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L. A. Endres	Deputy Clerk	Sacramento

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[1] Appointed Dec. 18, 1942.

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Associate Justices

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Roy M. Bostwick	Deputy Clerk	Fresno

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[2] Appointed. Took office Jan. 2, 1943.
[3] Appointed Jan. 2, 1943.

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LOS ANGELES COUNTY

Presiding Judge

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Judges

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Presiding Judge

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[4] On leave of absence to enter military service.

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CALIFORNIA REPORTER

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SECOND SERIES

56 Cal.App.2d 529

HESS v. GROSS et al.

Civ. 2985.

District Court of Appeal, Fourth District, California.

Jan. 7, 1943.

Hearing Denied March 8, 1943.

1. Courts 🔑114

Where record did not disclose that any written order had ever been entered which could be subject to correction, but court in nunc pro tunc order stated that order had been made fixing amount of bond to stay execution of judgment, nunc pro tunc order correcting the record to show order fixing amount of bond was valid. Code Civ.Proc. § 945.

2. Courts 🔑116(1)

A court is given broad powers in so correcting its records as to make them speak the truth.

3. Courts 🔑114

A nunc pro tunc order is allowed for purpose of preserving the rights of litigants.

4. Courts 🔑116(6)

Where record did not show order which had been made, fixing amount of undertaking to stay execution of judgment, the rule permitting record to be so changed as to make it speak the truth and show the actual facts was applicable and was binding on surety on the undertaking as well as the parties to the original action.

5. Courts 🔑116(6)

Where record did not show existence of order fixing amount of undertaking to stay execution of judgment pending appeal, status of surety on the undertaking was fixed by the actual facts as they existed and the surety's liability was in no way increased by mere correction of record to show facts, by nunc pro tunc order stating that order had been made fixing amount of bond.

6. Appeal and error 🔑1010(1)

In action against surety on bond staying execution of judgment pending appeal, where it appeared that record in original action did not contain order fixing amount of bond but court entered nunc pro tunc order stating that order had been made fixing amount of bond, surety's defense of lack of "consideration" failed and court's finding of want of consideration was without support in evidence. Code Civ.Proc. § 945.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Harry M. Hess against Charles S. Gross, T. H. Endicott, and others. From a judgment in favor of T. H. Endicott, plaintiff appeals.

Reversed with directions.

Duckworth, Mussel & King, of San Bernardino, for appellant.

Fred A. Wilson, of San Bernardino, and Edward A. Penprase, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action against the sureties on an undertaking staying execution pending an appeal from a judgment for the delivery of the possession of real property.

In a former action against one Moodey this plaintiff recovered judgment, from which Moodey appealed on April 11, 1938. On April 20, 1938, an undertaking in the amount of $3,000 was filed for the purpose of staying execution of said judgment, which was signed by these defendants and which covered the commission of any waste upon the property and the value of the use and occupation thereof, in the event the judgment should be affirmed. On

January 8, 1940, that judgment was affirmed.

The present action was commenced on December 10, 1940. An answer was filed by the defendant Endicott, but the other defendant did not appear. During the trial of this action it developed that the files of the former action did not contain any order fixing the amount of a bond for the purpose of staying execution of that judgment. Thereupon, there was filed in the former action under date of December 6, 1941, a nunc pro tunc order signed by the judge who tried that action in which it was recited that an order had been issued in that action on April 25, 1938, restraining the plaintiff from occupying the property described in the complaint pending the determination of the appeal from the judgment, that before the issuance of said restraining order and on April 16, 1938, the court had ordered the amount of the undertaking to stay execution of the judgment fixed at $3,000, that the records in said action did not show that such order fixing the undertaking was made, and that, in order to correct said records and make them speak the truth, it was thereby ordered that the amount of the undertaking staying the execution of the judgment pending the appeal be fixed at $3,000 as of April 16, 1938, and that the clerk was directed to make a minute order accordingly. A copy of this nunc pro tunc order was introduced in evidence in the present action. While the court found that the plaintiff had been damaged in the sum of $1,800 by reason of the facts set forth in the complaint it further found that the signing of the undertaking in question was without consideration insofar as the defendant Endicott is concerned. Judgment was entered in favor of the defendant Endicott and this appeal followed.

The main controversy is as to whether the judge who tried the former action had the power to make a nunc pro tunc order correcting the record in that action, and with respect to the effect of that order upon the respondent Endicott. This respondent argues that the amount of the said bond had not been fixed at the time the present action was commenced, that the stay bond was therefore invalid and ineffective to stay the execution of the former judgment, that since there was no stay of execution there was no consideration for his signing the bond, and that the entry of the nunc pro tunc order could not alter his status as a surety. This contention that no order fixing the amount of the stay bond had been made prior to December 6, 1941, is not sustained by the record. There is no evidence to that effect although a deputy clerk testified that he had searched the files and found no such order therein. On the other hand, the trial judge in the former action states in his nunc pro tunc order that an order had been made on April 16, 1938, fixing the amount of the bond at $3,000, and the record was ordered to be so corrected as to show such fact.

[1, 2] This respondent contends that the nunc pro tunc order was void since the record does not disclose that any written order had ever been entered which could be subject to correction, and that if the original order fixing the amount of the bond was oral it could not be corrected. It would be strange indeed if an error of the clerk in entering such an order as the one here in question could be corrected, but if the clerk failed to make any entry at all the court would be powerless to make the correction. So far as material here, the essential thing required by section 945 of the Code of Civil Procedure is that the amount of the bond be fixed by the trial judge. If this was done and the record failed to show that fact no good reason appears why such a situation should constitute an exception to the usual rules under which a court is given broad powers in so correcting its records as to make them speak the truth. In Osmont v. All Persons, etc., 165 Cal. 587, 133 P. 480, 482, the court said: "As to nunc pro tunc orders, it is true that certain courts in treating of them feel themselves bound by narrow, technical, and rigid rules. Such courts hold that the sole office of a nunc pro tunc order is to supply a deficiency in the record under a previous order, judgment, or decree actually given, so as to make that previous order, judgment or decree conform to verity. Such, indeed, is an important function performed by a nunc pro tunc order. But in the view of this court it is not its sole or exclusive function. Whenever justice requires it, if no express statute prohibiting it stands in the way, the courts of this state, under the guidance of this court, have always countenanced the entry of nunc pro tunc orders to preserve substantial rights, and such orders are made nunc pro tunc not alone to supply deficiencies in the record of previous orders

or judgments, but they are ordered entered nunc pro tunc when no previous judgment or order upon the matter has been made, though always, as has been said, to preserve and never to impair the rights of litigants."

In Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 395, 52 Am.St.Rep. 139, it is said: "The court is not precluded from correcting the entry merely because the 'record' does not show that it is itself incorrect. The rule at common law, that the record can be amended only when there is something in the record to amend by, was applied when it was sought to amend a judgment at a term of the court subsequent to that in which it had been signed and enrolled; but it has no application to the amendment of matters that do not form a part of the judgment roll or 'record.' "

In Re Skerrett's Estate, 80 Cal. 62, 22 P. 85, the court said: " * * * where an order has actually been made and its entry omitted, we suppose it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc, as of the date when it was actually made * * *." In Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 47 P.2d 733, 736, we find: "All courts have the inherent power to correct their records so they shall conform to the facts and speak the truth, and that right is not suspended by an appeal from the order nor because the record itself does not show that the entry was incorrect."

[3-6] Nor do we think this respondent was such a third person as would be immune from the effect of the nunc pro tunc order, or that this order changed his status as a surety. A nunc pro tunc order is allowed for the purpose of preserving the rights of litigants. Osmont v. All Persons, etc., 165 Cal. 587, 133 P. 480. The litigants in the action in which the nunc pro tunc order was made were Hess and Moodey. The respondent Endicott is not an innocent third party who happened to be affected by the judgment in that action. He injected himself into that action by agreeing to pay certain sums if the judgment should be affirmed and for the very purpose of assisting one of the parties to that action in obtaining a stay of execution. His purpose was accomplished and his real contention here is not that an order fixing the amount of the bond had not, in fact, been made but that the record in that action fails to disclose this fact. The usual rules permitting a record to be so changed as to make it speak the truth and show the actual facts are applicable here and these rules apply to and bind this respondent as well as the parties to the original action. This respondent's status as a surety was fixed by the actual facts as they existed and his liability is in no way increased by the mere correction of the record to show those facts. The record having been corrected and the requisite facts having been introduced in evidence in this action, his defense of lack of consideration failed. It follows that the court's finding in this regard is without support in the evidence. Under the other findings, the appellant was entitled to judgment.

The judgment is reversed with directions to enter judgment in favor of the appellant.

MARKS and GRIFFIN, JJ., concurred.

56 Cal.App.2d 624

BURNAND v. IRIGOYEN et al.

Civ. 13738.

District Court of Appeal, Second District,
Division 1, California.

Jan. 14, 1943.

1. Pleading 🔑106(1)

Common law "plea in abatement" as such has no existence as a doctrine or remedy in California.

See Words and Phrases, Permanent Edition, for all other definitions of "Plea in Abatement".

2. Abatement and revival 🔑4

"Abatement" at law means overthrow of pending action apart from cause of action, and in equity suspension of proceedings, and refers to result of defense which vitiates propriety of suit as brought in contradistinction to existence or statement of a cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Abatement".

3. Trial 🔑4

Where defense of another action pending upon same cause of action is interposed, court, upon motion of either party, should proceed to trial of such defense before trial of any other issue, and, if defense is sustained, judgment should be entered prohibiting trial of other issues until final determination of the other action. Code Civ.Proc. § 597.

4. Abatement and revival 🔑8(1)

To sustain judgment based on special defense of another action pending upon the same cause of action, it must appear that first action is for all practical purposes identical with second. Code Civ.Proc. § 597.

5. Election of remedies 🔑4

Where actions in ejectment and in unlawful detainer involving the same parties and property were pending at the same time, plaintiff had right to choose which remedy to pursue.

6. Abatement and revival 🔑8(2)

Pendency of action in ejectment did not warrant judgment suspending proceedings in action in unlawful detainer involving the same parties and property until final determination of action in ejectment. Code Civ.Proc. §§ 597, 1047.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action in unlawful detainer by Clara Kuhrts Burnand against Juan J. Irigoyen and others. From a judgment staying the action pending determination of an action in ejectment, plaintiff appeals.

Judgment reversed and cause remanded for a new trial in accordance with opinion.

Albert W. Leeds and Charles W. Partridge, both of Los Angeles, for appellant.

Saul Ruskin, of Los Angeles, for respondents.

DORAN, Justice.

This is an action in unlawful detainer. The litigation arose out of an agreement entered into between the appellant and Juan J. Irigoyen, Marie Antoinette Irigoyen, and Ana Maria Rankow, as guardian of the persons and the estates of Juan J. Irigoyen and Marie Antoinette Irigoyen, relating to a large and expensive residence in the Hollywood Hills, Los Angeles, and its furnishings.

Immediately after entering into the agreement the defendants defaulted in their payments and after waiting until June, 1940, appellant filed action No. 453-030 in the Superior Court for Los Angeles County, entitled "Action of Ejectment," seeking to recover possession of the property. The defendants filed answers and cross-complaints asserting, among other things, that the defendants Juan J. Irigoyen and Marie Antoinette Irigoyen were minors, that although the defendant Ana Maria Rankow, the mother of the minor defendants, signed the contract as their guardian, in fact she had not been appointed their guardian; that Juan J. Irigoyen had by then attained his majority, but Marie Antoinette Irigoyen had not. Both repudiated the contract and sought the return of all monies alleged to have been paid from their estates. Attempts at settlement followed, pending which neither side sought to bring this action to trial, and during the ensuing months negotiations were had and further installment payments were made, though the total payments were not enough to bring the contract into good standing.

The action in unlawful detainer was filed May 28, 1941. Appellant alleged facts to bring the case under the provisions of a paragraph in the contract limiting respondents' right of possession until certain payments should have been made and permitting a summary termination of their tenancy in case of default during such period, and alleged the service of notices in accordance with the contract and with sections 1161 and 1161a of the Code of Civil Procedure in April and May, 1941. Appellant filed the affidavit and undertaking prescribed by section 1166a of the Code of Civil Procedure and obtained a writ of possession. Before the service of the writ, respondents obtained an order to show cause and a stay of execution of the writ and filed a general demurrer. The demurrer was overruled. Both sides filed extensive affidavits with reference to the order to show cause, it being conceded that the issuance or restraint of the writ of possession was a matter within the discretion of the trial court. The affidavits on behalf of the respondents set forth various asserted defenses to the action; the affidavits on behalf of the appellant negatived these asserted defenses and in addition contained allegations to the effect that the premises were in a state of disrepair and were being subjected to abuse and mistreatment by the respondents. After a hearing the court vacated the order to show cause on condition that the amount of the bond filed by appellant be increased to five thousand dollars, which condition was complied with by the appellant. About this time the respondents moved out of the premises and the sheriff returned the writ wholly unsatisfied.

At the commencement of the trial of the within action on October 17, 1941, plaintiff commenced to put on her case. The process server who served the notices was called to the witness stand, but before he testified it was stipulated that the notices had been duly served. The appellant was called as the next witness. The respondents stipulated that the contract was in default and in the midst of discussion between the court and counsel concerning the nature and amount of the default, respondents' counsel raised the question of pendency of the ejectment action, alleged in the answer as a separate and distinct defense.

In the course of this discussion, the court suggested as a practical solution of the situation that the present action, the ejectment suit, a suit on a promissory note, and a suit for damages to the house and furniture instituted by appellant after she moved back into the premises, be consolidated for trial at a mutually agreed date. Appellant agreed to the suggestion but respondents refused.

Respondents' counsel stated that his motion was for a dismissal and not for an abatement and it was only after considerable colloquy between the court and counsel that he was induced to state that he was moving for an abatement. The court then denied the motion for dismissal and granted the motion for abatement.

The foregoing recital of the facts, which, with minor changes, is copied from appellant's brief, is not controverted in any material particular by respondent.

It is appellant's contention that the court erred in abating the action and in failing to make findings on matters proved at the trial prior to defendants' motion for abatement. In order to reveal the actual state of the record it appears necessary to incorporate that portion thereof relating to the ultimate disposal of the proceedings; it follows.

"The Court: After reading the pleadings, I am inclined to think you have the same cause of action only added facts in this case. The motion for abatement is granted.

"Mr. Ruskin: If your Honor please, I have not made any motion for abatement.

"The Court: I thought you did this morning.

"Mr. Ruskin: I would like to correct that. My contention is that this action should be dismissed on the basis of the picture given, and not merely abated.

"The Court: If that is your motion, that motion is denied.

"Mr. Ruskin: I am not making any motion for abatement, if your Honor please.

"The Court: Very well. We will then proceed with the trial. * * *.

"The Court: If you are seeking an abatement, that ends the action so far as any trial is concerned. If you are not making a motion for abatement, that is the end of it.

"Mr. Ruskin: I do not waive our rights, yet I feel we are not obliged to make a motion other than as disclosed by the facts. * * *

"Mr. Ruskin: I contend that your Honor has no jurisdiction to proceed with this action in view of the other action.

"The Court: That is your plea in abatement. That is the plea in abatement. You contend further that it should be dismissed.

"Mr. Ruskin: Yes.

"The Court: I disagree with you on that portion of your motion. You can make a motion for a plea in abatement and I will rule on that. * * *

"The Court: Do you waive the plea in abatement or do you insist on it?

"Mr. Ruskin: With the statement I have made to the Court, asking for the relief we are entitled to and to proceed with the action for that purpose, I make both motions.

"The Court: Answer my question directly. I will not take an evasive answer.

"Mr. Ruskin: Your Honor can see my predicament.

"The Court: I am going to pin you down. You are either going to take your plea in abatement or waive it.

"Mr. Ruskin: I am not waiving the plea in abatement; neither am I waiving the motion for dismissal.

"The Court: Based on facts other than the plea in abatement?

"Mr. Ruskin: Yes, of course.

"The Court: Personally I don't think the suit should ever have been brought.

"Mr. Ruskin: That is the reason I think it should be dismissed.

"Mr. Leeds: Your Honor suggested the consolidation of the whole thing.

"The Court: I will grant the plea in abatement and deny the other motion.

"Mr. Ruskin: Does that mean you are denying the opportunity to establish facts—

"The Court: Certainly. No. 450030 now pending involves the same facts as this action on trial in which I am granting the plea in abatement. It is the same issue under the same contract, same agreement, same facts, except additional facts alleged in the action that is now on trial. Do you desire findings or not?

"Mr. Ruskin: I would like to have findings, if your Honor please.

"Mr. Leeds: I think we should have findings.

"Mr. Ruskin: I take it the motion for dismissal is made and denied; is that the fact?

"The Court: Your motion to dismiss is denied. The plea in abatement is granted."

The pertinent part of the judgment is as follows: "It is hereby ordered, adjudged and decreed: 1. That the defendants have judgment against the plaintiff upon their plea in abatement and that this action abate pending the determination of Los Angeles County Superior Court action No. 453030." The findings are as follows: "That it is true that the action entitled 'Clara Kuhrts Burnand, plaintiff v. Juan J. Irigoyen, et al., defendants,' No. 453030, is now pending in this court. That the said action is between the same parties as the present action. That said action relates to the same property described in the present action. That said action is based upon the same grounds as the present action. That said action seeks substantially the same relief sought in this action. That all the relief sought in this action could be asked for and received in said other action."

[1, 2] The plea in abatement, as such, known to the common law and recognized by statute in some of the states, has no existence as a doctrine or remedy in California. The terms abate and abatement are not defined by statute and neither has any specific application to any statutory procedure. The plea in abatement is neither actual nor real and therefore, at most, can be regarded only in the abstract as distinguished from the concrete. The phrase is useful only and merely as descriptive of the substance, purpose and effect of a pleading, motion, order or judgment. Corpus Juris Secundum refers to abatement as follows: "Abatement at law is the overthrow or destruction of a pending action apart from the cause of action; in equity the suspension of the proceedings. The term 'abatement' is used, with reference to pending actions or suits, *to designate the result* upon a suit or action, of defects which vitiate the propriety of the suit as brought, in contradistinction to the existence or the statement of a cause of action; it looks to their *effect*; and consequently it is ordinarily defined *descriptively* in terms of the effect produced, so that the definition *varies* accordingly as abatement at common law or abatement at equity or under codes extending equitable doctrines to all suits or actions is spoken of; * * *." 1 C.J.S., Abatement and Revival, § 1, subsec. a, p. 27. (Italics added.) Certain California statutes use the term, however, but without particular significance. For example, a nuisance may be enjoined or abated. § 731, Code Civ.Proc.; also §§ 3484 and 3503, Civ.Code. Section 385 of the Code of Civil Procedure provides that an action does not "abate" by death, etc., and the Probate Code, section 752, uses the term with regard to legacies.

In this descriptive sense the phrase "plea in abatement" is not unfamiliar in the California decisions. For example, in Martin v. Splivalo, 69 Cal. 611, 11 P. 484, which was an action in ejectment and the answer pleaded another action pending, to wit, an action in unlawful detainer, the court used the following language, 69 Cal. at page 615, 11 P. at page 486. "As the former action, the pendency of which was pleaded in *abatement* in this action, *was for an unlawful detainer,* after the expiration of an alleged lease, it is clear that the same matters were not in issue in both actions, and a judgment in the first action would not be conclusive in the second. Kirsch v. Smith, 64 Cal. [13], 14 [27 P. 942]." (Italics added.) And in Scheeline v. Moshier, 172 Cal. 565, at page 570, 158 P. 222, at page 224, appears the expression, "The alleged pleas in abatement and in bar were insufficient." In Nevills v. Shortridge, 146 Cal. 277, at page 278, 79 P. 972, appears the following: "A *plea in abatement,* without disputing the justness of plaintiff's claim, objects to the place, mode, or time of asserting it, and requires *pro hac vice* that the judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time. It must not only point out the plaintiff's error, but must show him how it may be corrected, or in technical language it *must give the plaintiff a better writ.*" (Emphasis added to "plea in abatement," other italics included in quotation.)

[3] It is evident from the foregoing that the trial judge's effort to persuade defendant's counsel to "make a motion for a plea in abatement" is without legal sanction. Nor was a motion for dismissal proper in the circumstances. The appropriate procedure and the only procedure applicable to the situation presented by the pleadings, and in the light of what was attempted at the trial, was that authorized by the provisions of section 597 of the Code of Civil Procedure, the pertinent part of which is as follows: "When the answer pleads that the action is barred by the statute of limitations, or by a prior judgment, or *that another action is pending upon the same cause of action,* or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury upon any special defense so tried (other than the defense of another action pending) is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated; and where the defense of another action pending is sustained (and no other special defense is sustained) *an interlocutory judgment shall be entered* in favor of the defendant pleading the same *to the effect that no trial of other issues shall be had until the final determination of such other action* * * *." (Italics added.)

A motion for a trial on the special issue of another action pending would have been in order. But no such motion was made and no such trial was had. The record reveals that one witness for the plaintiff was asked a few questions, after which the entire proceeding was devoted to argument and discussion. The defendant offered no evidence; even the complaint in the former action, upon which defendant relied, was not in evidence. It appears in the record on appeal as part of the transcript of the proceedings, stipulated by counsel to be correct.

[4-6] But assuming that the authorized procedure had been followed and the judgment had been in form and substance as such procedure permits, nevertheless the judgment could not be upheld. In order to sustain a judgment based on a special defense that relies on the allegation of another action pending upon the same cause of action, it must appear that the first action is, for all practical purposes, identical with the second. The plaintiff cannot be forced to the election of remedies in such manner. Manifestly, the remedies of ejectment and unlawful detainer are not the same, hence, even though both actions were pending the plaintiff had the right to choose which remedy to pursue. See: Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am.St.Rep. 84. Moreover, the law provides that successive actions may be maintained. § 1047, Code Civ.Proc. The conclusion is therefore inevitable that the evidence does not support the findings, nor do the findings support the judgment.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed.

YORK, P. J., and WHITE, J., concurred.

56 Cal.App.2d 615

PEOPLE v. LAUTENSCHLAGER.

Cr. 2248.

District Court of Appeal, First District,
Division 2, California.
Jan. 13, 1943.

1. **Criminal law** 🔑1023(12)

Orders denying motions for probation after convictions for grand theft and for petit theft were not "appealable orders."

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Orders".

2. **False pretenses** 🔑7(1)
Larceny 🔑14(1)

Loan transactions ordinarily create only civil rights and obligations and it is only where evidence is sufficient to show larceny by trick and device or obtaining of money under false pretenses that a borrower may be held criminally liable.

3. **Larceny** 🔑63

In prosecution for grand theft, evidence merely showing several loan transactions, with agreement by defendant to pay bonus for loan and failure to repay loans, was insufficient to sustain conviction.

4. **Criminal law** 🔑1130(2)

Where brief of appellant on appeal from conviction for petit larceny merely suggested that respondent might stipulate that in event briefs on appeal from conviction of same defendant for grand theft resulted in reversal, that reversal would follow in this case but Attorney General in brief stated that he was without authority to enter into such stipulation and refused to accede to suggestion, without further argument by defendant or even suggestion of point justifying reversal, an affirmance would be ordered.

5. **Criminal law** 🔑1130(2)

Where defendant in brief on appeal from conviction for petit theft had not argued or even suggested any point which would justify a reversal of judgment, there was no duty resting upon appellate court to search record in endeavor to find error in the proceeding.

Appeals from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Walter Lautenschlager was convicted of grand theft and of petit theft, and he appeals, and also appeals from orders therein denying motions for probation.

Appeals from orders denying motions for probation dismissed, conviction for petit theft affirmed, and otherwise reversed.

Vincent Surr and Morgan V. Spicer, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Charles W. Johnson, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

[1] Two separate informations were filed against defendant, each charging him with the crime of grand theft. Defendant entered a plea of not guilty to the charge set forth in each information. The two actions were consolidated and were tried before a jury. In action 33697, the jury returned a verdict finding defendant guilty of petit theft. Judgment was entered sentencing defendant to six months in the county jail but the execution of the sentence was suspended. In action 33698, the jury returned a verdict finding defendant guilty of grand theft. Judgment was entered sentencing defendant to San Quentin. In each of said actions, defendant's motion for a new trial and his motion for probation were denied. Defendant took an appeal in each action from the judgment, from the order denying his motion for new trial and from the order denying his motion for probation. These appeals are presented upon a single transcript and a single set of briefs. As the orders denying defendant's motions for probation are not appealable orders (People v. Brooks, 140 Cal. App. 480, 35 P.2d 583), the purported appeals from said orders will be hereinafter dismissed.

Appeal in Action 33698.

In this action, it was charged that on or about July 19, 1940 defendant unlawfully took the property of Lora Grove, consisting of money in the sum of $500. The transaction out of which the charge arose was a loan of $500 in connection with a mining venture of the defendant.

Defendant had known Mrs. Grove for about a year prior to July 19, 1940. Mrs. Grove knew that defendant was interested in mining and she herself had invested several thousand dollars in a mine before she had become acquainted with the defendant. On one occasion defendant had driven Mrs. Grove and her husband on a trip into the mining counties of this state where they looked over some mines. Prior to the making of the $500 loan, Mrs. Grove had made several small loans to defendant. At the time the $500 loan was made defendant was indebted to Mrs. Grove in the sum of about $200.

Mrs. Grove testified that defendant came out to see her regarding the $500 loan in July, 1940; that "He came out there and he said he had a proposition, a mining proposition on hand and he needed $500 to pay for the corporation papers. He had to get those out. * * * He said he had to get those out, and he had to have some money to pay the attorney, and for other corporation business. I don't know just what that all is, so he said he had to have some money, and I asked him how much he had to have and he said $500. I said I haven't money, and he said he had some people that were taking over this mine and they were there with money, and I said, 'Why don't you wait until they take it over and pay the lawyer then.' He said, 'Well you can't always let people know you haven't any money.' He thought the proposition wouldn't go through if they founc that out. He said if I would only let him have $500 for a short time, for a week—he said he would pay me back in a week, anyway; that he would get the proposition over and he would pay me back all that he owed me. * * * He said something about he would give me extra money if I would let him have the money then, because he needed it so badly, and I told him I was not interested in any extra money, only I was interested in getting my own money back. * * *

"Q. Did he tell you how much extra money? A. No, he didn't say how much.

"Q. In other words, in the conversation at the house he said he was going to give you back the $500 and all the money he owed you, which you took to mean approximately $200, and also some extra money for giving it to him, is that right? A. Yes." Mrs. Grove further testified that she thereupon agreed to lend defendant the money; that she accompanied defendant to the bank where she withdrew the $500 and delivered it to him; that after giving the $500 to defendant, he gave her a paper acknowledging receipt of the $500 for use in connection with the DuBarry Mining Co. and stating that she would be "on the board of directors as vice president until one thousand dollars had been returned to her, and also 2500 shares of stock," and that she would withdraw from the board of directors "as soon as the other people put up their money." She further testified, "He thought that would be a bonus for the loan of the money, or getting the money. Q. In other words, you were to be paid $300 for accommodating him, is that the idea? A. Yes. Q. For giving him the use of your money? A. That is what I supposed he meant." She further testified that she never got the $500 loan or any part of it back but that she thereafter made other small loans to defendant, all but one of which small loans were repaid; that "he would borrow $10 and then $5, and then $10 again, and he paid me back all but the last $10 he got."

[2, 3] It is thus apparent that there were several loan transactions between the parties and that the $500 transaction in July, 1940, which is the basis of the charge here, was but one of these several loan transactions. Such transactions ordinarily create only civil rights and obligations and it is only where the evidence is sufficient to show larceny by trick and device or the obtaining of money under false pretenses that a borrower may be held criminally liable. People v. Cook, 10 Cal.App.2d 54, 51 P.2d 169; People v. Von Badenthal, 8 Cal.App.2d 404, 48 P.2d 82; In re Clark, 34 Cal.App. 440, 167 P. 1143; People v. Rae, 66 Cal. 423, 6 P. 1, 56 Am.Rep. 102. Defendant contends that the evidence here was insufficient for that purpose and, in our opinion, this contention must be sustained.

The main representation made by defendant to Mrs. Grove was that "he had a mining proposition on hand" and that he needed $500 to be used in an endeavor to work out a deal with certain prospective investors. He did not represent to Mrs. Grove that he had any definite agreement with any prospective investor but, on the contrary, expressed apprehension that "the proposition wouldn't go through." The undisputed evidence shows that defendant was interested in the DuBarry mine and was operating the same; that he was deal-form and was going through the process of forming a corporation in connection with the proposed deal; that he did need money for these purposes; and that all of the $500 borrowed from Mrs. Grove and some of the other money borrowed from her together with a considerable amount of his own money was used for these purposes. While it is true that the proposed deal was never consummated because the prospective investors did not see fit to enter into it, and the proposed incorporation was therefore never actually completed, we find no evidence to show any false representation or trick or device used by defendant in obtaining the $500 loan or to show any diversion of the money borrowed to uses other than uses stated by defendant to Mrs. Grove at the time the loan was made. Mrs. Grove never complained of any claimed false representation or of any claimed wrongful diversion by defendant of the $500 at any time. Her sole complaint appears to have been that she was not repaid as promised. Mrs. Grove subsequently accepted a $500 note and a $200 note from defendant as evidence of his indebtedness to her and did not cause his arrest until January, 1942, being a year and a half after she had loaned the $500 to defendant. It was stipulated upon the trial that defendant was without funds with which to repay the loan.

As we view the record, it presents nothing more than a case in which the defendant, who was well known to the complaining witness and who had previously borrowed money from her, borrowed the further sum of $500 from her in the hope that the money would assist him in consummating a mining deal with prospective purchasers thereby enabling him to repay all that he owed to the complaining witnesses together with a bonus and to make some money for himself. Neither his hope nor the hope of the complaining witness was realized, but, in the absence of any fraudulent representation or any trick or device used by defendant in obtaining the loan, his mere failure to pay his indebtedness as promised cannot justify his imprisonment. We therefore conclude that the judgment and order denying defendant's motion for a new trial in action numbered 33698 must be reversed.

Appeal in Action 33697.

In this action it was charged that on or about October 27, 1941, defendant unlawfully took the property of F. W. Gray, consisting of money in the sum of $700. As above indicated, the jury found defendant guilty of petit theft and the court sentenced defendant to six months in the county jail but suspended the execution of the sentence.

In the opening brief, it is said, "The judge has dealt lightly with such verdict, entering sentence for six months, and at the same time suspended it. Therefore, liberty is not at stake. The appellate court is rushed to death. The attorneys for the accused are paying their own printing bills. Why clutter up the records?" Nothing more is said in the opening brief concerning this appeal except to make a suggestion that respondent might enter into a stipulation that "In the event that our briefs in the appeal from #33698 result in a reversal in the Grove case, then that a reversal follow also in action 33697, the Gray case; otherwise not." In the brief of the attorney general it is stated, "Counsel for respondent is, of course, without authority to enter into any stipulation for a reversal of this judgment, and must therefore refuse to accede to appellant's suggestion." In defendant's reply brief, no further mention is made of this appeal.

[4, 5] As defendant has not argued or even suggested any point which would justify a reversal of the judgment or order denying his motion for a new trial in action 33697, there is no duty resting upon this court to search the record in an endeavor to find error in the proceedings. Under such circumstances, it is appropriate to order an affirmance.

In action 33697, the appeal from the order denying defendant's motion for probation is dismissed and the judgment and order denying defendant's motion for a new trial are affirmed. In action 33698, the appeal from the order denying defendant's motion for probation is dismissed and the judgment and order denying defendant's motion for a new trial are reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.

56 Cal.App.2d 499

CLARK, Director of Public Works, et al. v. STATE PERSONNEL BOARD et al.

Civ. 6915.

District Court of Appeal, Third District, California.

Jan. 4, 1943.

Rehearing Denied Feb. 2, 1943.

1. Officers ⚷94

After his resignation, a state civil service laborer was entitled to payment for such period of unused vacation as he had accumulated prior thereto where he had not waived his right to such compensation by refusing to take a vacation.

2. Officers ⚷94

After his resignation, a state civil service laborer employed on a monthly salary was entitled to a payment in lieu of compensatory time off to which he became entitled because of overtime worked. Pol.Code §§ 351, 675.1; St.1937, p. 2094 § 70.

Petition by Frank W. Clark as director of Public Works etc., and others against the State Personnel Board and others for a writ of mandate to compel the State Personnel Board to approve a payroll claim.

Writ issued.

C. C. Carleton, Frank B. Durkee, and Robert E. Reed, all of Sacramento, and Francis J. Carr, of Redding, for petitioners.

John J. Hamlyn, of Sacramento, amicus curiæ, for petitioners.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

ADAMS, Presiding Justice.

Frank W. Clark, as Director of Public Works, and other officers of the Department of Public Works, filed a petition for writ of mandate to compel the State Personnel Board to approve a payroll claim for moneys alleged to be due to said department as reimbursement for a payment made from District II revolving fund, to one Leaton G. Foster, who was formerly employed by the Department of Public Works as a highway equipment operator laborer with permanent civil service status. The petition alleges that on February 14, 1942, Foster resigned his position, his resignation to take effect on and after February 15; that he had, prior to February 15, "earned overtime of fifteen (15) hours, and accumulated vacation time" in the amount of eight full days, and that he was carried on the payroll until February 25, and paid from the revolving fund of said department "to cover said accumulated vacation and earned overtime"; that thereafter the claim of the Department of Public Works for reimbursement for the amount paid Foster was disapproved by the Personnel Board, on the ground that Foster's resignation was final on February 15; that on March 21, Foster submitted a second letter changing the effective date of his resignation from February 15, to February 25, and said letter was submitted to the Personnel Board; but that said board still refused to approve the claim.

[1] Respondents filed a general demurrer to the petition, and the matter was subsequently submitted to this court on a stipulation setting forth that the attorney general (except for possible inconsistencies) and the Personnel Board had for twenty-five years refused to approve cash payments to resigned state employees in lieu of vacations not taken prior to the effective dates of their resignations; that the Personnel Board had consistently for many years permitted the substitution of a second resignation or an amendment of a prior resignation to permit payment for unused vacation periods, but that said practice was discontinued June 30, 1942, with the submission of an opinion of the attorney general disapproving the practice.

Since the submission of the matter to this court the allowance of cash payments to state employees for unused vacation periods upon their separation from state service has been approved by the Supreme Court in the case of Pohle v. State Personnel Board, 21 Cal.2d 83, 130 P.2d 417, holding that an employee does not lose his right to compensation for accumulated vacation periods upon being separated from the service unless he has waived it by refusing to take a vacation before he was laid off. Neither refusal nor waiver is alleged or relied upon in the present case, and we therefore hold that upon his resignation Foster was entitled to a cash payment for such period of unused vacation as he had accumulated prior to his resignation.

As to the portion of the amount paid to Foster by petitioners for overtime, the petition alleges that for a long time prior to March 31, 1942, the Personnel Board followed the practice of approving payments made to resigned civil service employees for both accumulated vacation periods and overtime.

[2] Respondents here maintain, however, that there is no authority or justification for payment of overtime to civil service employees employed on a monthly salary; that no statute or rule of the Personnel Board provides for such payment, and that, on the contrary, rule 12, section 2 (h) of said board specifically prohibits it; also, that there is no rule of the board providing for days, or hours, or conditions of work in the Division of Highways, and that a civil service employee cannot accumulate overtime where no rule has been set up fixing hours of work; that payment for extra hours is not authorized by law, and that therefore public funds may not be expended for such purpose. Respondents also rely upon sections 351 and 675.1 of the Political Code and section 70 of the State Civil Service Act, St.1937, p. 2094, which provide that the salaries of employees shall be fixed in accordance with classifications made by the Civil Service Commission, that all salaries are subject to the approval of the State Department of Finance before they become effective and payable, and that employees in each class shall receive salaries within the limits for such class. They say, however: "We do not here question the right of the head of a state office or department, in the absence of a rule of the Board, to allow compensating time off for hours worked by employees in excess of those normally worked by employees in comparable positions. Situations arise from time to time where certain employees in office may be required to work a number of hours of overtime in this sense for one or more days in a week. The emergency may be such that the officer or Board cannot or finds it impracticable to procure the services of some other person to do this overtime work. It seems entirely reasonable and in accord with efficient and humane office management that the head of the office should grant to such an employee compensating time off for the extra hours worked."

Rule 12, section 2(h) of the Personnel Board does not prohibit the allowance of such compensatory time off, and such allowance was approved by the attorney general in opinions rendered January 23, and January 29, 1940.

We see no difference in principle between allowing an employee a cash payment for accrued vacation time upon his separation from the service, and allowing him, upon such separation, a cash payment in lieu of the compensatory time off to which he may have become entitled because of overtime worked.

Let the peremptory writ of mandate issue as prayed.

SCHOTTKY, J. pro tem., and THOMPSON, J., concurred.

56 Cal.App.2d 508

WOHLENBERG et al. v. MALCEWICZ et al.

Civ. 12194.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1943.

Hearing Denied March 1, 1943.

1. Automobiles 🔑244(12, 36)

Where first automobile in fast lane suddenly slowed down when truck pulled out of slow lane into fast lane and evidence was conflicting regarding whether second automobile struck first automobile before second automobile was struck by a third automobile, in action for injuries sustained by occupants of second automobile, evidence sustained finding that neither driver of first automobile nor driver of third automobile was guilty of negligence proximately causing the accident.

2. Automobiles 🔑201(1)

Even if motorist is guilty of negligence, the motorist is not liable for injuries sustained in accident unless the negligence of the motorist proximately caused the accident.

3. Negligence 🔑136(25)

Normally the question of causation is a "question of fact" and not a "question of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

4. Automobiles ⚷244(12)

Where first automobile in fast lane suddenly slowed down when truck pulled out of slow lane into fast lane and evidence was conflicting regarding whether second automobile struck first automobile before second automobile was struck by a third automobile, in action for injuries sustained by occupants of second automobile evidence was sufficient to permit finding that the slow-down occurred so quickly and unexpectedly that driver of first automobile had no reasonable opportunity to signal. Vehicle Code, § 544(c), St.1935, p. 185.

5. Automobiles ⚷244(36)

Where evidence disclosed that driver of overtaken automobile did not give hand signal but that red stop light operated by brake pedal flashed red before accident, even if there was a technical violation of the signaling statute finding was justified that the violation, if any, was not a proximate cause of the accident. Vehicle Code, §§ 544(c), 545, St.1935, pp. 185, 186.

6. Negligence ⚷56(3)

Before a violation of a statute can be "negligence per se" so as to impose liability, it must be shown that the violation was a proximate cause of the injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

7. Automobiles ⚷172(7), 245(15)

Whether operator of rear automobile is negligent in colliding with automobile in front depends on all the circumstances and presents a "question of fact" and not a "question of law".

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Personal injury action by E. T. F. Wohlenberg and others against Frank Malcewicz and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Charles Reagh and Elisabeth Craig, both of San Francisco, for appellants.

Robert L. Lamb and Theodore Tamba, both of San Francisco, for respondents Malcewicz.

Edmund Scott, of Redwood City, for respondents Adams.

PETERS, Presiding Justice.

Plaintiffs, who are husband and wife, brought this action to recover from defendants damages for personal injuries received by Mrs. Wohlenberg in an automobile accident alleged to have been caused by the negligence of defendants. The cause was tried before the court without a jury, and resulted in a judgment for defendants. From that judgment plaintiffs prosecute this appeal.

The injuries arose out of a three-car collision that occurred on the Bayshore Highway shortly after 5 p. m. on August 8, 1940. Mrs. Wohlenberg was riding in the back seat of an automobile being driven by Mrs. Berkes. The other two cars were being driven by defendant Betsy Adams and defendant Frank Malcewicz. The three automobiles were all proceeding in a southerly direction on the highway, and traffic was quite heavy. The highway is a main arterial, and has two lanes for traffic proceeding southerly. All three cars were in the inside, or fast lane. The Adams' car was first in line, followed by the Berkes' car and the Malcewicz' car brought up the rear. Betsy Adams testified that she was traveling at 40 to 45 miles per hour when a truck, some distance ahead, pulled out of the slow lane into the fast lane. This caused all the cars behind the truck to slow down. She stated that as a result she was forced to slow down very quickly. She was following another car at about a distance of one car length. She admitted that she gave no hand signal to the cars following her, but she testified that her car was equipped with the usual red "stop" light operated by the brake pedal. When her car had almost come to a stop, the Berkes' car ran into the Adams' car, and then hit it a second time.

Malcewicz testified that he was driving some 20 to 25 feet behind the Berkes' car at a speed of about 25 to 30 miles per hour; that he was driving a new Packard which was in perfect working condition; that the Berkes' car stopped very quickly; that it ran into the Adams' car and he crashed into the Berkes' car as the impact from the crash between that car and the Adams' car threw the Berkes' car backward. The force of the impact with the Malcewicz' car forced the Berkes' car to again hit the Adams' car. That corroborates the testimony of Betsy Adams that her car was hit twice by the Berkes' car. That testimony was also corroborated by La Vonne Olds, a passenger in the Adams' car.

Mrs. Wohlenberg testified that she was sitting in the back seat of the Berkes' car; that Mrs. Berkes was going 40 to 45 miles per hour; that she noticed the traffic slowing down; that the Berkes' car came to an easy stop behind the Adams' car without hitting it; that Mrs. Berkes had plenty of time to stop, and did so without hitting the Adams' car; that Malcewicz then crashed into the back of the Berkes' car; that as a result of the impact she was thrown forward and backward suffering the injuries for which this action was instituted.

[1-3] On this evidence the trial court found that neither defendant Adams nor defendant Malcewicz was guilty of any negligence proximately causing the accident. Appellants urge that the basic findings on negligence and proximate cause are not supported by the evidence. It is their contention that the trial court could have found that either Adams or Malcewicz was free from negligence, but that, under the evidence, it could not properly find that both were free of negligence. These contentions are unsound.

From the evidence the trial court could have found that the accident was proximately caused by the negligence of Adams, or of Berkes, or of Malcewicz, or by any combination of these drivers; or the court could have found that no one was negligent, that is, that the accident was unavoidable. The trial court did not find the cause of the accident. It was not required to do so. It found that it was not proximately caused by the negligence of Adams or Malcewicz. That means that the trial court was of the belief either, that the sole proximate cause of the accident was the negligence of Berkes, or that the accident was unavoidable. In either event, no liability would attach to defendants. Even if either or both defendants were guilty of some act of negligence neither would be liable unless such negligence proximately caused the accident. It is only in rare cases that an appellate court can say that a party was guilty of negligence proximately causing the accident as a matter of law. Normally, the question of causation is one of fact and not of law. These principles are elementary and have frequently been stated by the courts. (See cases collected 19 Cal.Jur., p. 732, § 139.)

[4-6] Appellants urge that defendant Adams was guilty of negligence as a matter of law in failing to give a hand signal. Section 544, subdivision c, of the Vehicle Code, St.1935, p. 185, provides that: "No persons shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal." Section 545 of the Vehicle Code provides in part: "The signals herein required shall be given either by means of the hand or arm or by a signal lamp or mechanical signal device of a type approved by the department. * * *" Betsy Adams testified that she gave no hand signal, and appellants urge that this alleged violation of the signaling statute is negligence per se. Wright v. Los Angeles Ry. Corp., 14 Cal. 2d 168, 93 P.2d 135; Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922; Sinclair v. Harp, 18 Cal.App.2d 167, 63 P.2d 876. To this contention there are several answers. Section 544 only requires the signal "when there is opportunity to give such signal." The evidence is such that the trial court could reasonably have believed that the slow-down occurred so quickly and unexpectedly that Betsy Adams had no reasonable opportunity to signal. Section 545 permits such signals to be given either by hand or "by a signal lamp * * * of a type approved by the department." There is no doubt that the signal lamp on the Adams' car was operating, and that it flashed red before the accident. Mrs. Wohlenberg admitted she saw the signal lamp go on. While there is no evidence that the lamp was of a type approved by the department (Hardin v. Sutherland, 106 Cal.App. 473, 289 P. 900), the fact is, that a red lamp signal clearly visible to those in the Berkes' car was given by the Adams' car. Even if there were a technical violation of the signaling statute (a point we do not decide), the trial court was amply justified in finding that such assumed violation was not a proximate cause of the accident. Before a violation of a statute can be negligence per se so as to impose liability it must be shown that the violation was a proximate cause of the injury. Skaggs v. Wiley, 108 Cal.App. 429, 292 P. 132; Ingram v. Wessendorf, 14 Cal.App.2d 16, 57 P.2d 989.

[7] Appellants urge that Malcewicz was guilty of negligence as a matter of law because of the fact that he ran into the rear of the Berkes' car, citing such cases as O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809; Edlund v. Los Angeles Ry.

Co., 14 Cal.App.2d 673, 58 P.2d 928; Nicholson v. Porter, 118 Cal.App. 555, 5 P.2d 659; Binford v. Purcell, 2 Cal.App.2d 87, 37 P.2d 732. These cases do not stand for the broad principle contended for by appellants. Each case must turn on its own facts. In the cases cited the rear driver collided with the car in front under circumstances where he had notice that unless he stopped he would hit the front car. All four cases were affirmances. The true rule established by those cases, and others (see Hardin v. Sutherland, supra; Donahue v. Mazzoli, 27 Cal.App.2d 102, 80 P.2d 743; annotation 104 A.L.R. 485) is that in each case whether the operator of the rear car is negligent in colliding with the car in front depends upon all the circumstances, and presents a question of fact and not of law.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

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56 Cal.App.2d 653

EULENBERG et al. v. TORLEY'S, INC., et al.

Civ. 2989.

District Court of Appeal, Fourth District, California.

Jan. 14, 1943.

Rehearing Denied Feb. 13, 1943.

Hearing Denied March 11, 1943.

1. Judgment 🔑570(5)

Where a judgment of nonsuit is based on ground that the evidence introduced shows affirmatively, as a matter of law, that the plaintiff is not entitled to recover, the judgment constitutes a bar to subsequent suit on the same cause of action.

2. Judgment 🔑563(2)

A decision determining the validity of a written instrument or passing on a controversy with respect to the interpretation thereof is a "decision on the merits" which bars subsequent suit on same cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision on Merits".

3. Judgment 🔑570(5)

Where judgment of nonsuit in former action was based on holding that written instrument relied on by the plaintiffs, both in the former action and present action did not constitute a lease, that no lease between the parties existed and that plaintiffs had no possessory right in and to premises in question, the judgment in the former action was binding as to all issues which depended on rights arising from the purported lease, and the present action, insofar as it was based on existence of lease, was barred, even though there were additional defendants, by the former judgment which was "res judicata" as to such issues.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Judgment 🔑570(16)

Ordinarily a judgment of dismissal on motion of plaintiff is not a bar to a subsequent action, but such rule does not apply where it affirmatively appears that the plaintiff intended to abandon the action, in which case it is treated as a "retraxit".

See Words and Phrases, Permanent Edition, for all other definitions of "Retraxit".

5. Trial 🔑384

Where affirmative defense of res judicata was not sustained by court as to all issues but plaintiff declined to present any evidence on remaining issue of conversion either with respect to stock of merchandise or fixtures, findings of court in favor of defendant on issues of conversion were proper.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by T. L. Eulenberg and others against Torley's Inc., and others. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Martin C. Casey, of San Bernardino, and John P. Tobin, of Los Angeles, for appellants.

J. Vincent Hannon and T. G. Dalton, both of Los Angeles, and Fred A. Wilson, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief, for possession of certain premises and for damages. Torley's Inc. operated a store, consisting of several departments, in Ontario. T. L. Eulenberg went to work in the drug department of this store with an agreement that if he were satisfied he should have the right to purchase the merchandise in that department, with a lease for the space occupied by it. Shortly thereafter, the parties entered into a memorandum of agreement which provided that these plaintiffs were to buy from Torley's Inc. the stock of goods in this department not exceeding a value of $3,000; that the stock was to be inventoried at present cost prices; that the plaintiffs would pay for this merchandise $500 in cash at the time of signing a lease; that they would pay the balance at $200 a month, plus interest, the instalments to begin one month after the date the lease was signed; that the deferred payments were to be evidenced by a promissory note and secured by a chattel mortgage on fixtures reasonably worth $2,500 to be installed by the plaintiffs; that a bill of sale of the merchandise was to be given when such mortgage was recorded; that the mortgage was also to secure the performance of all of the terms of the lease which was to be executed; that the term of the lease was to be two years from the date the lease was executed; and that the contemplated lease should contain certain other provisions which are immaterial insofar as this appeal is concerned.

On June 14, 1939, Torley's Inc. served upon these plaintiffs a written notice which recited that because of their failure and refusal to consummate the agreement with respect to the purchase of the stock of goods, the agreement therefor and for the furnishing of a lease was rescinded, with a demand for the possession of the premises in question, and which further notified the plaintiffs that they might, within 24 hours, remove any merchandise or fixtures which they had installed. The plaintiffs refused to vacate the premises or remove any articles, and on June 15, 1939, Torley's Inc. took possession and stored all such personal property in a warehouse in the names of the plaintiffs.

On July 13, 1939, these plaintiffs brought an action against Torley's Inc. asking damages for unlawful eviction, it being alleged that these plaintiffs were the owners of a leasehold interest in the premises in question under the terms of the memorandum agreement above referred to, a copy of which was set out in the complaint. In a second cause of action it was alleged that Torley's Inc. had converted to its own use the stock of merchandise in this drug store to plaintiffs' damage in the sum of $4,300. At the trial of that action the court held that the written agreement upon which the action was based did not constitute a lease. Thereupon, the court granted a motion for a nonsuit as to the first cause of action. The plaintiffs then stated in open court that they abandoned their second cause of action and moved for its dismissal. This motion was granted. A judgment was then entered in favor of the defendant, no appeal was taken and that judgment has become final.

Fourteen months after judgment in that action was entered a third amended complaint was filed in the present action. This complaint contains eleven causes of action, the first ten of which are based upon the theory that the memorandum of agreement above referred to constituted a lease and that under its terms the plaintiffs were entitled to the possession of the premises in question. The other cause of action was for damages alleged to have been suffered through the conversion by the defendants of the stock of goods and fixtures which were alleged to have been the property of the plaintiffs. The present action joined as defendants Torley Land Company, a corporation, which was alleged to be the owner of the land on which the store in question was located, and also J. M. Torley and Ray E. Torley, who were alleged to be directors of Torley's Inc., a corporation. Separate answers were filed by Torley's Inc., a corporation, and by J. M. Torley, Ray E. Torley and Torley Land Company, in each of which it was pleaded, among other things, that all causes of action were barred by the judgment in the former action, which judgment had become res judicata as to all issues raised in this action. At the trial of this action, the special defense of res judicata, with respect to all issues based and raised upon the existence of a lease between the parties, was first considered, evidence thereon was received, and the court announced that it considered the judgment in the other case, interpreting as it did the agreement here relied upon, as binding and controlling in the instant case. Counsel for the plaintiffs then stated that he gave oral notice of appeal and would follow this with a written notice of appeal. Counsel for the defendants then called attention to the fact that this action included a claim for damages for conversion of the fixtures, which was not within the issues of the other action, stated that these fixtures were in the warehouse where they were available to the plaintiffs and demanded that the plaintiffs proceed at that time to try "any issue of fact remaining," and that "there are one or two minor items as yet undetermined. I think we should try those unless you want to abandon that now." Counsel for the plaintiffs stated that he insisted on his right of appeal and declined to put on any evidence as to the other issues. The court made findings in favor of the defendants on all of the issues and the plaintiffs have appealed from the judgment which followed.

[1-3] The appellants first contend that the judgment in the prior action, being based upon a nonsuit insofar as the first cause of action is concerned, is not a bar to another action presenting the same issues. Cases are cited wherein it has been held that judgments of nonsuit based upon the insufficiency of the evidence are not a bar to subsequent suits on the same causes of action for the reason that they are not judgment on the merits. This is not the rule, however, when a nonsuit is based upon the ground that the evidence introduced shows affirmatively, as a matter of law, that the plaintiff is not entitled to recover. It is well settled that any decision determining the validity of a written instrument or passing upon a controversy with respect to the interpretation thereof is a decision on the merits. Robinson v. Howard, 5 Cal. 428; McMickens v. McMickens, 220 Cal. 731, 32 P.2d 597; See v. Joughin, 18 Cal.2d 603, 116 P.2d 777. The judgment in the former action was based upon a holding that the written instrument relied upon by the appellants, both in the former action and this action, did not constitute a lease, that no lease between the parties existed and that these appellants had no possessory rights in and to the premises in question. It not only appears from the instrument itself that the interpretation placed upon it in the former action was correct, but the judgment in that action having become final the interpretation thus given is conclusive and binding upon the parties as to all issues which depend upon rights arising from such purported lease. Insofar as this action is based upon the existence of the lease, or the interpretation thereof, and this applies to the major portion of the issues involved in this action, this action was clearly barred by the judgment in the former action, which is res judicata as to such issues.

[4, 5] The appellants further contend that, in any event, the judgment in the former action is not a bar to certain new issues raised in this action and because new defendants were added in this action. The addition of the new defendants added nothing with respect to the issues based upon the existence of a lease, which issues are exactly the same in both actions, it being merely alleged that the new defendants had something to do with the property involved in the purported lease. Both actions presented an issue as to the conversion of the stock of merchandise alleged to have been owned by the appellants. The present action did contain an issue with respect to the conversion of drug store fixtures alleged to have been owned by the appellants, which issue is not involved in the former action. Counsel for the respondents stated that these fixtures were stored in a warehouse and offered to permit the appellants to take possession thereof. It would seem, although the record does not clearly show this, that this situation applied to certain of the merchandise which had been brought upon the premises by the appellants. With respect to the issue as to the conversion of the stock of goods the appellants contend that the judgment in the former action is not a bar because that judgment was based upon the dismissal of that cause of action on their own motion. While, ordinarily, a judgment of dismissal upon the motion of the plaintiff is not a bar to a subsequent action (Hibernia Sav., etc., Soc. v. Portener, 139 Cal. 90, 72 P. 716), a different situation exists where it affirmatively appears that the plaintiff intended to abandon the action, in which case it is treated as a retraxit. Chase v. Van Camp Sea Food Co., Inc., 109 Cal.App. 38, 292 P. 179; Westbay v. Gray, 116 Cal. 660, 48 P. 800. It appears here that in the former action these appellants announced in open court that they abandoned their alleged second cause of action. However, it is unnecessary to decide whether or not this was such an abandonment of the cause of action with respect to conversion of the merchandise as would preclude a later action on that issue. In any event, an issue was presented as to the conversion by these respondents of certain merchandise and also of certain fixtures which had been brought upon the premises by the appellants

and which were removed by the respondents and placed in a warehouse in the names of the appellants. No evidence was presented on these issues and the appellants expressly declined to produce any evidence thereon. The appellants now state in their briefs "if the affirmative defense as alleged constitutes res judicata, then it is and was useless to proceed on the new matter." The affirmative defense of res judicata was not sustained as to all of the issues and no reason appears why the appellant should not have presented evidence on the remaining issues, if any they had. The respondents insisted that all of the issues raised by the pleadings be tried at that time and the appellants declined to present any evidence on the issues of conversion, either with respect to the stock of merchandise or the fixtures. In the absence of any evidence on these issues the findings of the court thereon must be sustained.

The judgment is affirmed.

MARKS, J., concurred.

Hearing denied; CARTER, J., dissenting.

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56 Cal.App.2d 406

MASAMI SASAKI v. YANA KAI.

Civ. 12003.

District Court of Appeal, First District, Division 2, California.

Dec. 30, 1942.

1. Pleading 🔑224

Where plaintiff failed to amend his complaint after demurrer was sustained to a count thereof, the count was eliminated from the action.

2. Action 🔑6

In action for declaratory judgment that judgment assigned to plaintiff was a lien upon realty superior to defendants' interest therein, where defendant pleaded deed to her from her codefendant and asked that her title be quieted against plaintiff, plaintiff was entitled to a replication without pleading to the asserted title and could attach the deed upon equitable or legal grounds.

3. Fraudulent conveyances 🔑208

If it is shown that there was mala fides or fraud in fact in a conveyance, whether actual fraudulent intent related to existing creditors or was directed exclusively against subsequent creditors, subsequent creditors may on the strength of such fraud, successfully impeach the conveyance.

4. Fraudulent conveyances 🔑208

Uuder the Uniform Fraudulent Conveyance Act, as to conveyances made after adoption of the act, subsequent creditors may attack a conveyance if it was made with actual intent to defraud existing creditors. Civ.Code, § 3439.01 et seq.

5. Contracts 🔑107

Where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce the act void or expressly prohibit it.

6. Fraudulent conveyances 🔑206(1), 208

Before adoption of the Uniform Fraudulent Conveyance Act, a voluntary conveyance made with actual intent to defraud existing creditors was void for illegality and subject to attack by existing or future creditors. Pen.Code, §§ 154, 531; Civ. Code, §§ 3439.01 et seq., 3439.07.

7. Execution 🔑40

Though nominal title to property be conveyed to another, it is liable for the debts of its owner, upon the principle that one cannot be the equitable owner of property and have it exempt from his debts.

8. Action 🔑6

In action for declaratory judgment that judgment assigned to plaintiff was a lien upon realty superior to defendants' interest therein, where defendant pleaded a deed to her from her codefendant and asked that her title be quieted against plaintiff, evidence that deed was made without consideration and with intent to defraud codefendant's existing creditors and that on entry of plaintiff's judgment defendant had permitted codefendant to exercise indicia of ownership was admissible. Pen.Code, §§ 154, 531; Civ.Code, §§ 3439.01 et seq., 3439.07.

9. Trial 🔑397(1)

Defenses not made the basis of findings by the trial court do not support judgment.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge pro tem.

Action by Masami Sasaki against Yana Kai for a declaratory judgment that a judgment assigned to plaintiff was a lien upon realty superior to defendants' interest therein. From a judgment quieting title in defendant, plaintiff appeals.

Reversed.

Albert E. Coger, of Los Angeles, for appellant.

John Y. Maeno, of Hot Springs, for respondent.

DOOLING, Justice.

This is an appeal from a judgment quieting the title of defendant Yana Kai to a parcel of real property. Appellant is the assignee of a judgment recovered by Yokohama Specie Bank, Ltd. against defendant Masajiro Kai. On July 26, 1940 plaintiff and appellant caused levy of execution to be made on the interest of Masajiro Kai in the property in question. Yana Kai moved to have this levy vacated and her motion was granted in the trial court. From this order an appeal was taken resulting in a reversal of the order. Yokohama Specie Bank, Ltd., v. Kitasaki, 47 Cal.App.2d 98, 117 P.2d 398.

[1] While that appeal was pending appellant herein commenced this action. The first count was for declaratory relief. (A second count was eliminated by the sustaining of demurrer thereto and the failure of appellant to amend.) By the first count appellant sought a declaratory judgment that the judgment assigned to him was a lien upon the real property superior to any interest of the defendants.

Respondent Yana Kai by answer set up a deed from Masajiro Kai to herself made in 1911 and prayed for judgment quieting her title against plaintiff.

On the trial plaintiff offered to prove that the deed by Masajiro Kai to Yana Kai in 1911 was made without consideration and with intent to defraud the then existing creditors of Masajiro Kai and further that from the time of the conveyance to Yana Kai up to a time subsequent to the entry of the judgment relied upon Yana Kai had permitted Masajiro Kai to exercise all of the elements and indicia of ownership. Objection was sustained to this offer of proof and this ruling is urged as error.

[2] Preliminarily it is argued by respondent that these issues were not tendered by plaintiff's complaint and the proffered evidence was therefore not within the issues. The respondent pleaded the deed from Masajiro Kai to herself by her answer and asked for affirmative relief quieting her title against appellant. In this state of the pleadings the law gave the plaintiff "a replication without pleading to this asserted title" and the plaintiff could "overcome the effect of the deed, and so destroy its validity upon either equitable or legal ground." Wolf v. Gall, 176 Cal. 787, 789, 790, 169 P. 1017; Moore v. Copp, 119 Cal. 429, 433, 51 P. 630.

The trial court took the view that the Yokohama Specie Bank, Ltd., having become a creditor subsequent to the transfer could not attack the transfer on the ground that it was made in fraud of existing creditors. This view finds support in some of our decisions. 12 Cal.Jur. 978. Appellant counters with the proposition that a voluntary conveyance in fraud of existing creditors is in violation of our penal laws, Pen. Code, §§ 154 and 531 and is therefore not merely voidable but void for illegality. California Delta Farms v. Chinese American Farms, 207 Cal. 298, 306, 278 P. 227; Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31; Smith v. Bach, 183 Cal. 259, 191 P. 14. This view also finds support in the language of Civ.Code, section 3439, as it read at the time of the transfer in 1911: "Every transfer of property * * * made * * * with intent to delay or defraud *any* creditor * * * is void against *all* creditors of the debtor * * *." (Italics ours); and in Everts v. Sunset Farms, Inc., 9 Cal.2d 691, at page 698, 72 P.2d 543, at page 546, the court said: "Furthermore, as we have already shown above, the transfers were in fraud of creditors. They were void and not merely voidable. Scholle v. Finnell, 166 Cal. 546, 137 P. 241. They were in contravention of the statute and public policy (Civ.Code, §§ 3439 and 3442; Pen. Code, § 531) * * *."

In the Everts case the court was, however, dealing with the rights of an existing creditor.

[3] Turning to the rule in other jurisdictions we find this statement in 24 Am. Jur. 284-5: "The prevailing opinion is that if it is shown that there was mala fides or fraud in fact in the transaction, whether the

actual fraudulent intent related to existing creditors or was directed exclusively against subsequent creditors, the effect is precisely the same, and subsequent creditors may, on the strength of such fraud, successfully impeach the conveyance."

[4] Since the adoption of the Uniform Fraudulent Conveyance Act in 1939, Civ. Code § 3439.01 et seq. it is clear that as to conveyances thereafter made subsequent creditors may successfully attack a conveyance if made with actual intent to defraud existing creditors. Civ.Code, § 3439.07; Themo v. Themo, 296 Mass. 190, 5 N.E.2d 26; McDonald v. Baldwin, 24 Tenn.App. 670, 148 S.W.2d 385.

[5] There is much force in the suggestion, which has never been squarely passed upon in the appellate courts of this state, that a conveyance with actual intent to defraud existing creditors being in violation of the penal provisions above cited is absolutely void for illegality and for that reason subject to attack by any creditor. The general rule is thus expressed in Berka v. Woodward, 125 Cal. 119, at page 127, 57 P. 777, at page 780, 45 L.R.A. 420, 73 Am. St.Rep. 31 (cited supra); " * * * where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it."

In addition to the cases cited above and many others, the following very recent cases follow and apply this rule: City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 346, 48 P.2d 87; Duntley v. Kagarise, 10 Cal.App.2d 394, 397, 52 P.2d 560; Citizens State Bank v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364.

[6] We conclude that even before the adoption of Civil Code, section 3439.07, a voluntary conveyance made with actual intent to defraud existing creditors was void for illegality, and hence subject to attack by any creditor, existing or future.

[7, 8] Independently of this conclusion the proffered evidence was admissible under the authority of McAlvay v. Consumers' Salt Co., 112 Cal.App. 383, 394, 297 P. 135, 140, where the court said: "But it is also the rule that, though the nominal title to property be conveyed to another, it is nevertheless liable for the debts of its owner [citing cases] upon the principle that one cannot be the equitable owner of property and still have it exempt from his debts."

The proffered evidence taken as a whole would support an inference that the conveyance to Yana Kai in 1911 was merely colorable to escape liability of Masajiro Kai for existing debts and that he retained the beneficial and equitable ownership until after the judgment was obtained against him.

[9] Certain other defenses set up in the answer of Yana Kai were not made the basis of any findings by the trial court and cannot therefore be relied upon to support the judgment on this appeal; nor was the right of Masajiro Kai to testify as to matters occurring during his marriage to Yana Kai questioned by any objection made in the trial court. We are not called upon to pass upon any of these questions at this time.

The judgment appealed from is reversed.

NOURSE, P. J., and SPENCE, J., concurred.

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56 Cal.App.2d 168

SWARTZ v. CALIFORNIA OLIVE GROWERS' PACKING CORPORATION.

Civ. 13756.

District Court of Appeal, Second District, Division 2, California.

Dec. 18, 1942.

1. Appeal and error 🔑965

Such a wide latitude is allowed trial court in deciding motions for change of venue that appellate courts will not disturb an order made upon conflicting evidence unless it is clear that the order was the result of arbitrary action and in case of such conflicting evidence, averments of affidavits of prevailing party may be deemed to be the "findings" of the court below upon the issue of change of venue.

See Words and Phrases, Permanent Edition, for all other definitions of "Findings".

2. Venue 🔑7

Where written contract under which plaintiff was appointed defendant corporation's general manager to effect an increase in sale of defendant's products specified no place of performance, it was performable in county in which the circumstances attendant upon its execution indicated was intended as the theater of performance, and hence where plaintiff conducted defendant's transactions in Los Angeles and plaintiff was discharged there, plaintiff properly sued for breach of the contract in Los Angeles County, notwithstanding that defendant's domicile was in Tulare County. Const. art. 12, § 16.

3. Corporations ⚿503(2)

The venue statute does not apply to domestic corporations, but only to actual persons, and suits against such corporations are governed by constitutional provision authorizing maintenance of a transitory action against a corporation in the county where the contract was performable or where the breach occurred. Code Civ.Proc. § 395; Const. art. 12, § 16.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Fred G. Swartz against California Olive Growers' Packing Corporation for breach of an employment contract. From an order denying change of venue, defendant appeals.

Affirmed.

Haight, Trippet & Syvertson and Lyle C. Newcomer, Jr., all of Los Angeles, for respondent.

Elliott, Aberle & Dunham, of Los Angeles, for appellant.

MOORE, Presiding Justice.

By a contract in writing dated November 2, 1940, respondent was employed as general manager of appellant for five years and to render such duties as might be required of him in effecting an increase in the sales of its products. The writing itself makes no mention of the locus of its execution, the place of residence of appellant, or of the county in which respondent's services were to be performed, although it recites that he is "of Los Angeles." However, the complaint alleges that the agreement was to be performed in Los Angeles County.

It appears from respondent's affidavit, used on the motion to change the place of trial, that the defendant was organized in Los Angeles, November 2, 1940, and that all of those who participated directly in its organization then resided in that city or its environs. Prior to such incorporation of appellant, respondent was engaged in the advertising and marketing counsel business in Los Angeles. He conceived the plan of organizing the olive growers' industry and presented it to certain growers who later joined respondent in the incorporation of appellant, prior to which event the same individuals agreed that respondent should be employed as such general manager and that he should maintain the principal business office of the corporation at Los Angeles. His duties included the organization of the olive growers of the state for the marketing of their products. Such growers are confined to nine counties, viz., San Diego, Riverside, Los Angeles, Kern, Tulare, Fresno, Sacramento, Butte and Tehama. With the approval of the officers and directors of the corporation, respondent promptly established the main office of the corporation in Los Angeles, from which he conducted the corporation's business until he was discharged. During the same period he maintained the corporation's bank account in the same city. Also, with the approval of all of the directors, he designated the main office as the "Head Office" and there employed accountants and legal insurance counsel, both of Los Angeles. Thereafter appellant prepared and published a chart showing such facts. Respondent's discharge was effected by a notice written and delivered to him, at the same "Head Office." During the period of respondent's service, substantially all of the business of appellant was conducted in Los Angeles, where a number of the meetings of the directors was held. Through the agency of respondent the corporation acquired 1,200 acres of olive lands in Riverside County but only 189 in Kern and 40 in Tulare—which lands were managed by respondent. In all substantial respects its business was conducted for more than six months in Los Angeles County by respondent, during which period no corporate business affair was transacted in that county by respondent without the consent of the directors.

The affidavits presented to the trial court in support of its motion to remove the action to Tulare County contain some evidential facts contradictory of the matters and things averred by respondent. Particularly is it established by a preponderance of the proof that the contract was executed in Tulare County, the location of appellant's principal place of business. But the evidence is sufficient to support the implied findings (1) that it was intended by the parties that the contract should be performed in Los Angeles County, and (2) that the breach occurred therein.

[1,2] Such a wide degree of latitude is allowed the trial court in deciding this ever-recurring controversy that the appellate courts will not disturb the order made upon conflicting evidence unless it is clear that the order was the result of arbitrary action. Miller v. Collins, 8 Cal.App.2d 10, 47 P.2d 334; Hubbard v. Mt. Raymond Mining Co., 33 Cal.App.2d 474, 92 P.2d 411, 93 P.2d 95; 25 Cal.Jur., p. 919. It follows that in case of such a conflict the averments of the affidavits of the prevailing party may be deemed to be the findings of the court below upon the issue of change of venue. Gordon v. Perkins, 203 Cal. 183, 263 P. 231; Sourbis v. Rhoads, 50 Cal. App. 98, 194 P. 521; C. H. Parker Co., Inc., v. Exeter Refining Co., 26 Cal.App.2d 610, 79 P.2d 1114. Inasmuch as the contract specifies no place of performance it was performable in the county in which the circumstances attendant upon the execution of the writing indicate that the parties intended as the theater of its performance. Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal.App. 296, 297, 195 P. 284. From the supporting papers of respondent and the finding of the trial court, the parties had no plan for respondent other than for him to conduct the transactions of the corporation from the "Head Office" at Los Angeles. The evidence is ample to warrant finding that such plan was executed during the tenure of respondent as the general manager. It must therefore necessarily follow, if the parties intended the contract to be performed in Los Angeles County, and if it was breached there, that respondent properly elected to sue in the county where his action arose. § 16, art. XII, Constitution. It was therefore not error to deny appellant's motion for the change.

Appellant contends that since it is shown that its domicile is in Tulare County, the burden was upon respondent to show that the contract was made or performable or that the breach occurred in Los Angeles County, citing as authority Hammond v. Ocean Shore Development Co., 22 Cal.App. 167, 133 P. 978. But, in the first place, as shown above, respondent successfully carried that burden, and in the second place, in the Hammond case, the corporation's motion for removal was without substantial opposition. Hammond's complaint lacked the allegations required for the maintenance of the action in the county of plaintiff's residence. He filed no affidavit in opposition to the motion for a change of venue.

[3] Appellant assumes that its contentions, viz., that the contract was made and was performable in Tulare County were upheld by the trial court. Having made such assumption it contends that such findings require the removal of the case to Tulare County, citing section 395, Code of Civil Procedure. If we grant the assumption as to the facts found, yet the code section will not avail appellant. That section does not apply to domestic corporations but is applicable only to actions against natural persons. Suits against such corporations are governed by the cited constitutional provision which authorizes the maintenance of a transitory action against a corporation in the county where the contract was performable or where the breach has occurred and in which the liability has arisen. Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 115 P. 318; Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 99 P.2d 678; McDuffie v. California Tehama Land Corp., 138 Cal.App. 245, 249, 32 P.2d 385; Pacific Freight Lines v. Pioneer Express Co., 39 Cal.App.2d 609, 103 P.2d 1056; Kaupke v. Lemoore Canal & Irr. Co., 7 Cal.App.2d 362, 46 P.2d 204. The Konig case holds that the burden of proof is upon the defendant corporation to show that the place of filing such an action is not the proper county for the reason that a corporation as sole defendant does not have an absolute right to have the action removed to the county of its domicile merely because its legal residence is in a county other than that in which the action is commenced. In the Pacific Freight Lines case, it was held that plaintiff's claim arising from his right of contribution from defendant arose in the county of the residence of plaintiff and for that reason the order removing the place of trial to the domicile of either defendant corporation was reversed. A similar situation required the affirmance of the Kaupke case. The

Cook case justifies the discrimination between corporations and natural persons as to the venue of personal actions against corporations and upholds our conclusion that the statute, § 395, Code Civ.Proc., does not determine the right to a change of venue where the defendant is a corporation.

Order affirmed.

W. J. WOOD, J., and McCOMB, J., concurred.

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56 Cal.App.2d 251

LOCKHEED AIRCRAFT CORPORATION v. LOS ANGELES COUNTY.

Civ. 13685.

District Court of Appeal, Second District, Division 3, California.

Dec. 19, 1942.

Taxation 🔑543(9)

In action against county for refund of taxes assessed against plaintiff's alleged possessory interest in airplane materials, where the complaint alleged that plaintiff had no possessory interest in the property and that all rights and interests therein was in the federal government, that a payment of the tax was not voluntary, and demand for its refund had been denied, judgment entered for plaintiff, on defendant's failure to answer further after its demurrer to complaint was overruled, was affirmed.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Lockheed Aircraft Corporation against the County of Los Angeles to recover the amount of taxes illegally assessed and paid under protest. From a judgment for plaintiff entered upon defendant's failure to answer after its general demurrer to the complaint was overruled, defendant appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Holbrook & Tarr, Harold C. Tallmadge and W. Sumner Holbrook, Jr., all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The defendant has appealed from a judgment that the plaintiff recover the sum of $26,004.01, which the trial court determined had been paid by the plaintiff because of an illegal tax levied against it. The defendant's general demurrer to the complaint, in which the facts of the claimed illegal levy were set up, was overruled, the defendant being given ten days in which to answer. The ten days passed without an answer, the defendant's default was taken, and judgment followed.

We see no reason to reverse the judgment. The tax which the plaintiff paid was, according to the allegations of the complaint, assessed upon the possessory interest the plaintiff had in certain airplane parts and materials alleged to belong to the United States government. The complaint alleged, however, that the plaintiff had no possessory interest in any of the property described in the assessment, but that "all right, title and interest, including the right of possession thereto, at all times was solely and exclusively in the Government of the United States of America." Further facts were alleged showing that plaintiff's payment of the tax was not voluntary, and that a demand for its refund had been made and denied.

The parties have argued this case as though we had before us the facts upon which the ultimate fact depends; that is to say, they have debated whether or not the plaintiff had a possessory interest in the airplanes and airplane parts described in the assessment and, if so, whether the interest was taxable. But this appeal is presented on the judgment roll alone, and the complaint declares that the plaintiff had no possessory or other interest in the personal property described. It follows that we have no basis upon which to consider this case on its merits, as we are engaged in doing the case of Douglas Aircraft Company v. Byram et al., 134 P.2d 15.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

56 Cal.App.2d 352

BURR v. PACIFIC INDEMNITY CO. et al.

Civ. 11942.

District Court of Appeal, First District, Division 2, California.

Dec. 23, 1942.

Rehearing Denied Jan. 22, 1943.

Hearing Denied Feb. 18, 1943.

1. Appeal and error 🔑932(1)

Amount of judgment not being attacked on appeal, the appellate court is entitled to assume that it is supported by evidence.

2. Appeal and error 🔑931(1)

Appellate court, where findings are in no way attacked in briefs, would be justified in assuming that findings were amply supported by evidence.

3. Highways 🔑113(4)

Findings, to effect that one of parties to contract for construction of tunnel for highway district had never signed letter constituting part of agreement in accordance with understanding, established that no binding written contract was entered into.

4. Highways 🔑113(4)

Contractor constructing tunnel for highway district, on refusal of payment of money then due under oral or implied agreement, was legally justified in ceasing work and suing for value of work and materials already furnished.

5. Contracts 🔑34

Contractor was not bound by any of the provisions of proposed but legally unexecuted contract.

6. Pleading 🔑236(7)

Trial court has a wide discretion in the matter of allowing or denying leave to amend pleadings to permit a new issue to be raised after pleadings have been settled and the trial has commenced.

7. Pleading 🔑236(7)

In action to recover for work, labor, and materials furnished, trial court did not abuse discretion in refusing to allow new issue in respect to third persons being interested in contract and not licensed as contractor to be raised after delay of almost two years.

8. Pleading 🔑236(7)

In action to recover for work, labor, and materials furnished, trial court had discretion to determine whether, after delay of almost two years in raising issue as to third person being interested in contract without having license as required by law, the case should be reopened to litigate such disputed question of fact on which legality of contract would depend.

9. Costs 🔑252

Attorney's fee having been included in judgment in action on contract with highway district, the prevailing party was not entitled to an additional attorney's fee on appeal, since the language of the statute clearly limits the attorney's fee to the trial. Gen. Laws 1937, Act 6423, § 2.

On Petition for Rehearing.

10. Joint adventures 🔑1
Partnership 🔑52

In action to recover for work, labor, and materials furnished under contract to construct tunnel for highway district, wherein it was claimed that third person not licensed as contractor was interested with plaintiff in contract, evidence in respect thereof *held* insufficient to support a finding that such third person was either a "partner" or "joint adventurer".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer" and "Partner".

11. Estoppel 🔑92(2)

Where proposed written contract for construction of tunnel for highway district never became effective because of party's wrongful refusal to sign letter which was to constitute part of contract, contractor was not "estopped" to deny that he was bound by all burdens of contract, in view of refusal of other party to bind himself to additional burdens contained in letter in violation of promise.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeals from Superior Court, Alameda County; James G. Quinn, Judge.

Action by P. L. Burr against the Pacific Indemnity Company and others to recover for work, labor, and materials furnished. From the judgment, both parties appeal.

Affirmed.

For prior opinion, see 128 P.2d 26.

Theodore M. Stuart, of San Francisco, for plaintiff and appellant.

Courtney L. Moore and Walter A. Dold, both of San Francisco, for defendants and appellants.

DOOLING, Justice pro tem.

The cross-appeals are herein presented on the one typewritten transcript: (1) An appeal by defendants from a judgment in favor of plaintiff, P. L. Burr, and (2) an appeal by plaintiff, Burr, from that part of the judgment only which failed to allow him as part of his recovery two additional items of $481.38 and $2,140.

[1] The action arose out of work done by Burr for defendant DuPuy in the construction of the Broadway low level tunnel for Joint Highway District No. 13, and was for work, labor and materials furnished by said plaintiff. The amount of the judgment for plaintiff is not attacked by defendants, and we are entitled to assume that it is supported by the evidence. Defendants urge two grounds for reversal which are thus stated in their opening brief:

"1. Can a contractor quit an uncompleted job, and recover the reasonable value of work and labor performed when he quits in direct violation of the terms of his written contract?

"2. Can two persons jointly maintain a lawsuit for work and labor performed as contractors on a construction job when only one of them has a contractor's license, when the other has no license, and when the two of them have not a joint or combination license as required by the Contractors' License Law?"

Under point one defendants in their opening brief assume, without argument or discussion, that the work sued for by Burr was done under a written contract and that certain provisions of that contract were violated by Burr when he quit the job with his work unfinished on October 15, 1937. This assumption flies directly in the teeth of findings V and VII made by the trial court in the following language:

"V. That the said plaintiff and the said DuPuy on June 30, 1937, and July 1, 1937, attempted to enter into a written agreement under which the said plaintiff was to furnish said labor, materials and supplies, and there was then prepared a portion of said agreement in typewriting with ink interlineations and four separate letters; all to be signed or initialed by the plaintiff P. L. Burr and the said defendant DuPuy. That the said plaintiff Burr and the said defendant DuPuy verbally agreed that all of the said writings combined would constitute their written agreement, one of which was the 'breakdown' on which the monthly payments were to be computed. Thereupon the said Burr signed or initialed all of said papers and the said DuPuy signed or initialed all thereof except the fourth letter (referred to in the evidence as the 'disputed letter') which said letter the said DuPuy accepted and approved and agreed to sign and mail to said Burr; that thereafter said DuPuy falsely represented that he had signed and mailed the same to said Burr; that the said disputed letter contained material provisions and agreements without which the said attempted written agreement was incomplete and failed to accomplish a complete meeting of minds or become a binding written contract; that said DuPuy has repudiated the obligations of said disputed letter."

"VII. That although the said attempt to enter into an agreement in writing failed the said plaintiff and the said defendant DuPuy proceeded with said work as though the prices, terms of payment and times of payment set forth in the said various writings were effective and represented to that extent the agreement of the parties; and, in furnishing the said labor, materials and supplies, the said defendant DuPuy well knew that the said plaintiff was proceeding upon the understanding that the agreed prices, terms of payment and times of payment were those set forth in the said various writings; and the said defendant DuPuy recognized his obligation to pay said prices at the times and in the amounts so specified. That the said agreed prices were and are the reasonable value of the said labor, materials and supplies."

[2] These two findings are in no way attacked in defendants' opening brief, and in their closing brief they content themselves with a general statement that both parties recognized from July 1 to October 15 that they were conducting their operations under a contract. In this state of the briefs we would be justified in assuming that findings V and VII above quoted find ample support in the evidence. Robben v. Benson, 43 Cal.App. 204, 213, 214, 185 P. 200; Royal Realty Co. v. Harvey Inv. Co., 95 Cal.App. 352, 360, 272 P. 805; Brovelli v. Bianchi, 136 Cal. 612, 69 P. 416; 2 Cal. Jur. 877.

An examination of the transcript shows that this assumption is correct. Taking the evidence most favorable to plaintiff (in accordance with the time honored rule governing appellate courts) it appears that a typewritten contract to be executed by Burr and DuPuy was prepared by an attorney acting for DuPuy; that this contract was supplemented by three letters signed or initialed by both parties; that Burr submitted to DuPuy a fourth letter (called in finding V the "disputed letter") stating that he would not sign the formal contract unless DuPuy agreed to and signed this fourth letter; that DuPuy promised to sign the letter and thereupon the formal contract was signed by Burr, and DuPuy had his pen in hand prepared to sign the letter when they were interrupted by a third party; that DuPuy then said that he would sign the letter later and mail it to Burr and that Burr before leaving said: "Now that is the condition because I do not want to go on with this contract and will not go on with this contract unless that letter is satisfactory and according to our agreement." The "disputed letter" was never signed by DuPuy although several times afterwards he promised Burr that he would sign it. Meanwhile Burr entered upon the performance of the work, and progress payments were made to him until October 15 when DuPuy refused to pay him anything further and Burr thereupon quit the job.

The evidence above recited having to do with the "disputed letter" is corroborated by certain witnesses, who represented the bonding company which furnished Burr's bond on the representation of DuPuy that he had signed or would sign the "disputed letter." Their testimony further shows that when it finally became apparent that DuPuy had not signed and would not sign the "disputed letter" the bonding company refused to be bound by its bond and returned the check for the premium to DuPuy.

[3] That under the facts found by the trial court in finding V no binding written contract was ever entered into is such a simple truism of the law of contracts as to require no citation of authority. In the language which is familiar to every first year law student there was no meeting of the minds.

[4] When DuPuy on October 15 refused to pay Burr any part of the money then due him under their oral or implied agreement Burr was legally justified in ceasing work and suing for the value of the work and materials already furnished. Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 51 P. 335; Laiblin v. San Joaquin Agricultural Corp., 60 Cal. App. 516, 213 P. 529; Big Boy Drilling Corp., Ltd., v. Etheridge, 44 Cal.App.2d 114, 119, 111 P.2d 953.

[5] Defendants do not question this rule of law but argue that it is inapplicable to this case: (1) Because under the written contract extra work (of which there was admittedly considerable) could only be charged for where contracted for in writing signed by DuPuy; (2) because under the written contract DuPuy was entitled to retain an amount sufficient to meet any claims against the work by subcontractors, laborers or materialmen; and (3) because under the written contract Burr was not entitled to cease work until 10 days after default in any payment and then only after giving 5 days' written notice. These points all assume and depend on the existence of the written contract. The finding of the trial court that the proposed written contract was never entered into destroys their major premise. Burr was not bound by any of these provisions of the proposed but legally unexecuted contract and the arguments predicated thereon are left without factual foundation.

The second point relied upon by defendants depends upon the following facts: F. A. Dailey was Burr's foreman on the job. On the witness stand he testified that he had a written contract with Burr. Upon defendants' demand this writing was produced but was not introduced into evidence on the trial of action. At a later stage of the trial it was stipulated that Dailey should be added as a party plaintiff and Alta Electric and Mechanical Company, Inc., should be added as a party defendant, without any amendment to the pleadings. This was done by formal written order of the court. The judgment as entered, however, runs only in favor of Burr, and defendants point to no evidence in the reporter's transcript which would support a judgment in favor of Dailey.

After judgment had been ordered by the court defendants for the first time raised the point that Dailey was a party to the contract between Burr and DuPuy and that Dailey had no contractor's license and

Dailey and Burr had no joint license. This point was made by motion to dismiss the action on that ground and also by motion for leave to reopen the case so as to set up that defense by amendment to the answer and to produce evidence in support thereof. These motions were denied by the court. After the entry of judgment the same matter was again urged by defendants in support of a motion for new trial.

The case originally went to trial on May 15, 1939. During the first day of the trial counsel for plaintiff at defendant's request produced and exhibited the document which he stated to be Dailey's contract with Burr. This document was neither introduced nor marked for identification. No evidence was introduced by any party during the course of the protracted trial tending in any way to prove that Dailey had any interest in the contract and the court properly, in this state of the evidence, ordered and gave judgment for Burr alone. The trial was not concluded until December 18, 1939. The notice of motion to dismiss the case and the notice of motion to reopen the case and file an amended answer were filed on March 5, 1941 and the motions were noticed for March 12. These motions were supported by an affidavit of one of defendant's attorneys which recited in part: "That affiant is informed and believes and therefore alleges that said contract of July 1, 1937, and the construction work on said Broadway Low Level Tunnel was performed by said Dailey and Burr as joint contractors or joint adventurers under and by virtue of the terms of said agreement of November 29, 1930, marked Exhibit 'A'."

In opposition to these motions affidavits of both Burr and Dailey were submitted categorically denying that Dailey was a contracting party with Burr or interested in Burr's contract with DuPuy.

It further appears from the affidavits on these motions that judgment had been ordered for plaintiff on February 3, 1941 and that proposed findings and proposed amendments thereto had been prepared and were then ready for submission to the court.

In attempted explanation of their long delay in attempting to raise this new issue one of the attorneys for defendants submitted an affidavit containing the following averments: "That thereafter, on or about February 13, 1941, your affiant had a conference with Mr. T. Rosenberg, one of the officers of Alta Electric & Mechanical Co., and with Mr. H. C. Millsap, attorney at law in Los Angeles representing the Alta Electric and Mechanical Co. in other matters. * * * That in the course of said conversation the matter of joinder of F. A. Dailey as plaintiff and cross-defendant * * * was discussed, and certain remarks were made that caused your affiant to wonder if said F. A. Dailey was a duly licensed contractor by the State of California. That thereafter your affiant researched the law relative to the necessity of the contractor having a license * * * and for the first time discovered that not only did individual contractors have to have a license but, by an amendment in 1935, the law required that where two or more persons, to each of whom had been issued a license, jointly submitted a bid or otherwise acted in the capacity of a contractor, they had to secure an additional license for acting in the capacity of such joint venture or combination."

It thus appears that after a trial extending from May 15, 1939, with interruptions, to December 18, 1939; after learning of Dailey's possible interest in the contract on May 15, 1939; after protracted arguments and briefing; and after judgment had finally been ordered on February 3, 1941, it first occurred to counsel for defendants on February 13, 1941 to inquire into the law and the facts about Dailey's possible interest in Burr's contract with DuPuy. It further appears that it was then averred, "upon information and belief" only by defendant's attorney that Dailey was a party to the contract and this fact was denied under oath by both Dailey and Burr.

The result was that on March 12, 1941, the trial court was asked to reopen the case to try a new issue never before suggested, an issue then only suggested upon information and belief and flatly denied by both Dailey and Burr, and with the only explanation for the delay of almost two years in urging it that it had not occurred to counsel to inquire into either the facts or the law at any time before February 13, 1941.

[6, 7] The trial court has a wide discretion in the matter of allowing or denying leave to amend a pleading to permit a new issue to be raised after the pleadings have been settled and the trial has com-

menced. Nulty v. Price, 202 Cal. 279, 260 P. 291; Manha v. Union Fertilizer Co., 151 Cal. 581, 91 P. 393; Scholle v. Finnell, 167 Cal. 90, 138 P. 746; Johnson v. Johnson, 134 Cal.App. 460, 25 P.2d 538; Reay v. Reay, 97 Cal.App. 264, 275 P. 533; Hagar v. Home Stores, Inc., 85 Cal.App. 533, 259 P. 1007. Under the facts of this case it is clear that the trial judge did not abuse his discretion in refusing to allow this new issue to be so tardily raised.

[8] Defendants argue that because this issue goes to the legality of the contract it could be raised at any time. If it had clearly appeared to the trial court or clearly appeared here that the contract was illegal the plaintiff should be denied a recovery. Force v. Hart, 209 Cal. 600, 289 P. 828; Morey v. Paladini, 187 Cal. 727, 203 P. 760. But in this case far from so appearing the suggested facts which would make the contract illegal were only stated on information and belief and were denied by the counter-affidavits. It rested in the sound discretion of the trial court to determine whether after the long delay and on the showing made the case should be reopened to litigate a disputed question of fact on which the legality of the contract would depend.

The plaintiff's appeal presents the question of the sufficiency of the evidence to justify two deductions by way of offsets from the amount of his judgment.

The first is an item of $481.38. Sheerin, a witness for defendants, testified that DuPuy was required by the District Engineer to pay this amount for damage to certain conduit pipes and cable which were damaged by a tractor running over them. He further testified that Farish, a subcontractor under plaintiff, had tractors on the job at the time. Dailey while denying knowledge of the cause of this damage testified that a tractor would have to run over this conduit to get in and out of the tunnel. It is claimed that this item is excessive on its face, that there was no proof that it was for the reasonable value of the repairs, no proof that the damage was caused by plaintiff's negligence and that the owner of the material damaged was guilty of contributory negligence.

In the trial of the case, extending over a period of many days and involving testimony concerning many dozens of items, the evidence at times, as in this instance, was undoubtedly sketchy. On the cross-examination of defendants' witness no inquiry was made as to the reasonableness of this particular item; the witness testified that DuPuy paid the amount and its reasonableness was apparently not questioned at the time. We think that the trial judge was justified in drawing an inference from the testimony that the conduit was damaged by the negligent operation of one of the tractors operated by Burr's subcontractor (there was no evidence of any other tractors operating on the job at that particular time) and that contributory negligence of the owner of the conduit was not proved.

The $2,140 item represents an amount paid to Farish, Burr's subcontractor, for hauling dirt. Sheerin, defendants' witness, testified that this represented 2,140 yards of dirt at $1 per yard hauled from the trenches in the tunnel. Dailey testified for plaintiff that none of this dirt was hauled ont of the tunnel. This conflict was resolved by the trial court in favor of defendants. Plaintiff makes the further claim that in any event the full amount paid Farish by DuPuy, including this $2,140, was already once deducted from plaintiff's claim in arriving at the judgment and that in deducting it a second time the court was duplicating the offset. The unit prices under which Burr was working provided $1 per foot for digging this trench, which would include hauling the material away if necessary. The full charge was made by plaintiff for this work and included in the judgment. It is thus clear that the $2,140 was a partial payment on account of this $1 per foot of excavation and hence properly deducted.

Plaintiff quotes section 2 of the Public Works Act (Deering's Gen. Laws, Act 6423); "Upon the trial of any such action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered."

[9] An attorney's fee was included in the judgment. Plaintiff asks for an additional attorney's fee on appeal. The language of the section, "upon the trial," clearly limits the attorney's fee to the trial, and we find no warrant therein for the allowance of a further fee on appeal. No California case in point has been cited or found by us but the Supreme Court of Oklahoma in National Credit Co. v. Franklin, 177 Okl. 417, 60 P.2d 744, reached a

similar conclusion on a statute apparently not so clearly limiting the fee to the trial of the action as ours.

The judgment is affirmed on both appeals.

NOURSE, P. J., and SPENCE, J., concurred.

On Petition for Rehearing.

PER CURIAM.

To meet the claim made by appellants DuPuy et al., in their petition for rehearing, that this court has misstated the facts to the prejudice of their right to petition for a hearing in the Supreme Court, we herewith set out in full the portion of the transcript which they assert was ample evidence to support a finding that Dailey was a contracting party:

"Mr. Moore. Q. Mr. Dailey, are you a partner of Mr. Burr in this contract? A. I had a written agreement with Mr. Burr.

"Q. Have you anything to do with the profit and loss in the venture? A. Yes.

"Q. Now, on or about July 1, 1937—

"Mr. Stuart (interrupting). Pardon me. Just before you leave that, so it will clear up the record, he has a working interest of what the agreement is but the contract was to be carried on in the name of P. L. Burr.

"Mr. Dold. In other words, he was a partner of Burr but the contract was carried on in the name of Burr.

"Mr. Moore. Mr. Burr and Mr. Dailey were partners on the job but the contract was conducted under the name of P. L. Burr.

"Mr. Stuart. I don't think they were partners but he has a working interest.

"Mr. Dold. Could you let us see the contract?

"Mr. Stuart. Yes."

[10] We did not quote this portion of the transcript in the opinion because in its vague and uncertain terms we could not discover any substantial support for a finding that Dailey was either partner or joint adventurer. The fact that he was a partner was expressly denied by Mr. Stuart and counsel for DuPuy chose to drop the inquiry at that point. The nature of Dailey's legal relation to Burr was not established and the entire quoted colloquy is perfectly consistent with Dailey's subsequent assertion that he was merely an employee of Burr to be compensated by a percentage of the profit.

[11] Appellants also complain that we failed to notice an argument, first advanced in a supplemental typewritten memorandum, that Burr having accepted the benefits of the proposed contract was estopped to deny that he was bound by all of its burdens. The trial court's finding, quoted in full in the opinion, that the proposed written contract never became effective because of DuPuy's wrongful refusal to sign the disputed letter, is a complete answer to this argument. No case has been cited by appellants, and we are certain none can be found, holding that a party who proceeds upon the false statement of another that he has signed, or will sign, a letter orally agreed upon as a material part of the written contract will be bound by all the burdens of the proposed contract although the other in violation of his promise refuses to bind himself to the additional burdens contained in such letter.

The petition for rehearing is denied.

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56 Cal.App.2d 631

PEOPLE v. CENTERS et al.

Cr. 3640.

District Court of Appeal, Second District,
Division 1, California.
Jan. 14, 1943.

1. Criminal law ⚷543(2), 1153(6)

It is within trial court's discretion to determine what showing of diligence to find missing witness within state is sufficient to authorize admission of witness' testimony at preliminary examination, and its action will not be disturbed unless discretion is abused. Pen.Code, § 686.

2. Criminal law ⚷543(2)

The term "diligence", as used in statute permitting admission of testimony of missing witness given at preliminary examination when witness cannot with due diligence be found within the state, is a relative term incapable of exact definition, and anything which will reasonably satisfy court of witness' absence and that he is not likely to return within its jurisdiction may be admitted. Pen.Code, § 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligence".

3. Criminal law ⚷543(2)

Evidence that witness who testified at preliminary examination left without forwarding addresses, and that no one questioned at places where he had worked and lived knew anything about his friends or his whereabouts, that process server visited various unions attempting to locate witness, and that he unsuccessfully checked post office for forwarding addresses for approximately seven addresses, was sufficient to support finding of "diligence" and authorized admission of witness' testimony at preliminary examination. Pen.Code, § 686.

4. Criminal law ⚷1169(1)

Admission of testimony of absent witness at preliminary examination was not prejudicial, where such testimony was merely corroborative of testimony of other witnesses.

5. Criminal law ⚷1144(15)

Where trial court instructed jury that alleged confession of one defendant could not be considered against other defendants, it was required to be assumed that jury followed instructions in arriving at verdict.

6. Criminal law ⚷673(4)

Where alleged confession of one defendant was offered only as to that defendant, and court instructed jury that it could only be considered against that defendant, admission was not prejudicial to another defendant.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Charles Austin Centers, Forrest E. Wilson, and another were charged with robbery. Forrest E. Wilson was convicted of robbery in the first degree, and he appeals.

Affirmed.

Dana Ong and William G. Kenney, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged by an information with the crime of robbery, together with a prior conviction of the same offense. He admitted the prior conviction and the jury found him guilty of robbery of the first degree. From the judgment of conviction which followed, and from the order denying his motion for a new trial, he prosecutes this appeal.

Apparently appellant does not question the sufficiency of the evidence to sustain his conviction, but relies upon alleged errors of the trial judge in connection with the admission of evidence which, he contends, were so prejudicial to his cause as to require a reversal of the judgment:

1. That the admission and reading of the testimony of the witness Salvatore as given at the preliminary hearing was illegal in that no proper foundation was laid to comply with section 686 of the Penal Code;

2. That the admission of the testimony of a police officer as to the purported confession made by defendant Teague was illegal and a subterfuge to get it before the jury, there being a question as to its free and voluntary character.

The evidence adduced at the trial herein reveals that about 1:30 o'clock on the morning of Monday, March 16, 1942, three men armed with revolvers entered through the rear door of the Tam O'Shanter Inn in the city of Los Angeles. The inn had closed for the night and there remained on duty only the night manager, Scheid, and four employees, to wit: Albert Ifft, Walter Salvatore, John Schneider and Anton S. Weidemeier. Manager Scheid testified that when the three men armed with revolvers entered the place, he turned and faced them and looked directly at defendant Centers, who said: "This is a holdup"; and that defendant Teague was standing behind Centers and appellant Wilson was standing "back over by the entrance to the dining room." They first forced Scheid and the four employees to lie on the floor in the rear kitchen and then forced Scheid to open the safe in the office from which they extracted approximately $1,700 in checks, currency and coins.

Appellant sought to establish an alibi by the testimony of his mother and his aunt to the effect that he was not present at the robbery but was at home in bed at 1761

Whitefield Road, Pasadena, California, a distance of from seven to ten miles from the scene of the crime. However, appellant was positively identified as a participant in the robbery by manager Scheid who, in answer to the question, "When did you see Wilson?", testified: "Well, I saw him the first time when I went into the kitchen and when I came back I passed him and then when I came out again I saw him standing over the boys." This witness subsequently identified and "picked out" Wilson from a police showup line. Appellant was also positively identified by the witness Weidemeier as having participated in the robbery armed with a revolver. The witness Schneider testified he was not sure but that appellant resembled one of the men who took part in the crime.

The testimony of Walter Salvatore, an employee of the Tam O'Shanter Inn, which was given at the preliminary hearing and read at the trial over appellant's objection, is the subject of appellant's first assignment of error: That the requirements of section 686 of the Penal Code that the witness "cannot with due diligence be found within the state," were not satisfied.

[1] "It is within the discretion of the trial court to determine what showing of diligence to find a witness within the state is sufficient to authorize the admission of his testimony [given] at the preliminary examination * * * and its action, like its decision upon any other question of fact, will not be disturbed upon appeal unless its discretion is abused; that is, unless it appears that the evidence is insufficient to support the finding of due diligence.

[2] "The term 'diligence' is a relative term incapable of exact definition and depends upon the circumstances of each case with all their distinct and varying phases and bearings. * * * Anything which will reasonably satisfy the court of the absence of the witness and that he is not likely to return within its jurisdiction may be admitted." 8 Cal.Jur. 129, 130, and authorities there cited.

[3] In the instant case the prosecution showed that prior to the trial a process server went to the places where Salvatore said he worked and lived at the time of the preliminary hearing. He had left both places without leaving forwarding addresses, and no one questioned at either place knew anything about his friends or his whereabouts. The process server also inquired at the Tam O'Shanter Inn and received two addresses in Glendale. Salvatore was known at each address, but he had gone without leaving a forwarding address at either place. At the suggestion of appellant, the process server then visited various unions trying to locate Salvatore but without success; likewise, he unsuccessfully checked the postoffice for forwarding addresses for approximately seven addresses. In addition, the employee Schneider testified he was a friend and former roommate of Salvatore's; that although formerly he had seen Salvatore every few days, he had not seen him for a month and a half before the trial; that since then he had tried to find Salvatore, but was unable to locate anyone who knew of his whereabouts. This was sufficient evidence to support a finding of diligence.

[4] Moreover, the testimony of the witness Salvatore is corroborative of the testimony of night manager Scheid and the employee Weidemeier to the effect that appellant, armed with a revolver, escorted the several employees into the rear kitchen of the inn and stood guard over them while they were lying on the floor during the time said night manager Scheid was being forced by the other two defendants to open the safe. As result, its admission was not prejudicial to appellant's cause, as is contended, but was entirely harmless.

[5, 6] With respect to the admission of a conversation purporting to be a confession made by defendant Teague, this was offered "only as to the defendant Teague with whom the conversation took place." Whereupon the court instructed the jury as follows: "Ladies and gentlemen, the district attorney has stated that he is offering this evidence as to the defendant Teague only, and it can only be considered against the defendant Teague." It must be assumed that the jury followed the court's instructions on this point in arriving at their verdict. At any rate, its admission was not injurious or prejudicial to appellant's cause.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.

56 Cal.App.2d 504

SANTA CRUZ PORTLAND CEMENT CO. et al. v. YOUNG et al.

Civ. 12112.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1943.

1. Limitation of actions ⚷34(7), 66(15)

Three-year statute of limitations was applicable to action by holders of assessment district bonds which were invalidated for improper assessment, to compel a reassessment, and statute commenced running on date bondholders were given statutory right to demand reassessment. Code Civ. Proc. § 338, subd. 1; Gen.Laws 1923, Act 8194, and § 12¼.

2. Limitation of actions ⚷66(15)

Where a party is given a right to demand performance of an act by another, statute of limitations commences to run from date demand could first be made.

3. Limitation of actions ⚷66(15)

Where assessment district bonds were invalidated in 1919, and by statute in 1921 bondholders were given right to demand reassessment and such demand was not made until 1941, action to compel reassessment was barred by three-year statute of limitations. Code Civ.Proc. § 338, subd. 1; Gen.Laws 1923, Act 8194, and § 12¼.

◆

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Mandamus by Santa Cruz Portland Cement Company and others against Harry A. Young and others to compel defendants as members of city council of San Jose to levy a re-assessment on certain real property. From a judgment entered after a demurrer was sustained without leave to amend, plaintiffs appeal.

Affirmed.

W. Melville Holden, of San Francisco, for appellants.

Archer Bowden and Owen D. Richardson, both of San Jose, and Landels, Weigel & Crocker, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs appeal from a judgment entered pursuant to an order sustaining without leave to amend defendants' demurrer to a petition for a writ of mandate to compel defendants, members of the City Council of San Jose, to levy a reassessment on certain real property described in the petition. The demurrer was sustained on the ground that the petition showed on its face that the cause of action was barred by the statute of limitations, and by laches. The appeal approaches the frivolous, as the allegations of the complaint definitely demonstrate that the cause of action is barred by the statute of limitations.

So far as pertinent here, the petition, filed on May 8, 1941, alleged that in December, 1913, the City Council of San Jose, purporting to conduct proceedings for public improvements under the Vrooman Act (Stats. of 1885, chap. CLIII, p. 147, as amended, Deering's Gen.Laws, 1923, Act 8194), caused to be created an assessment district in San Jose upon which assessments were levied; that after the improvements were made it was determined by the District Court of Appeal that there was a defect in the proceedings in levying the assessments, and that, for that reason, the bonds, liens, assessments so levied were unenforceable (Beck v. Ransome-Crummey Co., 42 Cal.App. 674, 184 P. 431, petition for hearing denied by Supreme Court October 9, 1919); that on April 2, 1941, plaintiffs caused to be served on defendants a written request for a reassessment of the properties included in the 1913 assessment; that defendants have refused to order the reassessment; that plaintiffs are the owners and holders of the bonds, liens, charges and assessments; and that they are without remedy unless the reassessment is ordered.

An examination of the pertinent provisions of the Vrooman Act shows the following situation: When the assessment was declared void in 1919 in Beck v. Ransome-Crummey Co., supra, there was no provision giving holders of void bonds, liens, charges or assessments the right to demand a reassessment. That right was conferred by a 1921 amendment to § 12¼ of the act (Stats.1921, chap. 378, p. 563). The section reads in part as follows:

"Whenever any assessment heretofore issued or which may be hereafter issued is or shall be void, or unenforcible, for want of sufficient authority for its issuance or from irregularities, or illegalities in the proceedings, or if bonds shall have been, or shall be issued to represent any assessments and such issuance shall not have been, or shall not be effective through the curative provisions thereof to make them valid and enforcible, then, in any of such events a reassessment therefor shall be issued. The true intent and meaning of this section is to make the cost and expense of work or improvement made through an attempted compliance with this act, payable by the real estate benefited by such work or improvement by making a reassessment therefor.

"Such power of reassessing embraces both a full and a partial reassessment, and is not exhausted by a single attempted exercise thereof.

"A reassessment shall be ordered under any one of three circumstances:

"First—Where the owner or holder of any assessments, or of bonds issued to represent assessments requests the legislative body of the city in which the assessment has been or shall be issued to order a reassessment. In such event if said legislative body be of the opinion that the assessments or bonds in question are not enforcible, it shall order the making and issuing of a reassessment covering only the assessments owned or held by the petitioner, or the assessments represented by the bonds owned or held by such petitioner."

This section was immaterially amended in 1923 (Stats. of 1923, chap. 57, p. 110), and remained in full force and effect until 1933, when the Vrooman Act was repealed. Stats.1933, Chap. 345, p. 948. The repealing statute contained a saving clause, reciting that the city council was not divested of its power to conduct any proceeding under the provisions of the act relating to any proceeding wherein the resolution of intention to levy the assessment was adopted before January 1, 1933.

The pertinent dates are as follows:

December, 1913—Assessment district created.

October, 1919—Decision invalidating proceedings became final.

Stats. of 1921—Holders of bonds, etc., given right to demand reassessment.

Stats. of 1933—Vrooman act repealed with saving clause.

April 2, 1941—Demand made on city council to reassess.

May 8, 1941—This action instituted.

[1] Appellants concede that the proper statute of limitations is that contained in section 338, subdivision 1, of the Code of Civil Procedure, providing a three-year limitation on "an action upon a liability created by statute, other than a penalty or forfeiture," and urge that such period did not start to run until the demand was made on April 2, 1941. The point is without merit.

[2] In the present case the cause of action to secure a reassessment arose upon the passage of the 1921 amendment. Appellants could have made a demand at any time after the passage of the statute. Under such circumstances, the statute of limitations starts to run from the date demand could first be made. This rule has frequently been stated and applied in this state, and there are no contrary cases. In Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 430, 116 P.2d 37, 39, 136 A.L.R. 800, the rule is stated as follows: "At any time following the death she could demand a pension from the board and upon refusal could maintain a suit to enforce such action. The city charter requires an application to the board before court proceedings can be instituted, but it is established in California that a claimant cannot delay the running of the statute of limitations by postponing the time of demand upon the proper officials; the statute therefore begins to run at the time when the plaintiff first had the power to make such demand. Barnes v. Glide, 117 Cal. 1, 48 P. 804, 59 Am.St.Rep. 153; Jones v. Board of Police Com'rs, 141 Cal. 96, 74 P. 696; Curtin v. Board of Police Com'rs, 74 Cal.App. 77, 239 P. 355; Wittman v. Board of Police Com'rs, 19 Cal.App. 229, 125 P. 265; Harrigan v. Home Life Insurance Co., 128 Cal. 531, 58 P. 180, 61 P. 99; San Luis Obispo County v. Gage, 139 Cal. 398, 73 P. 174."

In Wittman v. Board of Police Com'rs, supra, 19 Cal.App., page 231, 125 P. page 266, a case frequently cited and quoted from, the court stated the rule as follows: "These considerations bring the case within the rule followed and recognized in many cases that, where a right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accued for the purpose of setting the statute of limitations running. [Citing cases.]" See, also, Central Pac. Ry. Co. v. Costa, 84 Cal.App. 577, 258 P. 991; Gamewell F. A. T. Co. v. Los Angeles, 45 Cal.App. 149, 187 P. 163.

[3] These principles are conclusive on the present appeal. The cause of action set forth in the petition has been barred by the statute of limitations since 1924, seventeen years before the petition was filed.

The judgment is affirmed.

KNIGHT, J., and WARD, J., concurred.

56 Cal.App.2d 607

MORRISON et al. v. LANDERS et al.

Civ. 12162.

District Court of Appeal, First District, Division 1, California.

Jan. 13, 1943.

1. United States 🔑53

The Home Owners' Loan Act was intended solely for the benefit of home owners who were in financial difficulties, and any benefit to creditors of home owners is merely incidental. Home Owners' Loan Act of 1933, §§ 1–9 and § 4(d), 12 U.S.C.A. §§ 1461–1468 and § 1463(d).

2. United States 🔑53

Home Owners' Loan Act was intended to promote financing of indebtedness on homes so that agreed payments could be made by home owners who would otherwise face loss of their property. Home Owners' Loan Act of 1933, §§ 1–9 and § 4(d), 12 U.S.C.A. §§ 1461–1468 and § 1463(d).

3. Contracts 🔑123(1)

Where purpose of home owner's creditor, in procuring unsecured notes from home owner, is to exact from home owner an additional amount for co-operating with home owner to secure a Home Owners' Loan Corporation loan, whether the secret lien obtained by the creditor is general or specific is immaterial in determining the validity of the lien. Home Owners' Loan Act of 1933, §§ 1–9 and § 4(d), 12 U.S.C.A. §§ 1461–1468 and § 1463(d).

4. Contracts 🔑123(1)

Secrecy on part of home owner's creditor in obtaining a secret lien, either general or specific, on the realty, is tantamount to "fraud" and consequently violates the spirit and intent of the Home Owners' Loan Act. Home Owners' Loan Act of 1933, §§ 1–9 and § 4(d), 12 U.S.C.A. §§ 1461–1468 and § 1463(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

5. Contracts 🔑138(1)

Where parties are in pari delicto, neither can secure affirmative relief at law or in equity.

6. Contracts 🔑139

Where one party to a cause is involved to some extent in an illegality but the second party is grievously at fault and the first party only slightly at fault, the court will allow recovery of moneys paid by the first party under the contract.

7. Contracts 🔑139

Where owners of home subject to a first mortgage running to a bank and subject to a junior trust deed applied to Home Owners' Loan Corporation for loan with which to finance the entire indebtedness, and gave trust deed holder not only a new junior trust deed for the difference between the value of the property and the amount of the new first mortgage, but also unsecured notes representing balance originally secured by the old trust deed, and owners thereafter brought suit to have the unsecured notes canceled and amounts paid thereon credited on notes secured by new trust deed, fact that owners had obtained Home Owners' Loan Corporation loan by misrepresentation did not bar them from relief on ground parties were in "pari delicto". Home Owners' Loan Act of 1933, §§ 1–9 and § 4(d), 12 U.S.C.A. §§ 1461–1468 and § 1463(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Delicto".

8. Appeal and error 🔑996

In suit by owners of realty against junior lienholder to cancel unsecured notes given defendants in addition to the unsecured lien on ground that acceptance by defendants of lien and of Home Owners'

Loan Corporation bonds had been an accord and satisfaction and that execution of unsecured notes had been exacted as condition of defendants' co-operation to secure for plaintiffs a Home Owners' Loan Corporation first mortgage on the realty, trial court had right to draw reasonable inferences from the circumstances surrounding the transaction.

9. Contracts ⚷141(3)

In suit by owners of realty against junior lienholders to cancel unsecured notes given defendant in addition to the junior lien, evidence sustained finding that acceptance by defendants of the junior lien and of Home Owners' Loan Corporation bond had been an "accord and satisfaction" of al. obligations of plaintiffs to defendants, warranting cancellation of the notes.

See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

10. Appeal and error ⚷996

Appellate court may not substitute its own deductions for the deductions of the jury or of the trial court.

11. Payment ⚷42

Where trial court decreed cancellation of two unsecured notes given by owner of realty to holder of junior lien on the realty, and legality of junior lien was not disputed, payments already made on the canceled notes should have been applied to both interest and principal of the junior lien, and hence it was error to apply such payments to the principal of the junior lien to the exclusion of interest due thereon.

◆

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Suit by George G. Morrison and others against Thomas Landers and others for the cancellation of two notes and for other relief. Judgment for plaintiffs, and defendants appeal.

Affirmed as modified.

Harry N. Grover, of San Francisco, for appellants.

James M. Hanley and Herbert Chamberlin, both of San Francisco, for respondents.

WARD, Justice.

This is an appeal by defendants from a judgment in favor of plaintiffs canceling two notes executed by them to the former, and directing that payments made thereon be credited against another note, secured by a deed of trust. By the judgment defendants were restrained from foreclosing on the property until two weeks after the judgment had become final, the plaintiffs in that time to pay off the balance due on the note secured by the deed of trust, with interest.

In 1933 plaintiffs had outstanding against property, purchased by them from defendants in 1928, a mortgage to a San Francisco bank in the amount of $2,100, and a deed of trust to defendants in an amount of $2,607.02, both of which called for payments of principal and interest to be made monthly. Plaintiffs had difficulty in meeting these payments, and while foreclosure had not been threatened, when the Home Owners' Loan Act, 12 U.S.C.A. §§ 1461–1468, was passed on June 13, 1933 for the purpose of assisting small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages on their home property, they sought to refinance their indebtedness. For that purpose they filed with such authority an application for a loan. The act authorized the Home Owners' Loan Corporation to issue bonds and to exchange them, with cash adjustments, for mortgages against small homes up to "80 per centum of the value of the real estate as determined by an appraisal made by the Corporation." § 1463(d). It did not, however, compel mortgage holders to accept bonds of the corporation in exchange for their claims, and in this regard the application by plaintiffs for the loan was made with the assistance of defendants, they consenting to accept bonds in lieu of a portion of the money due them.

As applied to the property here involved, the act precluded the corporation from loaning thereon more than $2,960, 80 per cent of its appraised value of $3,700. Following negotiations, the actual amount loaned by it was $2,956.63 which was secured by a mortgage. The amount of the loan was disbursed by the corporation as follows: $2,063.33 in payment of the existing senior obligation at the bank, $93 in payment of delinquent taxes and expenses of refinancing, and $800 (in bonds) to defendants as junior mortgage holders. While the corporation in refinancing homes permitted junior liens thereon in some instances, its rules required that the combined indebtedness against the home should not exceed the appraised value as determined by it. Based upon such rule, the defendants were also given a junior lien against the property in the form of a deed of trust in the amount of $740, the difference between the $3,700 appraised value, and the amount of the senior lien.

Defendants had in the meantime procured unsecured notes from plaintiffs, one for $1,050 and one for $95, representing the balance due them originally secured by the deed of trust executed in their favor.

Some time thereafter plaintiffs, claiming that at the time of the negotiations with the Home Owners' Loan Corporation it had been represented to them by the defendants that the above two notes were part of the transaction with the loan corporation and had been approved by it, demanded that all payments, amounting to $390.80 theretofore made thereon be applied on the secured note for $740. Defendants claimed and testified that from the time they were first approached on the matter they had advised plaintiffs that they were not willing to take any loss in connection with the loan, for which they held security, and a notation on their consent to accept bonds of the corporation included the following: "And further consideration of deed of trust and note as second lien for balance due." Upon their refusal to comply with plaintiffs' demand, the present suit was brought for cancellation of the two notes in question, the application of amounts paid thereon to the secured note, and that defendants be enjoined from taking any action in the matter of foreclosure of the deed of trust securing the $740 note, notice of default on which had been recorded and notice of sale by the trustee given.

In support of their appeal the appellants make several contentions, namely, (1) that the respondents were not entitled to any equitable relief, because (a) they obtained the loan from the Home Owners' Loan Corporation by misrepresentation; (b) that, conceding the notes for $1,050 and $95 to be invalid because made and received in violation of the terms of the act, the parties thereto are in pari delicto, in which case the court will leave them where it finds them, granting relief to neither; (2) the trial court erred in applying all sums paid on the above two notes to the principal of the note for $740, thereby depriving defendants of interest on that note to which they were legally entitled; (3) that certain findings are not supported by the evidence.

The first point presented may be disposed of by reference to the case of McAllister v. Drapeau, 14 Cal.2d 102, at pages 109, 110, 92 P.2d 911, at page 915, 125 A.L.R. 800, where the court said:

"* * * a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H. O. L. C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations. * * *

[1] "The obtaining of secret second liens by the creditor violates the basic public policy expressed in the act. The act was intended solely for the benefit of home owners who were in financial difficulties—no one else was eligible for its benefits. Any benefit to creditors was merely incidental. But if a creditor could lawfully exact a secret second lien from his debtor, in many cases this would confer the benefits of the act on the creditor rather than on the debtor. Thus, in every case where the terms of the secret second lien were such that the debtor was financially unable to pay off both the first and second, the holder of the second, upon default by the debtor, could foreclose his second lien, and the holder of the second would obtain the property subject to the mortgage of the H. O. L. C.—a fifteen-year amortized mortgage at a low rate of interest—a very favorable type of mortgage which at that time was not generally available. In this way the creditor could and would circumvent the policy of the act and would obtain benefits never intended for him. This is not an unlikely possibility when it is considered that the benefits of the act were only available to home owners who were already in default on their first mortgage." Cases are cited to the effect that secrecy is tantamount to fraud on the H. O. L. C. See, also, Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4; Woods v. Kern County Mut., etc., Ass'n, 34 Cal. App.2d 468, 93 P.2d 837; Richard R. Adams Co. v. Pacific States S., etc., Co., 34 Cal.App.2d 723, 94 P.2d 370; Rockwood

v. Brown, etc., Invest. Co., 51 Cal.App.2d 241, 124 P.2d 612.

Appellants do not contend that, insofar as the statute here considered is concerned, there is any difference between a specific lienholder and a general lienholder. Their position is stated in their closing brief as follows: "In our opening brief we admitted that the established law of this state was that 'where the holder of a lien on real property obtains a secret lien from one who has received a Home Owners' Loan under the provisions of the Home Owners' Loan Act for the difference between what the lienholder receives from the Home Owners' Loan Corporation and the amount of his original claim, and such fact is not disclosed to the Home Owners' Loan Corporation before the loan is granted, and the proceeds of the loan paid, such second lien is void as against public policy.' However, we did not say that the notes in question were obtained without disclosing that fact to the corporation within the purview of the decisions of this state.

"It is our position that the evidence shows that appellants gave the corporation sufficient information to put the corporation on notice that they were receiving the notes in question, and that this is all that is required to make the note transactions valid."

[2-4] It is true that in the McAllister case the court was dealing with the validity of a specific secret second lien. However, the basic principle underlying the decision in that case is that the act is solely for the benefit of home-owners in financial difficulties; that "no one else was eligible for its benefits." The act was intended to promote the financing of indebtedness on homes so that the agreed payments could be made by owners who would otherwise face loss of their property. In the McAllister case, as in the present, the negotiations were "secret." The promissory notes herein, while unsecured, are part of the transaction involving a loan from the H. O. L. C. The method used was an attempt to circumvent the law, namely, to secure promissory notes, which, if legal, could furnish the basis for a judgment and bring about a situation repugnant to the terms of the act. Whether the lien is general or specific is immaterial if the purpose is to secretly exact from the owner an additional amount after cooperating with him to secure a Home Owners' Loan Corporation loan. Such secrecy is tentamount to fraud in actually obtaining a second lien, and consequently violates the spirit and intent of the statute. Richard R. Adams Co. v. Pacific S., etc., Co., supra, was a case in which cash and a promissory note were given the holder of a deed of trust to secure its consent to a Home Owners' Loan Corporation loan. A petition for hearing was denied by the Supreme Court.

[5, 6] In the McAllister case, 14 Cal.2d at page 112, 92 P.2d at page 916, the court further said: "The last point urged by appellant is that, admitting the note and second mortgage are void and illegal, the plaintiffs were participants in the illegal transaction, were therefore in pari delicto, and cannot, for that reason, secure affirmative relief. It is, of course, true that where parties are in pari delicto neither can secure affirmative relief at law or equity. But it is equally true that where one party is involved to some extent in the illegality, but where the second party is grievously at fault and the first party only slightly at fault, the court will allow recovery of moneys paid by the first party under the executory contract. Smith v. Bach, 183 Cal. 259, 191 P. 14; Woodham v. Allen, 130 Cal. 194, 62 P. 398; Daniels v. Tearney, 102 U.S. 415, 26 L.Ed. 187." 1 Pomeroy's Equity Juris., § 403, p. 756.

[7] This above rule applies to the facts in the present case. In view of this conclusion it is not necessary to consider appellants' argument against the contention of respondents that the equitable principle that relief will be denied to one coming into court with unclean hands is here applicable.

[8] Appellants claim that there is no evidence supporting findings that respondents were apprehensive of losing their home and that they, the appellants, had agreed to accept a second lien to secure the payment of the sum of $740, bonds of the Home Owners' Loan Corporation in the sum of $800, and to release all other claims and demands against respondents or said real property. While there may be some conflict in the evidence, there is testimony by respondent Julia Morrison that, before she made application for the loan, she was fearful of foreclosure by the bank, also that she was informed by the attorney for appellants that the proposed transaction

had been "approved by the Home Owners Loan." There is further evidence of the "mortgagees' consent to take bonds" in the amount above mentioned. There is also some evidence that appellants gave respondents to understand that they were unwilling to suffer a loss in connection with the matter, but there is evidence that the Home Owners' Loan Corporation did not know of the unsecured notes. It was the right of the trial court to draw reasonable inferences from the circumstances surrounding the transaction.

The court found that: "The agreement of defendants with the Home Owners' Loan Corporation to accept a second lien on the realty described in the complaint to secure the sum of $740 and to accept bonds of said corporation and cash in the sum of $800, and the acceptance thereof by defendants, was an accord and satisfaction of all other obligations of plaintiffs to defendants."

We quote further from the McAllister case, 14 Cal.2d at page 111, 92 P.2d at page 916: "Several of the courts to which the problem here involved has been presented, in addition to holding the secret second mortgage illegal, have held that in signing the 'Mortgagee's Consent to Take Bonds', above quoted, the creditor agreed to accept such bonds 'in full settlement' of his claim, and that such agreement constitutes an accord and satisfaction, a release or a novation. Cook v. Donner, supra [145 Kan. 674, 66 P.2d 587, 110 A.L.R. 244]; Chaves County Building & Loan Ass'n v. Hodges, supra [40 N.M. 326, 59 P.2d 671]. The holding of these courts is sound. The agreement signed by the creditor was to accept the bonds 'in full settlement of the claim of the undersigned * * * and thereupon to release all the claim of the undersigned against said property.' The argument of amici curiæ that this broad language only constitutes an agreement by the creditor to release his security and does not constitute an agreement to release the debt secured is unsound. In the instant case, at the time California Security Loan Corporation signed the consent, the debtor owed it but one debt, which was secured by the recorded first mortgage, and partially secured by the secret unrecorded second mortgage. By signing the consent, that company agreed to release its entire 'claim'. This could have no reasonable meaning other than that it was an unqualified agreement in writing to release the existing debt for the amount of bonds offered. This constitutes a valid release, and an accord and satisfaction. Sections 1524, 1541, Civ.Code."

[9, 10] There is evidence to support the findings, and this "court is without power to substitute its deductions for those of the jury or trial court." Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886, 888.

[11] Appellants contend that the trial court committed error in applying all of the money paid on the $1,050 and $95 notes, viz., the sum of $390.80, to the principal of the $740 note to the exclusion of interest due thereon. The legality of the $740 note is not in dispute, neither is the amount of the payments made. Respondents seek to justify the order of the trial court that the whole amount paid on the unsecured notes should be applied to the principal of the $740 note upon the theory that appellants became involuntary trustees charged with the duty of making such application. The duty of the respondents in this regard would, however, apply as much to interest as to principal. If, as admitted by respondents, the legality of the $740 note is not in dispute, the $390.80 paid should accordingly be applied to both interest and principal.

The trial court is directed to modify the findings and the judgment in accordance with the views expressed herein, appellants and respondents to bear their respective costs on appeal. As modified the judgment will stand affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

56 Cal.App.2d 126

HUMES v. HUMES et al.

Civ. 13739.

District Court of Appeal, Second District,
Division 1, California.
Dec. 16, 1942.

1. Executors and administrators 🔑224

One seeking to recover from the representative of an estate specific property alleged to be held in trust by decedent is not a "creditor of the estate" who is required to present a claim against estate. Probate Code, § 716.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor of the Estate".

2. Executors and administrators 🔑443(7)

A complaint, in action to enforce trust in real estate of a deceased, which failed to allege that plaintiff presented a creditor's claim against the estate, was not demurrable, since the action was not founded upon a "claim" or a "demand" against the estate within meaning of statute requiring filing of claim. Probate Code, § 716.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim" and "Demand".

3. Equity 🔑66

In action to enforce trust against real estate of deceased, allegations of complaint as to plaintiff's indebtedness to deceased, his proportionate share of trust deed indebtedness, and asking that an undivided interest be conveyed to plaintiff less his indebtedness, were sufficient to constitute an "offer to do equity."

See Words and Phrases, Permanent Edition, for all other definitions of "Offer to Do Equity".

4. Witnesses 🔑133

The statute prohibiting a party from being a witness, in action against executor upon a "claim" against the estate, as to any matter occurring before death of deceased, did not prohibit plaintiff from testifying as to such matters in an action to enforce a trust against real estate of deceased, since such action was not founded upon a "claim" against the estate within the statute. Code Civ.Proc. § 1880, subd. 3.

5. Evidence 🔑174(1)

In action to enforce a trust against real estate of deceased, admitting in evidence, for limited purpose of showing deceased's statement of a credit due plaintiff, a carbon copy of a general summary of financial transactions between plaintiff and deceased, which had been prepared by deceased and delivered to plaintiff, was not error.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Homer C. Humes against Ida May Humes, individually and as executrix of the estate of James Humes, deceased, and others, to enforce a trust in real estate of deceased, wherein the executrix filed a cross-complaint praying for foreclosure and termination of the trust. From a judgment for plaintiff, defendants appeal.

Affirmed.

Laurence B. Martin and Samuel Reisman, both of Los Angeles, for appellants.

Charles Greenberg, A. Stewart Maddox, Jr., and Allen M. Williams, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment in an action to enforce a trust in real property brought by respondent Homer C. Humes, a son of James Humes, deceased. Appellants, who are the widow, son, two grandsons, a grand-daughter and a great-grandson of decedent, urge that the trial court committed error in the following particulars:

1. In overruling their general demurrer to the amended complaint and their objection to the introduction of any evidence, because said amended complaint violated the equitable maxim that "He who seeks equity must do equity," and therefore failed to state a cause of action for equitable relief;

2. In permitting respondent to testify in support of his alleged cause of action in violation of subdivision 3, of section 1880 of the Code of Civil Procedure;

3. In receiving into evidence Plaintiff's Exhibit No. 2, which was a carbon copy of a document denominated "General Summary."

The factual situation underlying the instant litigation is briefly as follows: On or about February 26, 1925, respondent Homer C. Humes acquired title to an undivided two-thirds interest in real property located at the southeast corner of Alta Vista and Beverly Boulevards in the city of

Los Angeles, at which time the remaining one-third interest thereof was owned by Frank B. Harris and his wife. On March 18, 1927, James Humes, the father of respondent, purchased from Harris and wife their one-third interest in said property with the result that the legal title thereto then stood in the name of respondent as to a two-thirds interest and in the name of his father as to the remaining one-third interest. On September 1, 1927, respondent and his then wife conveyed the two-thirds interest in the said property to respondent's father James Humes, who, on November 19, 1927, executed a declaration of trust acknowledging receipt from his son and wife of a grant deed conveying said two-thirds interest in said real property to him, and providing for the application of a portion of the contemplated rental from the said property to the liquidation of obligations owing by the son to the father, as well as reconveyance of the son's two-thirds interest by the father upon full payment of such obligations by the son.

The ninth paragraph of said declaration of trust provided that "If full payment of all the aforesaid obligations chargeable to said two-thirds interest is not made within seven (7) years from date, the undersigned shall have the option and right to foreclose in Court the same as a mortgage is foreclosed." Said document was accepted in writing by respondent, Homer C. Humes.

As pointed out by appellants, the right to foreclose given by this document accrued to the father on November 20, 1934, and could have been exercised at any time within the following four years, or until November 20, 1938. However, the father died on January 14, 1938, without having exercised this right of foreclosure, and his widow, appellant Ida May Humes, (respondent's stepmother) was appointed executrix of his last will which contained the following clause: "Third: I direct that the income from my property located at the corner of Beverly Boulevard and Alta Vista and particularly described as follows * * * be used for the payment of the above indebtedness against the property located at 2835 West Eighth Street, above described, for payment of expenses of last illness, funeral expenses, family allowance * * * and any or all other proper charges against the said estate. I further direct that after the period of one year from date hereof, with the consent of the majority of the distributees hereinafter immediately named, said property may be sold and the net proceeds therefrom, after payment of the aforesaid obligations and charges, be distributed in equal shares to the following, to-wit: My son, Freeman Humes; My grandson, Harley Humes; My grandson, Palmer Humes; My granddaughter, Betty Humes, and My great-grandson, Jimmy Lane. * * *"

On July 26, 1938, respondent filed a creditor's claim in his father's estate setting up his ownership of a two-thirds interest in the real property situate at the southeast corner of Beverly Boulevard and Alta Vista, referred to the declaration of trust of November 19, 1927, and acknowledged a personal indebtedness to his father as of January 1, 1938, in the sum of $3,446.61. Said claim was rejected and disallowed by said executrix, and on August 28, 1939, respondent filed the instant action to enforce a trust in the said real property heretofore referred to.

Appellants' demurrer to the original complaint was sustained, whereupon respondent filed his first amended complaint, alleging the failure and refusal of said executrix to account to him for any of the income received from said property and the failure to apply the income received therefrom pursuant to the terms of the said declaration of trust dated November 19, 1927, and also alleged:

"(1) That the said James Humes, Deceased, during his lifetime held the said two-thirds interest * * * in trust for the uses as set forth in the said declaration of trust, and that the defendant Ida May Humes * * * and the other defendants * * * hold said property subject to all of the terms and conditions of said declaration of trust;

"(2) That when the balance of $6609.58, which said balance constituted plaintiff's proportionate share of the first trust deed indebtedness * * * and the balance of $4679.41, which said balance constituted the personal indebtedness of the plaintiff as a charge upon the rents, issues and profits derived from said real property as of December 31, 1937, have been fully paid, the plaintiff will be entitled to a conveyance from defendants of an undivided two-thirds interest in and to the said real property * * *

"(3) That the plaintiff is entitled to have two-thirds of all payments made upon the principal of the first trust deed indebtedness * * * credited to (his) share of said trust deed indebtedness, and that the plaintiff is further entitled to have two-thirds of the net profits derived from the said real property credited to the balance due upon his said personal indebtedness constituting a charge upon said real property;

"(4) That plaintiff is entitled to an accounting from the defendants of the rents, issues and profits received by said defendants from said real property since the death of the said James Humes."

On April 11, 1940, appellant Ida May Humes, as executrix of the estate of James Humes, deceased, filed her cross-complaint praying for foreclosure and termination of the trust, and on the same day filed her answer and counterclaim to the first amended complaint praying that respondent take nothing by his complaint, and that it be the order and decree of the court that respondent has no right, title or interest in the trust or the corpus thereof, that the same be terminated and that the corpus be distributed according to the terms of the last will of decedent James Humes; that said respondent is indebted to the estate in the sum of $1,150 with interest at 7 per cent from May 26, 1926: in the sum of $1,000 with interest at 7 per cent from November 19, 1927, and in the sum of $4,942.91; also that the said two-thirds interest referred to in the declaration of trust be foreclosed as a mortgage.

The judgment of the trial court, from which this appeal is taken, decrees, among other things, that the right of foreclosure as set forth in the ninth paragraph of the declaration of trust, "had been waived by the said James Humes, Deceased, in his lifetime"; that when the balance due on the trust deed, "as well as the personal indebtedness of the plaintiff * * * to said trust, upon which there was a balance of $4,679.41 as of December 31, 1937, shall have been paid out of the rents, issues and profits derived from and to be derived from said real property, then the plaintiff * * * will be entitled to a conveyance from the defendants, and each of them, of an undivided two-thirds interest in and to said real property * * *; that plaintiff * * is entitled to have two-thirds of the net profits derived from and to be derived from said real property * * * credited to the balance due upon his said personal indebtedness to the trust * * * as well as credited to his share of the first trust deed indebtedness * * * on the said real property * * *; that the plaintiff * * is entitled to an accounting from the defendants * * * of all of the rents, issues and profits received by * * * them, from the said real property described in said declaration of trust aforementioned since the death of the said James Humes, deceased; and cost of same to be paid by the trust. * * *"

In connection with their first point, appellants urge that respondent's amended complaint failed to state a cause of action entitling him to equitable relief for the following reasons:

1. Respondent failed to allege therein that, pursuant to section 716 of the Probate Code, he had presented a creditor's claim to the estate of James Humes, deceased, and that same was disallowed;

2. Respondent made no offer to do equity or to pay the money admittedly past due and in default under the terms of the declaration of trust.

[1, 2] While it is true that the amended complaint does not allege the presentation of a creditor's claim by respondent in the administration of his father's estate, respondent testified on cross-examination that such claim was presented and the same disallowed by the executrix, and the trial court so found. However, as was held in Re Estate of Dutard, 147 Cal. 253, 256, 81 P. 519, 520: "It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate, within the meaning of the property law. The decisions are clear and conclusive upon the proposition that, where one seeks to recover from the representatives of an estate specific property alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, is not required to present a claim as a creditor, and is not a 'creditor of the estate.' His action is not founded upon a claim or demand against the estate. See Gunter v. Janes, 9 Cal. 643, 658; Myers v. Reinstein, 67 Cal. 89, 7 P. 192; Roach v. Caraffa, 85 Cal. 436, 443, 25 P. 22; Byrne v. McGrath, 130 Cal. 316, 62 P. 559, 80 Am.St.Rep. 127; Elizalde v. Elizalde, 137 Cal. 634, 642, 66 P. 369, 70 P. 861." See, also, Swanson v. Siem, 124 Cal.App. 519, 527, 12 P.2d 1053; Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987; Back v. Farnsworth, 25 Cal.App.2d 212, 220, 77 P.2d 295.

[3] With respect to appellants' point that respondent made no offer to do equity, an examination of the amended complaint reveals that respondent alleged the specific amount of his personal indebtedness and also of his proportionate share of the trust deed indebtedness; alleged that executrix had refused to account to him for the income received from the property held in trust, had failed and refused to apply the income so received pursuant to the terms of the declaration of trust, and asked for an accounting, praying that "when the charges constituting a lien against the plaintiff's two-thirds interest in the said real property have been fully paid, together with plaintiff's proportionate share of the first trust deed indebtedness * * * it will be the duty of the defendants * * * to convey to plaintiff an undivided two-thirds interest in and to the said real property."

These allegations were sufficient to constitute an offer to do equity, since the conveyance to respondent of said trust property is made contingent upon the full payment of his indebtedness, as set forth in the declaration of trust, and the judgment herein so directs.

[4] Subdivision 3, of section 1880 of the Code of Civil Procedure provides that the following persons cannot be witnesses: "*Actions against estates.* Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator *upon a claim, or demand* against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." (Emphasis added.)

As heretofore pointed out in Re Estate of Dutard, 147 Cal. 253, 256, 81 P. 519, an action to enforce a trust is not founded upon a claim or demand against the estate. See, also, Holland v. Bank of Italy Nat. T. & S. Ass'n, 115 Cal.App. 472, 484, 1 P.2d 1031, where it was held that the testimony of respondent was admissible in spite of section 1880 of the Code of Civil Procedure, said section having no application to an action where a trust is sought to be established.

Again, in the recent case of Porter v. Van Denburgh, 15 Cal.2d 173, 176, 99 P.2d 265, 267, it was stated: "The defendant also contends that the plaintiff's cause of action [to impress a trust on certain personal property and for an accounting] was barred by her failure to file a claim in the estate of A. J. Clark, and that the testimony of the plaintiff relating to the transactions involved was incompetent under the provisions of section 1880, subdivision 3, of the Code of Civil Procedure. These contentions are necessarily predicated upon the assumption that the plaintiff's right is based on a claim against the estate as distinguished from a claim to ownership of the stock. Since the claim is not to any part of the estate but one of ownership, it follows that the defendant's additional argument that the cause of action is barred by the statute of limitations and that the plaintiff was not a competent witness to testify to matters or facts occurring prior to the death of the defendant's intestate cannot be sustained. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Maguire v. Cunningham, 64 Cal.App. 536, 222 P. 838."

In the early case of Myers v. Reinstein, 67 Cal. 89, 7 P. 192, 194, in ruling on the competency of the cestui que trust as a witness to establish the existence of the trust, the trustee being dead, the court said: "To hold that the claim or demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action. By so holding we would assume the very question to be tried and settled by the contestation between the parties. This we are not allowed to do."

In view of the above authorities, there was no error on the part of the trial court in permitting respondent to testify in support of his alleged cause of action.

[5] Passing to appellants' final contention that the trial court committed reversible error in receiving into evidence over their objection Plaintiff's Exhibit No. 2, a carbon copy of a document entitled "General Summary," respondent testified on direct examination that he received a statement from his father each year until the year of the latter's death outlining the status of their financial transactions, but he was unable to produce these annual statements. However, respondent testified he received from his father a document entitled "General Summary" purporting to be a summary of their transactions beginning with the year 1927 and ending with "accounts as of December 31, 1934"; that this document he received from his father in January of 1935, with the exception of the

last page thereof which he received "Around March 8 (1935) or a little after." It appears from the record that this was a carbon copy of a typewritten document addressed to respondent but unsigned, and was apparently introduced for the purpose of showing the statement therein to the effect that there existed "an accumulated credit to Homer C. Humes of $1,131.54 which by mutual consent can be applied on item 6, $1,000.00, leaving a credit of $131.54 to be carried to 1935 accounting"; the figures covered by said statement having already been stipulated by the parties in open court.

If the California cases of Edmunds v. Atchison, T. & S. F. Rwy. Co., 174 Cal. 246, 162 P. 1038, and Pratt v. Phelps, 23 Cal. App. 755, 139 P. 906, the courts have upheld the introduction into evidence of carbon copies of letters over the objection of the adversary party that no sufficient foundation had been laid, it being stated in the last named case that primarily the weight of the evidence in every case is a matter for the consideration of the trial court, and ordinarily cannot be considered upon appeal.

Carbon copies of letters were admitted in evidence in the case of Massachusetts Bonding & Ins. Co. v. State, 1925, 82 Ind. App. 377, 149 N.E. 377, 384, on the ground that they were duplicate originals, the court saying: "There was no error in admitting in evidence carbon copies of certain letters and other instruments over the objection of appellant, without first building a foundation for such evidence, by accounting for the original or first type. Different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are to be regarded as duplicate originals, of which any may be read in evidence without accounting for the others."

Again in Chanute Window Glass Co. v. Pierce, 1912, 87 Kan. 548, 125 P. 108, 109, the court said: "A carbon impression of a letter written on a typewriter, made with the same stroke of the keys as the companion impression, is an original. It is not material which one is mailed and which one retained by the writer, and either one may be offered as primary evidence of the contents of the letter."

In view of respondent's testimony that the "General Summary" was handed to him by his father, and that he, himself, had no part in its preparation, its introduction into evidence for a limited purpose does not constitute reversible error.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

WEBB v. PILLSBURY et al.

Civ. 13828.

District Court of Appeal, Second District, Division 2, California.

Jan. 14, 1943.

Hearing Granted March 11, 1943.

1. Appeal and error 🔑919

On appeal from judgment dismissing action after sustaining demurrers to verified amended complaint, all matters alleged in complaint must be accepted as facts in passing on issues involved.

2. Executors and administrators 🔑91

An administrator is creature of statute, must act within authority of law which creates him, and cannot exercise his powers except according to provisions of law.

3. Executors and administrators 🔑91

An administrator, whose powers are fixed by statute, has no inherent right to assume or exercise any power not conferred thereby or to depart from procedure outlined therein.

4. Executors and administrators 🔑171

An executor or administrator has no power to assign to creditor of decedent's estate such personal representative's statutory right to bring suit to set aside conveyances, made by decedent in his life time, as defrauding his creditors, though assignee is the only creditor of estate. Probate Code, § 579 et seq.

5. Executors and administrators 🔑269

Where conveyance of realty in trust vested legal title thereto in grantee as to all persons except grantor's creditors and property was not sold or transferred in manner prescribed by probate code after grantor's death, assignment of his estate's interest therein by administrator in compromise settlement of assignee's claim against estate conveyed nothing to assignee, who could not maintain action to quiet title to property.

6. Executors and administrators ⚿269

One compromising her claim against decedent's estate and receiving substantial benefits under compromise can no longer assert that she is "creditor of estate" and maintain suit as such to set aside conveyances, made by decedent in his life time, as in fraud of his creditors.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor of Estate".

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Letitia Dorothy Webb against A. C. Pillsbury and another to set aside certain conveyances as in fraud of grantor's creditors and quiet title to realty. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Frank P. Doherty and Haight, Trippet & Syvertson, all of Los Angeles, for appellant.

Chas. W. Fourl and George I. Devor, both of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiff appeals from a judgment of dismissal entered after demurrers to her first amended complaint were sustained without leave to amend.

Recitals of the amended complaint disclose this factual background:

In 1924 plaintiff, then known as Letitia Dorothy Wallace, entered into a written contract with Franklyn L. Hutton by the terms of which he agreed to pay her $1,000 per month for the period of her natural life, or until her marriage, in which latter event payments were to be reduced to $500 per month. It was further provided that, should Hutton predecease plaintiff, then there should be paid to her from his estate the sum of $100,000, if unmarried, or, if married, the sum of $50,000, in lieu of further monthly payments.

A second written agreement was entered into by the same parties January 18, 1929. Plaintiff had married subsequent to the 1924 compact and was in the process of obtaining a divorce when the 1929 writing was executed. Without any condition as to marriage or otherwise, the new contract stipulated that Hutton should pay to plaintiff during her lifetime the sum of $1,000 per month and should provide by will or otherwise, in the event he predeceased her, for the payment to her of the sum of $100,000, which sum was declared to be a direct charge against his estate. As consideration for the covenants to be performed by Hutton it was provided that plaintiff should convey to him certain specified real property.

Defendants' relation to the litigation stems from a contract dated April 30, 1940, whereby Hutton conveyed to defendant The Beverly Hills National Bank and Trust Company as trustee certain real property in Los Angeles County. This trust instrument provided that one designated parcel of land should be forthwith conveyed to defendant Pillsbury as compensation for services theretofore rendered, that as to the remainder of the land it should be improved, subdivided, sold and otherwise handled subject to written directions of defendant Pillsbury, the proceeds and income from the operations to be paid by the trustee to Hutton and defendant Pillsbury as in said trust provided. By explicit terms of the indenture the trustor was empowered to terminate the trust and to retake possession of the trust properties should defendant Pillsbury predecease him. Reciprocally it was provided that in event of the death of the trustor before that of defendant Pillsbury, then the trust should terminate and the corpus thereof, with all assets, real and personal, should be transferred to Pillsbury "as his own and separate property."

Hutton died testate in Florida, December 5, 1940. Domiciliary administration of his estate was had there, and ancillary administration in California. No provision was made in his will for the payment to plaintiff of $100,000 or any other sum. In fact no mention was made of her claim.

Thereafter and within the time allowed by law, plaintiff filed a creditor's claim in the sum of $100,000 against Hutton's estate in the ancillary proceeding in the Los Angeles County Probate Court. No other creditor filed a claim against the Hutton estate, and time within which claims might be filed expired October 16, 1941. After filing her claim plaintiff requested the administrator to bring action against defendants to set aside, as in fraud of creditors, Hutton's conveyances to defendants under the trust agreement of April 30, 1940. This request was refused. Then plaintiff and the administrator entered into a "compromise agreement," later approved by the probate court, by which, in settlement and compromise of her claim of $100,000, the sum of $23,500 was paid to her by the estate, and the administrator executed an assignment in writing conveying to her all the right, title and interest of the Hutton estate in and to the properties involved in the trust of April 30, 1940, and assigning to her any and all causes of action in law or in equity to recover the real property or any part thereof, and further assigning to her all the right and title of the estate or its administrator in and to the trust agreement itself. The real property involved in the trust is of less market value than $76,500, the unpaid portion of plaintiff's $100,000 claim. Hutton at the time of his death was insolvent, in the sense that the assets of his estate were insufficient to pay his creditors, and particularly to pay plaintiff's claim. Likewise, it is claimed, he was insolvent when he made the transfer in trust, and at that time his assets were less than the amount required to pay his probable liability on existing debts as they matured. Neither was there consideration for the transfer.

[1] All these matters, alleged in the verified amended complaint, must be accepted as facts for the purpose of passing upon the issues here involved. The question is: Do such facts, when accorded full verity and taken as a whole, state a cause of action against defendants?

The complaint is in three causes of action.

In the first count appellant sues as assignee of the administrator, claiming that she, by assignment, acquired the administrator's statutory right as conferred by section 579 of the Probate Code to prosecute an action to set aside fraudulent conveyances made by deceased in his lifetime.

Under the second cause of action appellant's claim is that the administrator's assignment to her was in effect a conveyance of real property by which she acquired title thereto, and she seeks to quiet title as against the cloud imposed by the fraudulent trust agreement of April 30, 1940.

Finally, in her third cause of action, appellant adopts the theory that she is still a creditor of the estate to the extent of a claim unsatisfied in the amount of $76,500, and as such creditor she has a right to proceed to set aside the conveyances alleged to have been made in fraud of creditors.

[2-4] Basically appellant's right of action depends upon whether or not the personal representative of deceased Hutton's estate had the power to transfer to a creditor his statutory right to bring suit to set aside conveyances fraudulently made by deceased in his lifetime. This statutory right of the personal representative to maintain such action derives its authority from section 579 et seq. of the Probate Code. It is there provided that if the decedent in his lifetime conveyed property with intent to defraud creditors, "and there is a deficiency of assets in the hands of the executor or administrator, the latter, on application of any creditor, must commence and prosecute to final judgment an action for the recovery of the same for the benefit of the creditors." Further provisions set out the manner of distribution of assets so recovered.

It is to be noted that the code itself contains no prohibition against the assignment by the personal representative of this right of action. Neither does it provide that such assignment may be made. As far as the language of the code is concerned, a right of action is expressly conferred upon the administrator, and an orderly procedure for the exercise of that right is prescribed.

Little benefit is to be derived from the study to which counsel directs our attention as to the growing tendency of the law to recognize the assignability of all causes of action, that nonassignability is the exception (3 Cal.Jur. 42) and that even actions sounding in fraud may be assigned. Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959. Nor are we helped by the conflicting authority as to the right of a bankruptcy trustee to assign a cause of action to set aside a fraudulent conveyance made by the bankrupt. Glenn, "Fraudulent Conveyances and Preferences," § 132, vol. I, 1940 edition; In re Rosen, D.C., 15 F.Supp. 516; Parker v. Hand, 299 Ill. 420, 132 N.E. 467.

Likewise case law is meager. Nothing directly in point has been cited in the reported volumes of this state. An old (1858) Michigan case, Morris v. Morris, 5 Mich. 171, contains language most favorable to respondents' contention. In that case, the administrators of decedent's estate sold and assigned to a creditor certain promissory notes secured by mortgage executed in favor of decedent. In a suit to foreclose the mortgage the creditor-assignee sought to avoid the effect of endorsements showing partial payment of the notes by the claim that there was no consideration for the endorsements and consequently they were void as against creditors of deceased. Such could not be done, the Michigan court held, saying: "An act, void as against creditors, is good between the parties, and can only be attacked by creditors by some method recognized in law. The statute * * * provides that * * * an administrator may institute proceedings to avoid such dispositions made by the intestate, as were fraudulent against creditors. * * * He can not assign any such right." The reasoning of that case is persuasive here, especially in view of the similarity between California and Michigan statutes.

Furthermore, consideration of the fundamental legal situation here involved leads to the conclusion that appellant by the assignment under which she claims acquired no right to bring suit to avoid the trust conveyance. An administrator is the creature of statute, must act within the authority of the law which creates him, and his powers cannot be exercised except according to the provisions of law. 11b Cal. Jur. 210, 211. When such powers are fixed by statute "there is no inherent right to assume or exercise any power not conferred, or to depart from the procedure outlined." Perry v. Superior Court, 29 Cal. App.2d 114, 84 P.2d 250, 252. A complete procedure is provided by the Probate Code for the recovery of property fraudulently conveyed by decedent in his lifetime (§ 579 et seq.), and when such procedure does not provide for the sale, transfer or assignment to others of the right to sue, conferred by statute upon the personal representative, and upon him alone, it cannot be assumed that there is any inherent power in the executor or administrator to assign such right. Indeed sound policy wisely withholds from the personal representative the power to alienate his right to sue. Such procedure, if permitted, might very conceivably allow a purchaser from the estate to speculate in frauds, would permit one creditor to benefit at the expense of another, would place such actions beyond the control of the courts, and would otherwise defeat the equitable purposes of the established statutory procedure.

That plaintiff is the only creditor of the Hutton estate does not give her any more favorable status so far as her power to act as assignee is concerned. Putney v. Fletcher, 148 Mass. 247, 19 N.E. 370; Richman v. Ady, 211 Iowa 101, 232 N.W. 813. The statutory provisions, if binding at all, are binding upon all creditors alike, whether one or more in number, and are controlling generally without specific exceptions as to the number of creditors involved.

[5] As to appellant's second cause of action, which in effect is one to quiet title to the trust property which she claims was conveyed to her under her compromise agreement with the administrator of the Hutton estate, it must fall by its own statement of facts. Primarily the property in question was not a part of the Hutton estate. It was alienated by him in his lifetime and vested legal title in the grantee as to all persons except creditors of the grantor, "who may question it in a proper proceeding." Moore v. Schneider, 196 Cal. 380, 238 P. 81, 82. If the Hutton estate had been the owner of the property it could have been sold and transferred only in the manner prescribed by the Probate Code for the sale of real estate belonging to the estates of deceased persons, and no claim is made that such was done in the present instance. It is obvious that the instrument under which appellant claims the property conveyed nothing to her (Holland v. McCarthy, 177 Cal. 507, 171 P. 421), and, therefore, that she cannot maintain a quiet title action upon such a basis.

[6] Neither can appellant maintain her suit in the role of creditor of the Hutton estate, as she seeks to do in the third count. Having compromised her claim against the Hutton estate, and having received substantial benefits under the compromise, she cannot any longer assert that she is a creditor.

It is apparent that appellant has not followed the course contemplated by statute, and that she does not allege facts sufficient to permit her to resort to any remedy other than that which the statute makes available to her.

In view of the conclusions as above indicated we deem it unnecessary to discuss questions as to the illegality of the original contract between plaintiff and deceased and other kindred subjects elaborately argued by respondents.

The judgment is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

56 Cal.App.2d 534

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE v. CALIFORNIA EMPLOYMENT COMMISSION.

Civ. 12160.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1943.

Hearing Denied March 8, 1943.

1. Charities 🔑1

Originally "charity", under a strict construction of the word, implied the giving of something or the rendering of gratuitous service, but by later usage and in common parlance it has been sometimes extended to embrace liberality and generosity by patrons or benefactors in conferring advantages of a social character other than the rendering of personal aid or the bestowal of alms.

See Words and Phrases, Permanent Edition, for all other definitions of "Charity".

2. Contracts 🔑147(1)
Statutes 🔑181(1), 184

The word "charity", if used in a statute or legal instrument, must be defined in conformity with the purpose or intention of the lawmakers or the parties to the instrument.

3. Taxation 🔑204(2), 241(2)

The Unemployment Insurance Act imposing compulsory contributions on employers and employees, but excluding service performed in employ of corporation operated exclusively for charitable purposes no part of net earnings of which inures to benefit of any private shareholder or individual is to be given a strict construction and requires that it be shown that hospital claiming exemption is operated for no other purpose than that of dispensing charity. Gen.Laws 1937, Act 8780d, § 7(g).

4. Taxation 🔑251

The articles of incorporation, by-laws, origin and development of nonprofit institution, rights of members, privileges of nonmembers, and benefit to public may be proper evidence to show the charitable or noncharitable character of the institution claiming exemption from taxation.

5. Taxation 🔑241(3)

Where mutual beneficial association did not distribute profits, but net earnings arising from its hospital facilities and service to nonmembers at rates in excess of those generally charged to members in good standing inured to benefit of members in good standing in augmented service and privileges, the corporation was not operated "exclusively" for "charitable purposes" and its earnings inured to "benefit of private shareholder or individual" so that corporation was not exempt from contribution under Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 7(g).

See Words and Phrases, Permanent Edition, for all other definitions of "Benefit of Private Shareholder or Individual", "Charitable Purposes" and "Exclusively".

6. Charities 🔑1

Where people band together to purchase hospital care in event of illness, it is a "business venture" rather than a "charitable undertaking" and the beneficiaries thereof do not consider the benefits received to be "charity".

See Words and Phrases, Permanent Edition, for all other definitions of "Business Venture" and "Charitable Undertaking".

7. Taxation 🔑241(3)

In determining whether mutual beneficial association operating hospital was exempt from contributions imposed by Unemployment Insurance Act on ground that it was a charitable organization, the charitable character of the corporation was not to be measured by the Insurance Code nor by the Probate Code. Gen.Laws 1937, Act 8780d, § 7(g); St.1939, p. 1907, § 11493.5; Probate Code, §§ 27, 41.

8. Taxation 🔑241(3)

Evidence sustained finding that the net earnings of mutual beneficial association arising from its hospital facilities and service to nonmembers at rates in excess of those generally charged members inured to benefit of members. Gen.Laws 1937, Act 8780d, § 7(g).

9. Taxation 🔑446½

Under the amendment to the Unemployment Reserves Act, the Employment Commission may prescribe that a ruling by it shall operate prospectively only, but if it fails so to provide, its ruling must operate retroactively as well as prospectively. Gen.Laws Supp.1939, Act 8780d, § 44.

10. Taxation 🔑320

Where the Employment Commission first rules, contrary to the Unemployment Reserves Act, that no tax is due, and thereafter corrects its ruling, the taxpayer must pay the taxes to the extent recovery is not barred by statute of limitation, unless the subsequent correct ruling affirmatively provides that it shall not be applied without retroactive effect. Gen.Laws Supp.1939, Act 8780d, § 44.

11. Taxation 🔑210

Where department of employment notified employer that it was granted exemption from contributions under Unemployment Insurance Act but later state commission gave employer official notification that exemption was revoked, and the later ruling failed to provide that it should be without retroactive effect, employer was not relieved from liability under statutory provision authorizing commission to prescribe extent to which rule shall be applied without retroactive effect. Gen.Laws 1937, Act 8780d, § 7(g); Gen.Laws Supp.1939, Act 8780d, § 44.

12. Estoppel 🔑62(2)

Where employer made deductions from wages of its employees until receipt of ruling from state authority that employer was not liable for tax under Unemployment Insurance Act, whereupon employer paid its employees amount withheld and did not thereafter withhold any portion of employees' salaries until federal government's reversal of similar ruling, the state was "estopped" from collecting amount of tax representing employees' contributions, but was not estopped from collecting contributions imposed on employer. Gen.Laws 1937, Act 8780d, §§ 7(g), 37, 38, 44; Gen.Laws Supp.1939, Act 8780d, §§ 44, 45, 45.3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

13. Taxation 🔑528

An employer could not be held liable for interest on contributions under the Unemployment Insurance Act which were not paid when due solely in reliance on official ruling of nonliability. Gen.Laws 1937, Act 8780d, §§ 7(g), 37, 38, 44; Gen.Laws Supp. 1939, Act 8780d, §§ 44, 45, 45.3.

14. Estoppel 🔑62(2)

Generally, the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law.

15. Officers 🔑103

An administrative regulation which is in conflict with tax law is invalid and the government is not bound thereby.

16. Taxation 🔑587

Generally, recovery of taxes is not precluded on ground that taxes were not paid when due in reliance on an official ruling of nonliability unless recovery is barred by statute of limitation.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Actions by La Societe Francaise de Bienfaisance Mutuelle, a corporation, against the California Employment Commission. The actions were consolidated for trial. Judgment for defendant, and plaintiff appeals.

Judgment affirmed in part and reversed in part with directions.

P. A. Bergerot, A. P. Dessouslavy, and E. P. Bergerot, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Maurice P. McCaffrey and Glenn V. Walls, both of Sacramento, for respondent.

WARD, Justice.

Plaintiff brought four actions to recover sums aggregating $36,045.84, paid under protest under the California Unemployment Insurance Act (Stats.1935, ch. 352, p. 1226;

Gen.Laws 1937, p. 4121, Act No. 8780d), as contributions claimed by defendant to be due for the period from January 1, 1936, to March 31, 1940, and as interest thereon and delinquent penalties. These actions were consolidated for trial, and resulted in a judgment in defendant's favor for the entire amount prayed for in the several suits. Plaintiff has appealed from the judgment, and from an order denying its motion to vacate said judgment and to enter a different judgment. The record does not disclose the order.

Sections 37, 38 and 44 of the California Unemployment Act (Stats.1935, p. 1226, supra, as amended) impose contributions on employers and their workers based upon rates paid and received for services performed in "employment." Section 7(g) of said statute excludes from the term "employment," services performed in the employ of a corporation organized and operated exclusively for charitable, scientific or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Plaintiff contends that it is a corporation organized and operated exclusively for charitable purposes, and that no part of its net earnings inures to the benefit of any private shareholder or individual within the meaning of section 7(g) of the California Unemployment Insurance Act; that, since the provisions of said section 7(g) of the state act are adopted from the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., and other federal tax statutes, this court must look to "the general understanding throughout the country" for the construction of the terms employed in section 7(g); and that under such "general understanding," the appellant is per se a charitable institution.

The defendant contends on the other hand that the plaintiff is not a corporation organized and operated exclusively for charitable, scientific or educational purposes, and that its earnings, or a portion thereof, do inure to the benefit of private individuals, inasmuch as the members of plaintiff receive hospitalization and other medical treatment and care, on payment of rates far lower than those charged to non-members, which preferential treatment is made possible only because plaintiff derives a profit from its services so rendered to non-members.

Plaintiff was organized in the year 1851 as an unincorporated beneficial society, and in 1856 incorporated pursuant to and in accordance with chapter VIII of the Corporation Act of 1850 (Stats. 1850, p. 373), with its principal place of business in the city and county of San Francisco. It has no capital stock, and is composed of private individuals or members who, in consideration of the payment of admission fees and monthly dues, are entitled to receive medical, hospital and other privileges and advantages provided for in its by-laws, which state that appellant "is founded on the basis of mutuality for the treatment of sick members." The advantages provided for are available only to members in good standing. The affairs of the corporation are managed by a board of fifteen directors, who are elected by the members annually and who serve without any fees, salaries or other compensation whatever.

Admission to membership is limited to persons of French birth, or descendants of French or speaking French, sound in mind and body and less than 50 years of age, but these requirements have not been applied with great strictness. Its membership is not limited in number and varies from time to time by reason of death or the admission of new members. An admission fee is charged which ranges from $25 upwards. Monthly dues are $1.75. Life memberships cost $1,500; however, one who has been a member for 15 years may acquire life membership for $1,000.

Since its original organization in 1851 plaintiff has grown until it now operates a large hospital in San Francisco, which not only cares for its members, but offers its services to the general public. Its equipment, services and facilities are adapted to the treatment of various kinds of human sickness and ailment, and its executive staff is required to formulate policies to provide a high and progressive standard of professional service and scientific work.

During the fiscal year ended February 29, 1940, 44% of the patient-days at the hospital were recorded for members; 24% for part-paying members, being those who received and paid for services and facilities in excess of those to which they were entitled as members; and 32% for full pay patients, or non-members.

The hospital operates a training school for nurses, and provides equipment and facilities for the training of internes who are under the supervision of competent physicians. Plaintiff also maintains an old people's home for the care of its aged and feeble members, and a relief fund which is used to pay the dues of widowed, orphaned or needy members. Plaintiff is an agency of the Community Chest of San Francisco and receives from this source a certain sum annually to compensate it for the cost of services rendered to patients sent by the Chest.

Since its incorporation, it has received as gifts and bequests the sum of $351,853.74. Its gross annual income from all sources during the five fiscal years ended February 29, 1940 varied from $384,609.61 to $418,354.60 of which approximately 43% of the average annual gross income was from admission fees and dues; approximately 54% from hospital rates or charges; approximately 2% from miscellaneous sources such as rentals, interest and dividends, and approximately 1% from gifts, legacies and donations. The annual gross expenses for the same period have varied from $373,502.55 to $421,562.84. In the last four fiscal years plaintiff has operated at a total loss of $63,980.03, the loss, however, for the year February 29, 1940 was reduced to $1,825.93.

As found by the court, any profits, gains or net earnings accruing "from plaintiff's operations are devoted and applied to the better and more ample care of its members and for the furnishing to said members of said medical, hospital and other benefits and privileges prescribed and contemplated by said bylaws, and that such profits, gains and earnings are not in any form or manner distributed or paid to anyone as dividends or interest. * * * That the earnings of plaintiff arising from the furnishing of hospital and other facilities and services to individuals who are not members of plaintiff, at rates, fees or charges in excess of those applicable to members, inure to the benefit of plaintiff's members only in the sense that such earnings have been and are used to enable plaintiff, as hereinabove found, to give better and more ample and augmented service, privileges and benefits to plaintiff's members."

Some time in 1937, the plaintiff requested of the Commissioner of Internal Revenue a ruling as to whether plaintiff was liable for payment of the taxes imposed by the federal Social Security Act. In a letter dated July 14, 1937, the commissioner advised the plaintiff that it was exempt from the payment of such taxes for the reason that it came within the provisions of sections 811(b) (8) and 907(c) (7) of said Social Security Act (similar to section 7(g) of the state statute), and that it was also granted exemption from income taxes under section 101(6) of the Revenue Act of 1936, 26 U.S.C.A. Int.Rev.Code § 101 (6) (also similar to section 7(g). In a letter dated February 24, 1939, the Commissioner of Internal Revenue advised plaintiff that its exemption from income tax under section 101(6) was revoked, but that it was entitled to exemption under section 101(8), relating to civic leagues and local associations of employees. In a letter dated April 3, 1939, the Commissioner of Internal Revenue revoked the exemption from social security taxes previously accorded the plaintiff. In subsequent letters to the plaintiff, the Commissioner of Internal Revenue has reaffirmed the opinion expressed in his letters of February 24 and April 3, 1939.

In response to a letter from plaintiff enclosing copy of the then ruling of the Department of Internal Revenue, defendant, by letter dated July 31, 1937, granted to plaintiff exemption under section 7(g) of the California Unemployment Insurance Act, noting therein that it was possible the ruling might be reversed in the future. On or about September 28, 1939, the defendant officially notified the plaintiff that the opinion of July 31, 1937, was revoked.

As the result of a demand by defendant for contributions claimed to be due from it to the unemployment fund for the period commencing January 1, 1936, and ending September 30, 1939, plaintiff paid to defendant sums aggregating $26,822.84. Each payment was made under written protest, which set forth the grounds of objection, including the fact that the question had been ruled upon by the Internal Revenue Department and the Department of Employment in their notifications of July 14th and July 31st, 1937, respectively. Thereafter, under the provisions of said act, and under similar protest and objection, it made further payments to defendants of $2,460.28, $4,213.67 and $2,549.05. It is for the recovery of the total of these payments that this consolidated action (four separate suits therefor having been commenced) is prosecuted. Some of the payments were made long after they became due by reason of the fact that the officials charged with the collection of these unemployment contributions had advised plaintiff that it was not liable therefor, and as to those, interest was added to the amounts demanded and paid under protest.

The facts appear to be undisputed. The findings follow practically the allegations of the complaint.

[1, 2] The plaintiff contends that a non-profit hospital is ipso facto a charitable organization. The definition of charity originally, under a strict construction of the word, implies the giving of something, or the rendering of gratuitous service. However, by later usage and in common parlance its meaning is sometimes extended to embrace liberality and generosity by patrons or benefactors in conferring advantages of a social character other than the rendering of personal aid or the bestowal of alms. If used in a statute or legal instrument, the word must be defined in conformity with the purpose or intention of the law makers or the parties to the instrument.

[3] Appellant has presented an opening brief of nearly two hundred pages, interesting as a treatise, containing various definitions of "charity," "charitable hospital," etc., all supported by authority. There is, however, very little comment therein on the exact language of the California Unemployment Insurance Act (Stats.1935, ch. 352, p. 1226) imposing compulsory contributions on employers and employees, excluding, however, certain types of service (§ 7) among which are "Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual." § 7(g). The words "operated exclusively for * * * charitable * * * purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual" call for a construction in accordance with the narrower definition of charity above given and require that it be shown the hospital is operated for no other purpose than that of dispensing charity, one test of which is that a shareholder or private individual shall not participate directly or indirectly in its net earnings.

The distinction between a charitable and non-charitable institution has been well stated in the case of In re Estate of Henderson's Estate, 17 Cal.2d 853, pages 859, 860, 112 P.2d 605, page 609, in which case, the court said: "If a group of individuals agree to contribute equal amounts into a fund to be used for the benefit of all, such a group may well be said to be non-charitable in nature because each individual is providing only for his own welfare and does not intend to make a free contribution toward the assistance of others. If an outsider, however, receiving no benefits from the organization, makes a gift to it, that gift may well be a charitable one if the members of the organization are sufficiently numerous and it is organized for a purpose beneficial to society such as providing for medical assistance to its members. Such a donor has the charitable purpose of assisting those members of a large group who become sick, without any benefit to himself, and the gift thus may be a charitable one."

[4] The question whether in a given case a hospital was a charitable institution has frequently arisen in tort actions. Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Ritchie v. Long Beach Community Hospital Ass'n, 139 Cal.App. 688, 34 P.2d 771; Shane v. Hospital of Good Samaritan, 2 Cal.App.2d 334, 37 P.2d 1066. See, also, Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 97 P.2d 798, and England v. Hospital of Good Samaritan, 14 Cal.2d 791, 97 P.2d 813. In all such cases, including those in which a governmental agency's right to tax hospitals arises, the articles of incorporation, the by-laws, the origin and development of a non-profit institution depending upon assets merely sufficient to continue maintenance, the rights of members or associates, the privileges of non-members, and the benefits to the public under certain circumstances, may be proper evidence to show the charitable or non-charitable character of the institution. An institution may be declared "charitable" for the purpose of a bequest or in a tort action, but "non-charitable" for the purpose of taxation.

[5] The vital question on this appeal is, did any of appellant's net earnings inure "to the benefit of any private shareholder or individual?" § 7(g). The facts heretofore stated demonstrate that while no profits or dividends are distributed, nevertheless the net earnings of appellant arising from its hospital facilities, and services to "non-members" at rates in excess of those generally charged members inure to

the benefit of the members in augmented service and privileges which would not be available to them but for the added "outside" sources. In other words appellant is not "exclusively" a charitable organization.

We refrain from citing In re Estate of Dol, 182 Cal. 159, 187 P. 428, growing out of a bequest to a similar hospital, or Brown v. La Societe Francaise, etc., 138 Cal. 475, 71 P. 516, (involving the appellant hospital) as conclusive support of the contention that appellant is not a charitable institution, in view of the following language used in Re Estate of Henderson, supra, 17 Cal.2d page 859, 112 P.2d page 608: "In Re Estate of Dol the question was squarely presented whether a bequest to a mutual benefit society organized to render medical aid to its members was charitable. The court, however, held on the basis of the Brown and Gorman [Gorman v. Russell, 14 Cal. 531] cases that the bequest was not charitable because the organization itself was not a charitable one. It failed to consider in any way whether the gift was charitable in nature despite the status of the organization, overlooking the fact that the Brown and Gorman cases on which it relied were not at all concerned with the charitable nature of gifts." We further call attention to the present by-laws of appellant, which provide that it is "founded on the basis of mutuality for the treatment of sick members," and to the finding of the trial court that its benefits were available only to members "in good standing." This indicates that while appellant performs certain charitable functions, it is in fact an association for the mutual advantage of the members who have paid admission fees and continue to pay dues.

A case somewhat similar factually is In re Farmers' Union Hospital Ass'n of Elk City, 190 Okl. 661, 126 P.2d 244, at page 246, where the court said: "In speaking of private advantage as being a factor that precludes any organization from assuming the status of a charitable or benevolent institution, we mean private advantage to the organizers, and the supporters thereof. The fact that a profit is realized from the operation of a hospital does not condemn the scheme as non-charitable or non-benevolent. It is the use to which the profit is put that means much. In this case some of the profits is used to increase the facilities and some to the reduction of the cost to the members. This is a private advantage. * * * There is a wealth of these cases [theretofore cited], and a variety of schemes of organizations and methods of operation, and many are held exempt and others not. In all of them there is one factor the presence or absence of which means almost more than anything else in determining the issue. That is this: Are the doors of the hospital open to all, poor patients and pay patients alike? If the answer is yes, it is a charitable hospital and its property is entitled to the exemption from taxation provided; if the answer is no, it is not a charitable hospital and is not entitled to the exemption."

In Smith v. Reynolds, D.C., 43 F.Supp. 510, 513, the court said: "There can be little question but that a voluntary association for the mutual benefit of its members may, without difficulty, be distinguished from a public charitable institution. These distinctions have been considered by the Courts and textwriters. [Citing cases]" Northwestern Municipal Ass'n v. United States, 8 Cir., 99 F.2d 460; In re Estate of Lubin, 186 Cal. 326, 199 P. 15, and In re Estate of Wirt, 124 Cal.App. 7, 12 P.2d 95, relied upon by appellant are not directly in point. In each case the court was called upon to determine whether a bequest itself was a "charitable" one, not the character of the organization itself.

Appellant urges that "The Unemployment Reserves Act and the Federal Social Security Act were in course of enactment at the same time and were intended to be components of a national and unitary plan for unemployment relief. Hence, the provisions which are common to both, and which were adopted from Earlier Federal fiscal statutes, should be given the same meaning, especially where their meaning had already become well established." In support of this contention, appellant argues that the history of the Social Security Act (Federal Internal Revenue Code, §§ 1426(b) (8) and 1607(c) (7), 26 U.S.C.A. Int.Rev.Code §§ 1426(b) (g), 1607(c) (7), conclusively establishes that Congress considered "hospitals not operated for profit" to be "charitable" institutions and that "charitable corporations" must have the same meaning in each state.

[6] It is true that many decisions may be found defining "charity" in a comprehensive and liberal manner, so that practically all institutions of social benefit may be included, but such liberal definition is not appropriate when the statute provides that the institution or corporation must be

conducted "exclusively" for charity. In re Mendelsohn, 262 App.Div. 605, 31 N.Y. S.2d 435, contains some language upholding appellant's theory. An institution of exactly the same type as appellant, however, was not involved. In that case it was held that the hospital was operated exclusively as a non-profit organization. The true rule is that when people band together to purchase hospital care in the event of illness, it is a business venture rather than a charitable undertaking, and the beneficiaries thereof do not consider the benefits received to be "charity." Hassett v. Associated Hospital Service Corp., 1 Cir., 125 F. 2d 611.

Further, we are unable to agree with appellant as to the view, purpose and intent of Congress, that hospitals not operated for profit are charitable institutions. In the Hassett case, an action to recover taxes alleged to have been illegally collected under certain provisions of the Social Security Act on the ground that the corporation was operated exclusively for charitable purposes by reason of the fact that its earnings did not inure to the benefit of shareholders or individuals, the court (pages 615. 616, of 125 F.2d) said: "That Congress did not intend organizations similar to the plaintiff to be considered corporations organized and operated exclusively for charitable purposes is borne out by an examination of the statutes. The section of the Social Security Act here involved is exactly the same as Section 101(6) of the Revenue Act of 1934, 26 U.S.C.A. Int.Rev. Code, § 101(6), dealing with exemptions from income taxation. The income tax law, however, differs from the social security law in one important respect. In addition to the exemption granted to corporations organized and operated exclusively for charitable purposes, it also grants exemptions to certain types of mutual savings banks; fraternal beneficial societies; cooperative building and loan associations and banks; cooperative cemetery companies; benevolent life insurance associations of a purely local character; mutual ditch and irrigation companies; mutual or cooperative telephone companies or like organizations; farmers' or other mutual hail, cyclone, casualty or fire insurance companies or associations; farmers', fruit growers' or like associations organized and operated on a cooperative basis; voluntary employees' beneficial associations providing for the payment of life, sick, accident or other benefits to the members of such associations or their dependents; and teachers' retirement fund associations. None of these specific exemptions is contained in the Social Security Act. The fact that Congress specifically mentioned these organizations, even though the statute contained the exemption granted to corporations organized and operated exclusively for charitable purposes, would seem to indicate that Congress did not consider these organizations specifically mentioned to be within the scope of a charitable organization. Since the plaintiff closely resembles many of the organizations specifically exempted, Congress could not have intended it to fall within the scope of a corporation organized and operated exclusively for charitable purposes."

[7, 8] It is next suggested that the Legislature has declared a non-profit institution contracting to furnish—though not itself furnishing—hospital service to its members, to be a "charitable institution." The charitable character of appellant is not here to be measured by Insurance Code, section 11493.5, St.1939, p. 1907, nor by Probate Code sections 27 and 41 cited by appellant. It is not necessary to discuss these theoretical problems in view of the provision in the statute under consideration that the corporation fund or foundation must be operated "exclusively" for charity. No such provision is found in the foregoing sections. The only question to consider is the method of operation of appellant hospital. The findings are based upon reasonable inferences drawn from the evidence and on this point should be sustained. California Emp. Comm. v. Betthesda Foundation, 54 Cal.App.2d 348, 128 P.2d 874.

We conclude that appellant is not a corporation operated exclusively for charitable purposes within the meaning of the state Unemployment Reserves Act, and that the act imposed on it liability for contributions on account of wages paid its employees unless the effect of section 44 of the act as amended in 1939, Gen.Laws Supp.1939, Act 8780d, was to relieve it of this liability by reason of the fact that its failure to make payment of contributions when due was in reliance on the commission's interpretation that wages paid by it were not subject to contributions. If it is held that the effect of the 1939 amendment was not to relieve appellant from liability, there is a further question as to whether in the absence of statutory relief the state is nevertheless estopped to demand the contributions from appellant on wages paid while there remained unrevoked the commission's interpretation that such wages were not subject to contributions.

The pertinent provisions added by amendment in 1939 to section 44 of the act are as follows: "Each employer shall be liable for any and all contributions required to be made by his workers on account of wages paid to them by such employer regardless of whether or not such employer shall have made a deduction on account thereof from the workers' wages at the time such wages were paid; provided, however, that no employer shall be liable for contributions required on behalf of himself or of any of his employees with respect to wages payable or paid, as the case may require, while there is in effect at the time such wages became payable or were paid (whichever time is the time for determining contribution liability) a rule or regulation or interpretation of the commission or of the department that such wages were not subject to contributions imposed by this section. As used in this act, except when the context clearly requires otherwise, the term 'contributions' shall include the contributions of workers pursuant to this section.

"The commission or the department may prescribe the extent, if any, to which any rule, regulation or interpretation issued or promulgated in accordance with the provisions of this act shall be applied without retroactive effect." Stats.1939, pp. 2052, 2053.

The above provision is derived from federal legislation. Int.Rev.Code, § 3791, 26 U.S.C.A. Int.Rev.Code, § 3791; Revenue Act 1921, 42 Stat. 314, § 1314; Revenue Act 1928, 45 Stat. 874, § 605; Revenue Act 1934, 48 Stat. 757, § 506. The provision of the Internal Revenue Code is as follows: "The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." 1 Paul and Mertens, Law of Federal Income Taxation, p. 16, § 1.25, p. 87, § 4.13; 48 Harv.L.Rev. 1304, 1308; 28 Columbia L. Rev. 570; see discussion Bertha G. Bamberger v. Commissioner, 27 B.T.A. 785, reversed and remanded 10 Cir., 67 F.2d 983. In 1937 and 1939 provisions similar to that of the Internal Revenue Code were added to a number of our tax statutes. Gift Tax Act, Stats. 1939, ch. 652, p. 2085, § 39; Personal Income Tax Act, Stats.1937, p. 1861, § 34; Corporation Income Tax Act, Stats.1939, ch. 1049, p. 2932, § 26; Bank and Corporation Franchise Tax Act, Stats. 1939, ch. 1050, p. 2960, § 22.1; Use Tax Act, Stats. 1937, p. 1943, § 21; Private Car Tax Act, Stats.1939, ch. 680, p. 2187, § 24; Motor Vehicle Transp. License Tax Act, Stats.1939, ch. 944, p. 2658, § 15; Use Fuel Tax Act, Stats.1939, ch. 682, p. 2194, § 28; Motor Vehicle Fuel License Tax Act, Stats.1939, ch. 705, p. 2223, § 12a.

In the present case, as noted above, on July 14, 1937, the United States Commissioner of Internal Revenue wrote to appellant that its claim to exemption from payment of taxes imposed by the federal Social Security Act was allowed, that it came within the section of that act exempting corporations operated exclusively for charitable purposes. The letter also informed appellant that it was exempt from income tax under analogous provisions of the statute imposing that tax.

On July 31, 1937, the Department of Employment of this state acknowledged receipt from appellant of a copy of the interpretive ruling of the federal Commission of Internal Revenue and notified appellant that it was granted exemption under section 7(g) of the state act. The letter concluded: "It is possible that this ruling may be reversed in the future. If so, you will be notified."

Prior to receiving these rulings appellant had made deductions from the wages paid its employees. Thereafter it paid over to its employees the amounts withheld and did not subsequently make deductions until notified of a change of ruling as to its status.

In 1939 both the federal and state authorities reversed their rulings. In a letter of February 24, 1939, the Bureau of Internal Revenue informed appellant that its status had been before the bureau for review and that it had been held that it was not entitled to exemption from the income tax under the charitable corporation exemption, but that it was entitled to exemption under section 101(8) of the Revenue Act of 1938, which applies to nonprofit civic leagues or organizations operated exclusively for the promotion of social welfare. The letter stated that the status of appellant for social security tax purposes would be made the subject of a separate communication. On April 3, 1939, appellant was informed that it was liable for taxes imposed by the Social Security Act. Several months later, by letter of September 28, 1939, the state commission gave appellant official notification that its opinion of exemption expressed in the letter of July 31, 1937, was revoked.

On September 19, 1939, the amendments to section 44 of the state Unemployment Reserves Act became effective. The provisions are quoted above. The effect of the amendatory provisions, if valid, is in certain circumstances to relieve an employer from liability for the tax imposed by other provisions of the act. The feature which will relieve an employer from liability for contributions "required" by the act is that there has been in effect at the time the wages became payable or were paid "a rule or regulation or interpretation of the commission or of the department that such wages were not subject to contributions." But whether such a ruling will have that result depends on subsequent action taken by the commission at the time it reverses its ruling. This follows from the concluding paragraph of the amendment. By that paragraph it is provided that "the commission or the department may prescribe the extent, if any, to which any rule, regulation or interpretation issued or promulgated in accordance with the provisions of this act shall be applied without retroactive effect."

[9-11] Under this paragraph the commission may prescribe that a ruling by it shall operate without retroactive effect, that is, prospectively only. If it fails so to provide its ruling, by force of this statutory provision, must operate retroactively as well as prospectively. That is, where the commission first rules, contrary to the statute, that no tax is due and thereafter corrects its ruling, the taxpayer must pay the taxes to the extent recovery is not barred by the statute of limitations unless the subsequent correct ruling affirmatively provides that it shall be applied without retroactive effect. In the present case the later ruling failed to provide that it should be without retroactive effect.

The commission or department merely interprets the statute in the course of its administrative application. Since the statute has the same meaning from the time of its enactment, a correct interpretation must of necessity speak as of the effective date of the statute. The provisions we are here considering give the administrative authorities power to relieve a taxpayer from the consequences of this principle where it would be harsh and unfair to require him to pay taxes which he failed to pay when due in reliance on an administrative ruling. Under the express terms of the statute herein the taxpayer is not relieved from his obligation unless the commission or department prescribes that its ruling shall be without retroactive effect. This was not done in the present case.

In this analysis it is unnecessary to consider the validity of the amendatory provisions as against the contention that they confer judicial or legislative power on an administrative body in violation of the state Constitution. It is also unnecessary to consider the further problem whether the Legislature intended that the provisions should in any event operate retroactively to relieve the taxpayer from contributions which had become due and payable before the effective date of the amendments, or were designed to apply in the future where the commission should rule thereafter that no tax was due, and subsequently issue a corrected ruling. In the event the provisions apply to taxes due and payable before their effective date, there is a further problem, not necessary to consider here, as to whether a gift of public moneys would thereby be made in violation of the state Constitution. Cal.Const. art. IV, §§ 22, 25, subd. 16, § 31.

There remains the question whether independent of the statutory provisions of 1939, which, as we have shown, do not protect plaintiff, the state is nevertheless estopped to collect the past due taxes, or any part thereof. The tax is made up of the employer's contribution, measured by a percentage of the wages of each employee, and the employees' contributions, likewise a percentage of individual wages. Stats.1935, pp. 1232, 1234; Stats.1939, p. 2052. The act provides that the employer shall withhold the amount of his workers' contributions from their wages and shall transmit all contributions to the unemployment fund. § 44. If payments to the fund are not made when due, the employer is additionally liable for interest. § 45. Since 1939 the act provides for a penalty where the employer "without good cause" fails to pay contributions, and for a heavier penalty where his failure is due to intentional fraud.

Stats.1939, p. 2053, § 45.3, Gen.Laws Supp. 1939, Act 8780d. No penalties were collected in the present case.

The plaintiff herein, as employer, made deductions from wages of its employees until receipt of the rulings from the federal and state authorities that it was not liable for the tax because operated exclusively for charitable purposes. Upon receiving these rulings plaintiff paid to its employees the amounts withheld, and it did not thereafter withhold any portion of its employees' salaries until receipt of the April 3, 1939 ruling from the federal commissioner that it was subject to tax under the federal Social Security Act. The payments of taxes made by plaintiff under protest on October 5, 1939, and thereafter, included both its contributions as employer and the amounts required as employees' contributions. As to the employees' contributions on wages paid before April 3, 1939, the payment was made entirely with its own funds since it had long since turned over to its employees the amounts deducted from their wages. On February 19, 1940, the state demanded of plaintiff that it pay interest in the amount of $4,213.67 on contributions due for the period January 1, 1936, through June 30, 1939, and plaintiff made payment under protest on February 28, 1940.

[12, 13] It seems plain that if the state is permitted to retain the amount which represents the employees' contributions, plaintiff as the employer will be without recourse against its employees to recover from them the amounts which it should have withheld from their wages, but which it failed to withhold in reliance on official rulings that it was not liable for the tax. Section 44 as amended in 1937 provides: "Contributions by workers, payable to the commission as herein provided, shall be exempt from garnishment, attachment, execution or any other remedy for the collection of debts." Stats.1937, pp. 2066, 2067. As to such part of the tax, the burden of which the act contemplates will be borne by the employees, and which the employer "transmits" to the fund, we are of the view that the state may not belatedly hold the employer to payment where he has failed to pay, or to make the necessary deductions from his employees' wages, in reliance on an express ruling that he is not liable for the tax. As between the state and the employer, the state may not in good conscience thus place on the employer a burden which the act itself did not intend that he should bear. We are further of the view that the employer cannot be held to pay interest on contributions which were not paid when due solely in reliance on the official ruling of non-liability. On the other hand, the state should not lose its right to taxes which the employer should have paid from its own funds to discharge its own tax obligation. That is, the state is entitled to retain that portion of the tax collected under protest which represents the plaintiff's contribution as employer, notwithstanding plaintiff failed to make payment when due in reliance on the erroneous ruling of non-liability.

That there are situations where the taxpayer should not be penalized by being held to pay penalties, is given statutory recognition in Minnesota, where it is provided: "The commissioner shall have power to abate penalties when in his opinion their enforcement would be unjust and inequitable. The exercise of this power shall be subject to the approval of the attorney general." Laws of Minnesota, 1941, c. 550, p. 1168, § 19. In a decision just rendered the Minnesota Supreme Court modified a decision of the district court by eliminating penalties from a judgment for recovery of a tax deficiency which had not been paid when due in reliance on a former erroneous ruling which left no deficiency. In re Abbott's Estate, Minn., 6 N.W.2d 466, Nov. 20, 1942. The court itself eliminated the amount of penalties from the judgment, although the commissioner had not taken such action.

In Waterbury Savings Bank v. Danaher, 128 Conn. 78, 20 A.2d 455, 462, involving taxes due under the Connecticut Unemployment Compensation Act, the court held that the state could collect from the employer no part of the contributions required to be made for the period from November 1, 1937, to March 30, 1939, where such contributions were not paid when due in reliance on an erroneous ruling of the Tax Administrator that the employer was a federal instrumentality. The court said, without extended discussion: "Where it appears that it is against public policy that an administrative officer should change a decision with retroactive effect, it is the court's right and duty to curb his powers so as to serve that policy." Under the Connecticut act no part of the contributions required was deductible from wages.

[14-16] We are unable to go to this extent in our holding. The cases cited by the court involved rulings of a different type. In those cases the first regulation, upon which reliance was had, was not an erroneous interpretation of a statute, but a valid exercise of administrative power conferred by the statute. In the Connecticut case and in the present case the rulings are of a different type. It is the general rule that the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law. United States v. Tuthill Spring Co., D.C., 55 F.2d 415; Darling v. Commissioner of Int. Rev., 4 Cir., 49 F.2d 111; Champ Spring Co. v. United States, 8 Cir., 47 F.2d 1; McIlhenny v. Commissioner of Int. Rev., 3 Cir., 39 F.2d 356; United States v. Bartron, D.C., 35 F.2d 765; United States v. Kelley, D.C., 24 F.2d 234; United States v. Standard Spring Mfg. Co., D.C., 23 F.2d 495; Langstaff v. Lucas, D. C., 9 F.2d 691; 49 Yale Law Journal, 1264. An administrative regulation which is in conflict with the statute is invalid and the government is not bound thereby. Intercoast Trading Co. v. McLaughlin, D.C., 18 F.Supp. 149; Fresno Grape Products Corp. v. United States, 81 Ct.Cl. 553, 11 F.Supp. 55. The duty of the tax officials is to collect taxes imposed by law. Accordingly, unless recovery is barred by the statute of limitations it is generally no defense that taxes were not paid when due in reliance on an official ruling of non-liability. The taxpayer is deemed to act with knowledge that administrative officials cannot bind the government by their erroneous interpretation of tax statutes. Even where the government has made a refund to the taxpayer on an interpretive ruling that no tax is due it is held that it may subsequently recover the amount erroneously refunded. St. Louis Union Tr. Co. v. United States, 8 Cir., 82 F.2d 61; United States v. Tuthill Spring Co., supra; Champ Spring Co. v. United States, supra; United States v. Bartron, supra; United States v. Standard Spring Mfg. Co., supra; contra; United States v. Detroit Steel Products Co., D. C., 20 F.2d 675.

Recent studies of the cases dealing with the effect of administrative rulings have expressed the view that as a matter of sound public policy there should be some amelioration of the harsh consequences of the principle that the government is not bound by erroneous rulings of officials administering the tax laws. Representative of this critical point of view is an article by Maguire and Zimet, Hobson's Choice in Federal Taxation, (1935) 48 Harvard Law Review 1281. The authors remark: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." P. 1299. The authors find in the principles broadly laid down in the decisions "frequent manifestations of official irresponsibility." P. 1308.

The 1939 Supplement to Paul and Mertens, Law of Federal Income Taxation, refers to "the courts' double standard of moral attitude in looking the other way when government agents act inconsistently in safe-guarding the public revenues and in dealing severely with the taxpayers' slightest inconsistencies." P. 2534; for discussion of estoppel against the government in tax matters, see pp. 2507–2536 of this supplement. The discussion of estoppels against the government concludes: "There is certainly much to be said for a rule which will work both ways, but the development of such a rule is hardly to be expected, although we may find some increasing tendency to hold the Commissioner more strictly to account upon the basis of the same principles of estoppel which are now so frequently employed against the taxpayer." P. 2536; see, also, 88 U. of Pa.L.Rev. 556; 54 Harv.L.Rev. 398.

We have heretofore referred to the decision of the Supreme Court of Errors of Connecticut in Waterbury Savings Bank v. Danaher, 128 Conn. 78, 20 A.2d 455, where the state was held without right to collect unemployment taxes which had not been paid when due in reliance on an official ruling of non-liability. We have said that we are not in accord with that decision insofar as it would permit plaintiff herein to avoid liability for the full amount of the tax due from it. It is our view that in the present case a proper regard for the protection of the interests of the government in its revenues, with recognition also of a degree of responsibility on the part of the government to a taxpayer who has relied to his prejudice on an official ruling, is achieved by requiring the taxpayer to discharge that part of the tax burden which it was contemplated it should bear by the statute imposing the tax, while relieving it from liability for the employees' contributions and interest on delayed payments. The taxpayer will pay from its own funds as much as it would have paid originally but for the erroneous administrative ruling, but it will not pay more.

In application of the views expressed above, appellant cannot justify reliance on the rulings of non-liability after receipt of the federal ruling of February 24, 1939, to the effect that its exemption from the income tax was no longer referable to the exemption of corporations operated exclusively for charitable purposes, but to a different provision. The letter stated that the plaintiff's status for social security tax purposes would be made the subject of a separate communication. In view of the similarity between the charitable exemption provision of the income tax law and that of the Social Security Act, appellant was bound to anticipate the ruling of non-exemption from the social security tax, which ruling followed by letter of April 3, 1939, and also was forewarned that the state would reverse its position. The state act follows the language of the federal statute and both together provide an integrated scheme of social security. The testimony is that plaintiff did in fact commence making deductions from wages paid in April 1939, upon receiving the letter from the federal government.

The principle that estoppels will rarely be invoked against the government is not limited to the tax field. 19 Am.Jur. 818. Accordingly, where it is found that the rule that estoppels will be raised against the government in exceptional cases is applied in such manner as nevertheless to leave the doctrine of exceptions with real vitality, there is reason for employing similar standards in application of the doctrine in tax matters. In this state an estoppel was raised against the City of Los Angeles in Times-Mirror Co. v. Superior Court, 3 Cal. 2d 309, 44 P.2d 547, McGee v. City of Los Angeles, 6 Cal.2d 390, 5 P.2d 925, and City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370. In the last of these cases the facts were that the Los Angeles Railway Corporation was required to pay a percentage of its gross receipts as consideration for its franchises. After annexation of certain territory to the city of Los Angeles the corporation should have made the payments to the city, rather than to the county, but it continued to pay the county. It was held that justice and equity required a holding that the rules of laches and estoppel barred the city from holding the railway corporation to pay a second time.

The judgment is reversed in part, with directions to the trial court to compute the portion of the taxes paid under protest, which represents the amount of employees' contributions for the period between January 1, 1936, and February 24, 1939, and to enter judgment for plaintiff for that amount, and for the sum of $4,213.67, paid by plaintiff under protest as interest on delayed payments. Insofar as the judgment denies the recovery of any part of the employers' contributions it is affirmed. Each party shall bear its own costs.

PETERS, P. J., and KNIGHT, J., concurred.

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56 Cal.App.2d 513

BLACK ROCK PLACER MINING DIST. v. SUMMIT WATER & IRRIGATION CO. et al.

Civ. 6728.

District Court of Appeal, Third District, California.

Jan. 5, 1943.

1. Mines and minerals 🔑101

An organized placer mining district was without authority under statute to maintain a suit in its own name, but was required to maintain suit through its board of directors. Gen.Laws Supp.1933, Act 4938a, §§ 45, 66, 73, 73.5, 73.12; St.1939, pp. 1096, 1098, 1099, §§ 2457, 2458, 2472(d), 2473(b).

2. Parties 🔑1

Where an action is entirely statutory, it is necessary to bring the action in name of person to whom the right to sue was given by statute, regardless of any question as to real party in interest.

3. Eminent domain 🔑191(3)

A complaint in eminent domain must allege that use to which property sought to be condemned is one authorized by law, that it is to be devoted to a public use, and that particular property is necessary for such purpose.

4. Eminent domain 🔑33

Placer mining is recognized as a "private enterprise" to which doctrine of eminent domain does not ordinarily apply.

See Words and Phrases, Permanent Edition, for all other definitions of "Private Enterprise".

5. Eminent domain 🔑33

If land or other property is actually to be used for placer mining purpose for benefit of individuals and not for public benefit, it may not be deemed to become a "public use" subject to eminent domain by ipse dixit of legislature merely because it is operated by an association of its owners organized under Placer Mining District Act. Gen.Laws Supp.1933, Act 4938a, § 74; St.1939, p. 1099, § 2474.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Use".

6. Constitutional law 🔑70(1)
Eminent domain 🔑13

The question what is a public use, so as to be subject to eminent domain, is a "question of law", and, although deference will be paid to legislative judgment, as expressed in enactment providing for appropriation of property, it will not be conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

7. Eminent domain 🔑196

A placer mining district, in order to acquire private property by eminent domain, is required to prove that private property is required for a specified purpose and is to be used for a designated public benefit, notwithstanding provision in Placer Mining District Act designating all property required by any district formed under the act in fully carrying out provisions of act, to be a public use. Code Civ.Proc. § 1238; Gen.Laws Supp.1933, Act 4938a, §§ 73.5, 74; St.1939, p. 1099, § 2474.

8. Eminent domain 🔑191(3)

A placer mining district's complaint, in eminent domain action, which alleged only that property sought to be condemned was necessary for purpose of carrying out provisions of act under which district was organized, without alleging that property sought was to be for public use, was insufficient to state a cause of action. Code Civ.Proc. §§ 1237, 1238, 1241; Gen. Laws Supp.1933, Act 4938a, §§ 73.5, 74; St.1939, p. 1099, § 2474.

9. Eminent domain 🔑13

It is the manner and purpose for which property is used that determines whether it is devoted to a "public use", so as to be subject to eminent domain. Code Civ. Proc. § 1237; Gen.Laws Supp.1933, Act 4938a.

10. Eminent domain 🔑33

The statute providing for exercise of eminent domain to acquire certain properties for specified mining purposes independently of Placer Mining District Act does not purport to determine that the specified mining purposes are ipso facto properties devoted to "public use," but merely provides that if they are necessary for such purposes for public use, they may be condemned in manner provided by law. Code Civ.Proc. § 1238.

11. Eminent domain 🔑13

Question regarding use to which property sought to be condemned is to be devoted must be determined from facts of each case. Code Civ.Proc. §§ 1237, 1238, 1241; Gen.Laws Supp.1933, Act 4938a.

12. Appeal and error 🔑959(1)

In passing on an alleged abuse of discretion in sustaining a general demurrer to complaint without leave to amend, all proper facts within judicial knowledge of court should be taken into consideration in determining whether complaint may be amended. Code Civ.Proc. § 1875, subd. 3; Gen.Laws Supp.1933, Act 4938a.

13. Mines and minerals 🔑86

Mere inaccuracies of estimated acreage included in the report accompanying organization of placer mining district under Placer Mining District Act would not invalidate organization proceedings.

14. Eminent domain 🔑192

If defects in organization of placer mining district under Placer Mining District Act rendered organization proceedings void or disqualified district from maintaining eminent domain action, such defects should be raised by answer in district's eminent domain action as a matter of defense. Code Civ.Proc. § 1238; Gen. Laws Supp.1933, Act 4938a, § 73.5; St. 1939, p. 1099, § 2474.

15. Eminent domain ⚷9

A duly organized placer mining district may condemn private property for necessary public use of the district in an action in eminent domain based on adequate allegation of facts. Code Civ.Proc. § 1238; Gen.Laws Supp.1933, Act 4938a, § 73.5; St.1939, p. 1099, § 2474.

16. Appeal and error ⚷1078(1)

Plaintiff "waived" its right to object to dismissal of action against one of defendants for failure to serve summons within two years from commencement of suit, where error on such account was not assigned or relied upon in the briefs. Code Civ.Proc. § 581a; Rules for Supreme Court and District Courts of Appeal, rule 8, § 2, par. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

17. Appeal and error ⚷236(2)

The question of an abuse of discretion in refusing to permit amendment of a pleading after demurrer thereto has been sustained may properly be considered on appeal, even in absence of a request to amend the pleading. Code Civ.Proc. § 472c.

◆

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action in eminent domain by Black Rock Placer Mining District against Summit Water & Irrigation Company, Nevada Irrigation District and others. From a judgment pursuant to an order sustaining a demurrer to complaint without leave to amend the pleading, the plaintiff appeals.

Reversed with directions.

W. E. Wright and H. Ward Sheldon, both of Nevada City, for appellant.

C. F. Metteer, of Sacramento, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment rendered pursuant to an order sustaining a demurrer to its complaint without leave to amend the pleading. The suit was brought in eminent domain by an organized placer mining district, under section 73.5 of the Placer Mining District Act (Stats.1933, ch. 899, p. 2321, Deering's Supp.Laws of Cal.1933, p. 1889, Act 4938a; now § 2473(b), Public Resources Code, St. 1939, p. 1099), to condemn land in Nevada County for the use of the district.

The appellant contends that a placer mining district which is organized pursuant to law has the right to invoke proceedings in eminent domain, as provided by section 1238 of the Code of Civil Procedure, and that the Legislature has the sole province of determining what constitutes public uses for that purpose.

The respondent asserts that the plaintiff lacks legal capacity to maintain this action in eminent domain, and that the complaint fails to allege facts sufficient to constitute a cause of action chiefly because it is not stated the land is sought to be condemned *for public use*. On the contrary, it is claimed that the public records of the organization of that district, of which the courts may take judicial notice, affirmatively show that the lands contained therein are used solely for private and not for public benefit.

We are of the opinion the demurrer was properly sustained. The complaint fails to state facts sufficient to constitute a cause of action in eminent domain.

[1, 2] The action was brought in the name of Black Rock Placer Mining District. The complaint fails to allege that directors were elected or that a board was organized as required by sections 45 and 66 of the Act of 1933, supra (now §§ 2457 and 2458 of the Pub.Res.Code, St.1939, p. 1096). The suit is not maintained by or through the board of directors, as the law requires (§§ 73 and 73.12 of Act of 1933, supra; now § 2472(d), Pub.Res.Code, St. 1939, p. 1098), assuming that such a board actually exists. Those sections provided in part:

"Acting through such board, the district shall have power: * * *

"To * * * sue and be sued."

The act specifically authorizes the district to maintain suits only through its board of directors. This is a statutory requirement. No other method of maintaining suits by or against the district is provided for by statute. This suit was therefore improperly brought contrary to the provisions of law, in that regard. It is said in 20 California Jurisprudence, page 492, section 11: "It is therefore necessary, where an action is entirely statutory, to bring the action in the name of the person to whom the right to sue is given by statute, regardless of any question as to the real party in interest."

The complaint fails to allege the purpose for which the land sought to be condemned is intended to be used. The pleading fails to state that the land is *necessary* for any particular purpose, or that it is to be used *for a public purpose.* Paragraph VII of the complaint contains the only allegations with respect to the use of the land sought to be condemned. It reads:

"That none of the property hereinabove described has heretofore been appropriated to a public use, or, if it has, the use which the plaintiff herein proposes to make thereof, *is more necessary for the use of the said Black Rock Placer Mining District than that to which any of the said property has heretofore been dedicated.*" (Italics added.)

It is true that paragraph II of the complaint, after stating that the district was organized "for the purpose, among other things, of conducting placer mining, acquiring, maintaining, constructing and operating all necessary property, canals, storage basins, reservoirs and works for the placer mining * * * and for the further purpose of storing and transporting water to be used for such placer mining," it is further alleged that the real estate sought to be condemned "is necessary for the *said* purposes." This is not an affirmative statement that the land is to be used for any particular purpose or that it is to be used for a public purpose. No facts are alleged from which the court may determine whether the land is to be devoted to a public use.

[3] It has been frequently held that a complaint in eminent domain must allege that the use to which the property sought to be condemned is one authorized by law, that it is to be devoted to a public use, and that the particular property is necessary for that purpose. 10 Cal.Jur. 397, § 99; 8 Standard Enc. of Proc. 285, § F,3,f; 4 Bancroft's Code Prac. 3875, § 2994. In the text last cited, in which each statement is supported by numerous authorities, it is said:

"The complaint or petition should allege that the use to which the property is to be appropriated is one which is authorized by law, that it is a public use, and that the particular property sought to be obtained is necessary for such use. Ordinarily, pleading the conclusion that the use is public is insufficient; it should be definitely shown that the use to which the property is to be put is a public one by pleading the ultimate facts."

The appellant contends that all property and facilities owned by the district, regardless of the use to which they are devoted, are deemed to be devoted to a "public use." The appellant relies on section 74 of the Act of 1933 (now section 2474, Pub.Res. Code, St.1939, p. 1099) in that regard. That section provided: "The use of all water or other facilities required for the working of the mines in the lands of any district formed under the provisions of this act, together with the facilities auxiliary thereto *and all other property required in fully carrying out the provisions of this act is hereby declared to be a public use,* subject to the regulation and control of the State in the manner prescribed by law." (Italics added.)

[4] The Legislature has no power to arbitrarily declare that all property used for or incidental to placer mining shall constitute a public use regardless of the manner or extent to which it is used. Placer mining is recognized in California as a private enterprise to which the doctrine of eminent domain does not ordinarily apply. 54 A.L.R. 63, note. It is said in County of Sutter v. Nicols, 152 Cal. 688, at page 694, 93 P. 872, at page 874, 15 L.R.A.,N.S., 616, 14 Ann.Cas. 900, that:

"The business of mining for the benefit of the mine owner is as much a private affair as that of a farm or factory, and the right of eminent domain cannot be invoked in aid of it."

In the case of Associated Pipe Line Co. v. Railroad Comm., 176 Cal. 518, at page 529, 169 P. 62, at page 66, L.R.A.1918C, 849, with respect to the power of the Railroad Commission to declare certain property a public utility, it is said: "It has no power to declare what shall constitute a public utility. But this, argues respondent, is a function of the Legislature. Not so. The Legislature possesses no such power. It cannot by its edict make that a public utility which in fact is not, and take private property for public use by its fiat that the property is being devoted to a public use."

[5, 6] If, as a matter of fact, land or other property is actually used for placer mining purpose for the benefit of individuals and not for public benefit, it may not be deemed to become a public use subject to eminent domain by the ipse dixit of the Legislature merely because it is operated by an association of its owners organized under the Placer Mining District Act. The question as to whether the property is to

be devoted to public use is a problem for judicial determination. Stratford Irr. Dist. v. Empire Water Co., 44 Cal.App.2d 61, at p. 67, 111 P.2d 957; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Logan v. Stogsdale, 123 Ind. 372, 24 N.E. 135, 8 L.R.A. 58; 35 Words and Phrases, Perm.Ed., p. 387; Cooley's Const.Lim., 8th Ed., 1141. In the text last cited it is said:

"The question what is a public use is always one of law. Deference will be paid to the legislative judgment, as expressed in enactments providing for an appropriation of property, *but it will not be conclusive.*" (Italics added.)

In the Stratford Irrigation District case, supra [44 Cal.App.2d 61, 111 P.2d 961], the court stated: "The mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, as a matter of fact, the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use."

In the case from which we have last quoted, it was held that the complaint sufficiently stated a cause of action in that regard for the reason that it was specifically alleged the designated purposes "are for a public use and benefit." No such language is employed in the complaint in this action.

[7, 8] We therefore hold that the mere commencement of an action to acquire property by a placer mining district "for the purpose of carrying out the provisions of the act" under which it is organized, as declared by section 74 thereof, does not ipso facto determine that it is necessarily to be devoted to a public use. In spite of the last-mentioned section it is essential to allege and prove that private property is required for a specified purpose and is to be used for a designated public benefit before it may be subjected to eminent domain. The complaint in the present action makes no such allegations.

[9, 10] It is the manner and the purpose for which property is used that determines whether it is devoted to a public or a private use. Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 36 Cal.App. 556, 562, 178 P. 150; 54 A.L.R. 15, note. "Eminent domain is the right of the people or government to take private property for public use." § 1237, Code Civ.Proc. It may not be so taken for private use. When a person or an association acquires private property to be used for the purposes specified in section 1238 of the Code of Civil Procedure, he holds it as "an agent of the state." § 1001, Civ.Code. Section 1238, supra, does not declare that the various properties mentioned therein are deemed to be used for public benefit. It merely asserts that such enumerated properties may be the subject of eminent domain provided it is necessary to appropriate them for a public use. The previous section supplies the necessary public use element of eminent domain. Subdivision 5 of section 1238 provides for the exercise of eminent domain to acquire certain properties for specified mining purposes independently of the Placer Mining District Act, as follows:

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * *

"5. Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines, also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines."

That section does not purport to determine that roads, tunnels, ditches, basins for deposit of tailings, etc., are ipso facto properties devoted to public use. It merely provides that if they are necessary for such purposes for public use they may be condemned in the manner provided by law. In compliance with the statutes applicable to eminent domain, it is necessary to affirmatively allege and prove the necessity for acquiring the land and that the purpose of doing so is for a public use. Before private property may be taken for a public use it must appear that the proposed use is authorized by law, and that the taking is *necessary* to such use. § 1241, Code Civ. Proc. It is true that, with respect to certain corporations and governmental subdivisions, the *necessity* for taking private property for designated public purposes may be presumed from evidence of formally adopted resolutions to that effect. §

1241, supra. But in the present case the adoption of such a resolution is not alleged.

[11] The question regarding the use to which the property is to be devoted must be determined from the facts of each case as they are alleged or appear in evidence.

In support of the judgment based on the order sustaining the demurrer to the complaint without leave to amend the pleading, the respondent asserts that by reference to the map and public records of proceedings of the organization of Black Rock Placer Mining District in the office of the county clerk, which were filed as required by law (§ 21, Act of 1933, supra; now § 2420, Pub.Res.Code, St.1939, p. 1090), of which records the court will take judicial notice, it appears that the mining district was not duly organized and therefore lacks legal capacity to maintain this suit in eminent domain. The respondent contends that the map which was filed with the county clerk pursuant to section 19 of the Placer Mining Act (now § 2418, Pub.Res. Code, St.1939, p. 1089), which is attached to its opening brief, shows that the district was organized for private purposes and that it therefore lacks legal capacity to maintain this action. It is pointed out that the map shows a discrepancy of 120 acres from the total acreage of placer mining property which was included in the petition and report. No other discrepancies are specified.

[12] It is true that the California cases hold, in passing on an alleged abuse of discretion in sustaining a general demurrer to a complaint without leave to amend the pleading, that, under subdivision 3 of section 1875 of the Code of Civil Procedure, all proper facts within the judicial knowledge of the court should be taken into consideration in determining whether the complaint may be amended. Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987. Under circumstances similar to those which are involved in that feature of this appeal, the last cited case holds that the court should take judicial notice of the records of the United States Land Office, which showed that the particular real properties to which plaintiffs sought to quiet title had been withdrawn by the government from entry, and that the appellants therefore could not amend their complaint so as to entitle them to quiet title under any circumstances. For that reason it was there held the trial court did not abuse its discretion in sustaining demurrers without leave to amend.

[13, 14] Assuming, without so deciding, that the map and organization proceedings of the placer mining district in the present case are records of which the court is required to take judicial notice, we are nevertheless unable to hold that they disclose such discrepancies as render the organization void or which disqualify the appellant from maintaining an action in eminent domain based on adequate allegations of the complaint. We are of the opinion mere inaccuracies of estimated acreage included in the report accompanying the organization of the district will not invalidate the proceedings. Nor does the statute require that the placer mining properties contained therein shall necessarily be contiguous. By reference to the map of the district attached to the appellant's opening brief, we observe no discrepancies or defects, and none has been called to our attention in other proceedings for the organization of the district which render it void, or disqualify it from maintaining this action. If such defects do exist we assume they should be raised by answer as a matter of defense.

[15] We know of no valid reason why a duly organized placer mining district may not condemn private property for necessary public use of the district in an action in eminent domain based on adequate allegations of facts. Subdivision 5 of section 1238 of the Code of Civil Procedure contemplates the exercise of eminent domain to acquire properties for specified mining purposes for public use. Section 73.5 of the Placer Mining Act (now § 2473 (b) of the Pub.Res.Code) specifically authorizes the district, through its board of directors, to acquire property by "condemnation" for public use for the purposes enumerated therein incident to the operation or maintenance of the mining district.

[16] The appellant has waived its right to object to the dismissal of the action against one of the defendants, the Summit Water and Irrigation Company, which was granted under section 581a of the Code of Civil Procedure for failure to serve the summons within three years from the commencement of the suit, or at all, for the reason that error on that account is not assigned or relied upon in the briefs. Scott v. Times-Mirror Co., 181 Cal. 345, 371, 184 P. 672, 12 A.L.R. 1007; Baker v. Baker, 168 Cal. 346, 350, 143 P. 607, Ann.Cas.1916A, 854; Rule VIII, § 2, par. 2, Rules for Supreme Court and District

Courts of Appeal; 3 Am.Jur. 334, §§ 774, 775.

[17] We are of the opinion the plaintiff should have been granted leave to amend its complaint if it so desired. It has been recently determined that the question of an abuse of discretion in refusing to permit the amendment of a pleading after a demurrer thereto has been sustained, may be properly considered on appeal, even in the absence of a request to amend the pleading. Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358. Section 472c of the Code of Civil Procedure, which was adopted in 1939, specifically so provides. The case last cited holds that such an order may be reviewed on appeal even though the action was pending when the last-mentioned section of the code was adopted.

The order sustaining the demurrer was properly made, but the judgment is reversed and the court is directed to grant the plaintiff a reasonable time within which to file an amended complaint.

SCHOTTKY, J. pro tem., and ADAMS, P. J., concurred.

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56 Cal.App.2d 635

Ex parte MAKI.

Cr. 3656.

District Court of Appeal, Second District, Division 2, California.

Jan. 14, 1943.

1. Constitutional law 🔑88

The ordinance forbidding administration of massage to person of opposite sex is not unconstitutional as violating constitutional provision that no person shall on account of sex be disqualified from pursuing any vocation. Const. art. 20, § 18.

2. Constitutional law 🔑42

A steam bath owner, convicted of violating ordinance by calling in masseuse to administer massage to male patron, could not complain on ground that ordinance violated constitutional provision that no person shall on account of sex be disqualified from pursuing any vocation. Const. art. 20, § 18.

3. Municipal corporations 🔑625

An ordinance forbidding administration of massage to person of opposite sex is a reasonable regulation imposed by city council in fair exercise of "police powers".

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

4. Municipal corporations 🔑122(2)

In testing legislative judgment with respect to necessity for enactment of regulatory laws, in absence of judicial determination to the contrary, presumption is that city council's action was supported by known facts requiring the enactment.

5. Constitutional law 🔑81

The Legislature may suppress a practice deemed inimical to the state and may adopt reasonable measures to effectuate its purpose.

6. Criminal law 🔑26

That particular transaction considered apart from menace sought to be prevented may be innocuous does not immunize it from prohibition contained in the enactment.

7. Constitutional law 🔑89(1)

An ordinance forbidding administration of massage to person of opposite sex is not invalid as unreasonably infringing upon the "right of contract".

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Contract".

8. Constitutional law 🔑83(1)

A person is not guaranteed by the State or Federal Constitution the unrestricted privilege of conducting his own business as he pleases.

9. Constitutional law 🔑38

Regulatory laws cannot be based on caprice, or personal enmity, or zeal to serve private interests.

10. Municipal corporations 🔑611

A municipality may regulate conduct of those not licensed under general laws.

11. Municipal corporations 🔑626

An ordinance forbidding administration of massage to person of opposite sex is not invalid because city council did not comprehend every possible situation for evil.

12. Municipal corporations ⚷63(1)

Municipal authorities and not courts must determine whether local conditions demand regulatory legislation, and they are vested with large discretion not to be judicially controlled unless clearly violative of constitution.

13. Municipal corporations ⚷626

A violator of regulatory ordinance may not defeat his conviction because evils of a different but more pernicious character have not also been regulated.

14. Municipal corporations ⚷626

That pseudo masseurs and other disreputable persons give massages gratis and are not included within inhibition of ordinance does not operate to invalidate ordinance prohibiting administration of massage to person of opposite sex.

15. Constitutional law ⚷205(5)

An ordinance forbidding administration of massage to person of opposite sex unless done under supervision of licensed physician is not unconstitutional as granting "special privileges and immunities". St. 1937, p. 1229; Const. art. 1, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Privileges and Immunities".

16. Constitutional law ⚷296(1)

An ordinance forbidding administration of massage to person of opposite sex, as applied to owner of steam bath and massage business, is not unconstitutional as depriving him of property without "due process of law". Const. art. 1, § 13; U.S.C.A. Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

17. Constitutional law ⚷296(1)

The reasonable exercise of police power in regulating any occupation to maintain moral welfare does not arbitrarily deprive a person so engaged of his property without "due process of law". Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

18. Constitutional law ⚷296(1)

That a person by his occupation may be unable to gain certain profits as result of enforcement of regulatory measure is not a deprivation of his property, without "due process of law". Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

19. Municipal corporations ⚷111(1), 120

In determining validity of ordinance, court must determine intent of lawmakers, and whether that intent violates an established right.

20. Municipal corporations ⚷611

The likelihood that licentiousness may result from intimate contact of members of opposite sexes is a necessary factor in considering whether ordinance forbidding administration of massage to person of opposite sex is an intelligent effort to regulate occupation of maintaining massage parlor.

21. Municipal corporations ⚷120

The court must so interpret an ordinance as to render legislative intent valid and operable, and court must diligently seek for such intent.

22. Municipal corporations ⚷120

In determining validity of ordinance, court is not confined to interpretation that follows strictly dictionary definition of words used.

23. Constitutional law ⚷296(1)

The finding by legislative body that existence of evil in connection with any business or occupation is widespread is sufficient answer to complaint of one therewith engaged notwithstanding that he himself is honorable and decent in conduct of his own concerns, and he is not thereby deprived of his property without "due process of law". Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

24. Municipal corporations ⚷625, 626

An ordinance is not "discriminatory" so long as distinctions it makes relate reasonably to object of legislation, and it is not arbitrary if any reasonably conceivable state of facts would sustain it.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory Ordinance".

25. Constitutional law ⚷240(1)

In determining whether ordinance forbidding administration of massage to person of opposite sex unless done under supervision of licensed physician denies equal protection of the law, neither operation of massage parlor nor the administering for remedial or hygienic purposes of "massage", which is rubbing or striking the body for remedial benefit, constitutes "practice of medicine". St.1937, p. 1229; U.S.C.A. Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Massage" and "Practice of Medicine".

26. Constitutional law ⚷240(1)

An ordinance forbidding administration of massage to person of opposite sex unless done under supervision of licensed physician is not unconstitutional as denying "equal protection of the laws". U.S. C.A.Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

◆

Charles Maki was convicted of violating a city ordinance forbidding the administration of a massage to a person of the opposite sex, and petitioned for a writ of habeas corpus.

Writ discharged and prisoner remanded.

Perry G. Briney, of San Pedro, for petitioner.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision in this case is whether a city ordinance is valid which forbids the administration of a massage to a person of the opposite sex unless done under the supervision of a licensed physician.

Petitioner having been convicted by the municipal court of Los Angeles obtained a writ of habeas corpus upon his petition which disclosed that a former judgment of dismissal had been reversed by the appellate division of the superior court. The ordinance in question is section 27.03.1, Los Angeles Municipal Code, and is as follows:

"(a) It shall be unlawful for any person to administer, for hire or reward, to any person of the opposite sex, any massage, any alcohol rub or similar treatment, any fomentation, any bath, or any electric or magnetic treatment, nor shall any person cause or permit in or about his place of business, or in connection with his business, any agent, employee or servant or any other person under his control or supervision, to administer any such treatment to any person of the opposite sex.

"(b) This section shall not apply to any treatment administered in good faith in the course of the practice of any healing art by any person licensed to practice any such art or profession under the provisions of the Business and Professions Code of California [St.1937, p. 1229], or of any other law of this state."

In considering the language of that section it will be borne in mind that section 27.03 of the same code forbids any person to give a massage, rub, magnetic treatment, etc., unless he shall have received from the city a permit to conduct such pursuit at the location named in the permit. Subdivision (f) of such section contains the following provision: "No person engaged in any business mentioned in this Section shall permit any person in his place of business to treat or perform any act for which such permit was granted upon any patient or customer of the opposite sex."

Petitioner's attack upon section 27.03.1 is based upon five grounds, viz.:

(1) It violates section 18, article XX of the Constitution;

(2) It unreasonably infringes upon the right of contract;

(3) It violates section 21, article I of the Constitution in that it grants special privileges and immunities;

(4) It deprives petitioner of a property right without due process of law (§ 13, art. I, Const.);

(5) It denies equal protection of the laws, in violation of the Fourteenth Amendment.

[1, 2] (1) Section 18 of article XX is not violated. It declares that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Petitioner's right to engage in the vocation of a masseur is not questioned. It was not his occupation that brought him to the attention of the police but rather his disregard of a regulation of such occupation, properly imposed by the municipality. In no sense does the ordinance challenge the right of either man or woman to work as a massagist or to operate such business. From the agreed statement of facts upon which petitioner was convicted it appears that he was "and still is the owner of and conducting a steam bath and massage business." The ordinance was violated when

petitioner called in his masseuse to administer a massage to a male patron. Had petitioner himself proceeded with the massage no warrant would have been issued or complaint filed. He could not assign to his masseuse the performance of a task which she was forbidden by the ordinance to do and then in his own defense plead the nullity of the measure because it violates the rights of his employee as guaranteed by section 18. He has no right to complain upon that ground. People v. Steelik, 187 Cal. 361, 375, 203 P. 78; Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

[3] The ordinance applies alike to both men and women. If petitioner should receive only male patrons and do his own work or employ only masseurs, he would not violate the ordinance. If he should receive only female patrons and employ only masseuses to do his work, there would be no violation. The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers. In re Miller, 162 Cal. 687, 124 P. 427. Petitioner vainly relies upon Matter of Maguire, 1881, 57 Cal. 604, 40 Am.Rep. 125, which held that an ordinance excluding a female from attendance in a barroom was an evasion of section 18. That decision was overruled in 1893 by Ex parte Hayes, 98 Cal. 555, 33 P. 337, 20 L.R.A. 701, wherein the Supreme Court declared that section 18, article XX does not limit the power of the state to prescribe conditions in regulating the conduct of a retail liquor business.

[4-6] In testing the legislative judgment with respect to the necessity for the enactment of regulatory laws in the absence of a judicial determination to the contrary, the presumption is that the city council's action was supported by known facts requiring the enactment. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734. Such presumption demands but little application here. The inclination of a percentage of mankind to ignore conventionalities, moral codes and inhibitory statutes and to indulge in licentious practices arising from the sex impulse is too well known to the student of history and sociology to require extended discussion. They have been prohibited in every land of recorded history from ancient Babylon (Code of Hammurabi) to the present time. The evil became so grave a menace to the welfare of the early Saxon state in Britain that our rude forebears made adultery a capital offense (Taine's History of English Literature). By reason of the continued presence of such element whose lack of restraint would, by subverting the common morality, weaken the foundations of an approved social order, the Legislature may suppress the practice deemed inimical to the state and may adopt such measures as may be reasonable to effectuate its purpose. Purity Extract & T. Co. v. Lynch, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184; American Linseed Oil Co. v. Wheaton, 25 S.D. 60, 125 N.W. 127, 41 L.R.A.,N.S., 149. Moreover, the fact that a particular transaction considered apart from the menace sought to be prevented may be innocuous, does not immunize it from the prohibition contained in the enactment. Since the ordinance in question does not prohibit either man or woman from engaging in the occupation of the masseur but merely regulates the conduct of a business in the interest of the state, there is no infraction of article XX of the Constitution.

[7-9] (2) The assignment that the city ordinance unreasonably infringes upon the right of contract has no substantial basis. Merely because the practice of administering the massage is in itself an innocent and worthy vocation and fulfills a popular demand of the ill and the injured is not a sufficient reason to deny the reasonable exercise of the police power. Notwithstanding the ordinance, petitioner may occupy his entire time massaging men for reward or otherwise; may employ any masseuse to massage any woman requesting such treatment; may employ, or permit, any person to work in his establishment so long as such person observes all regulatory statutes and ordinances and refrains from massaging persons of the opposite sex. Neither the state nor the federal Constitution guarantees to a person the unrestricted privilege of conducting his own business as he pleases. The state may condition the right to conduct a business or to pursue a calling. Nebbia v. New York, 291 U.S. 502, 527, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469. Such is the burden of him who would practice law, medicine, dentistry or optometry; who would operate a railroad, grain elevator, compress, hospital, dairy or garbage collection. The very guaranty of our liberties surrounds us with restrictive safeguards and subjects us

to scrutiny and control from birth to the grave. Regulatory laws must not be the fruitage of caprice or of personal enmity or of a zeal to serve a private interest. Miller v. Wilson, 236 U.S. 373, 380, 35 S. Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829.

(3) Petitioner contends that the ordinance violates section 21 of article I of the Constitution which forbids that "any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Those to whom special privileges are granted by the ordinance, asserts petitioner, are licensed physicians and their employees, in that those permitted to give massages are not selected upon the basis of their qualifications; that anyone may do so if he asks no reward for his service or if he is supervised by a licensed physician; that anyone may administer a massage so long as a masseur treats a man and a masseuse treats a woman; that a man may be treated by a masseuse and a woman by a masseur at the office of a physician. Such discrimination, argues petitioner, is not based upon some "natural, intrinsic, or constitutional distinction." Citing Gaetano Bocci & Sons Co. v. Lawndale, 208 Cal. 720, 284 P. 654, 655.

We find no violation of section 21 in the language of the ordinance. The physician is granted no special privilege thereby. He qualifies himself for such responsibility by his allegiance to time honored ethical standards as well as by complying with the requirements of the state in gaining the knowledge and skill which qualify him to administer to the human body. The physician is obligated not only to adhere to the application of the most advanced methods and remedies in the art of healing but also to scorn immoral behavior and to denounce licentious practices. But not even he may act arbitrarily. He may cause a massage to be given only to those who in good faith seek his professional ministrations. The very act of the state in granting licenses to those only who are qualified as physicians is itself an attempt to prevent the quack and the charlatan from preying upon the unsuspecting public. There is, therefore, a distinction in the moral trustworthiness of the licensed physician, as a class, and the massagist. The latter has no professional standards to uphold. His endeavors are activated by only a personal zeal to promote his own prosperity.

[10-15] Since the physician is licensed by the state, the city is powerless to prohibit or to regulate his practice. But this does not deprive a municipality of regulating the conduct of those not licensed under general laws. Also, because the city council in finding the necessity for an enactment to regulate massage studios, did not comprehend every possible situation for evil, its ordinance in selecting only one class of cases is not to be thereby defeated. "It may confine its restrictions to those classes of cases where the need is deemed to be clearest". West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400, 57 S.Ct. 578, 585, 81 L.Ed. 703, 108 A.L.R. 1330; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 689, 151 P. 398. Municipal authorities and not the courts are to determine whether local conditions demand such legislation and they are vested with a large discretion not to be judicially controlled unless clearly violative of the organic law. In re McNeal, 32 Cal.App.2d 391, 89 P.2d 1096. Neither may a violator defeat his conviction because evils of a different but more pernicious character have not also been regulated. In re Hixson, 61 Cal.App. 200, 213, 214 P. 677. The fact that psuedo masseuses and other disreputable persons give massages gratis and are not included within the inhibition does not operate to defeat the ordinance. The city council is presumed to have considered facts presented by officials who in the course of official duty assembled the data bearing upon the evils subsisting by virtue of the giving of massages. It was the legislative function to determine that regulatory measures should be confined to those places where massages are given for hire. From any view of the ordinance we find no special privilege conferred or immunity granted.

[16-18] (4) The fallacy of petitioner's argument that the ordinance deprives him of his property without due process of law will already have occurred from the foregoing discussion. The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property. The language of the ordinance and the evils intended thereby to be prevented make it clear that the intent of the city council was solely to serve the public welfare and not to oppress any class. The fact that a person by his occupation may be unable to gain certain profits as a result of the en-

forcement of regulatory measure is not a deprivation of his property without due process of law. Enactments that curb the vicious or restrain the wicked necessarily restrict the emoluments of his enterprise. However, such results are not to be considered in determining the validity of a law.

[19-23] Rather are we impelled by the necessity of determining the intent of the lawmakers and whether that intent violates an established right. The likelihood that licentiousness may result from the intimate contact of members of opposite sexes in the secrecy of the treatment chamber is a necessary factor in considering whether the ordinance is an intelligent and serious effort to regulate the occupation of maintaining a massage parlor. Rose v. Superior Court, 80 Cal.App. 739, 746, 252 P. 765. It is our duty so to interpret the ordinance as to render the legislative intent valid and operable, (In re Haines, 195 Cal. 605, 621, 234 P. 883) and diligently to seek for such intent. Marshall v. Williams, 85 Cal.App. 507, 511, 259 P. 970; Carr v. Kingsbury, 111 Cal.App. 165, 171, 295 P. 586; § 3541, Civ.Code. We are not frozen to an interpretation that follows strictly the dictionary definition of the words used. Patton v. Los Angeles Pacific Co., 18 Cal.App. 522, 123 P. 613. As far back as 1896 (Dunlop v. United States, 165 U.S. 486, 498, 17 S.Ct. 375, 41 L.Ed. 799) it was found that licentious acts were so prevalent in massage establishments that an advertisement by women inviting men to their "Baths" and "Massage" rooms was held to be an obscene publication because it was calculated to deprave the morals. But it is unnecessary to support the wisdom of the city council by the history of the conditions of ancient days or of the gay nineties. Respondent points out that in the city of Los Angeles, in 1915, the prevalence of sex evils arising out of massage parlors caused the city council then to enact section 27.03, supra, as a safeguard against the deterioration of the social life of the community. Petitioner contends that because pseudo-massagists and kindred fakers debase a creditable business by screening themselves with the insignia of an honorable vocation to conceal their crimes he and his fraternity of ethical and moral operatives and operators should not be subjected to regulations designed to prevent immoral acts. The finding by the legislative body that the existence of an evil in connection with any business or occupation is widespread is a sufficient answer to the complaint of one therewith engaged notwithstanding that he himself is honorable and decent in the conduct of his own concerns. He is not deprived of his property because he must conform to such regulations. His own compliance with such measures is both a privilege of citizenship and a protection against evils otherwise surreptitiously imported.

[24-26] (5) There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire and who are not licensed to practice one of the arts of healing. An ordinance is not discriminatory so long as the distinctions it makes relate reasonably to the object of the legislation. It is not arbitrary if any reasonably conceivable state of facts would sustain it. New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578, 58 S.Ct. 721, 82 L.Ed. 1024. The ordinance does not attempt to regulate the practice of licensed physicians. If it did so, it would of course be void for entering that domain in which general laws hold sway. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. Neither the operation of a massage parlor nor the administering of a massage for remedial or hygienic purposes is the practice of medicine. The massage, that is rubbing or stroking the body for remedial benefits, is practiced by every mother in the land in the normal care of her children. Because it puts the infant to sleep or relaxes the fatigued laborer does not place it in the category of the arts of the physician any more than does applying hot towels to an aching back or an ice pack to a bruised body. There is no law that classifies the application of homely remedies as a practice of medicine. Since the massage, then, is not the practice of medicine, the regulation by ordinance of those places maintained in metropolitan centers for the purpose of administering such treatments does not discriminate against the proprietors of such establishments.

It is therefore ordered that the writ be and it is hereby discharged and the prisoner is remanded.

W. J. WOOD and McCOMB, JJ., concurred.

56 Cal.App.2d 374

WILLIAMS et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12097.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1942.

Hearing Denied Feb. 25, 1943.

1. Waters and water courses 🔑40

Owners of land riparian to river had riparian right superior to claim of municipality diverting waters therefrom, regardless of whether lands were acquired subsequent to effective date of Desert Land Act of 1877, under which grantee of public lands took title to such water right incident thereto as might be conferred by local laws, customs, and judicial decisions of state of location which have recognized riparian rights to beneficial use of waters upon lands within the state adjacent to rivers and streams. Desert Land Act of 1877, 43 U.S.C.A. § 321 et seq.

2. Waters and water courses 🔑152(11)

Decree enjoining municipality from diverting water of river was not erroneous because riparian owners seeking to quiet title to riparian rights did not have continuous ownership or control of parcels involved in proposed power projects, in view of reservation that court could modify decree to permit such use of waters by plaintiffs only upon application and notice and showing that they could put water to beneficial use.

◆

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Dan E. Williams and others against City and County of San Francisco. Judgment for plaintiffs and defendant appeals.

Affirmed.

John J. O'Toole, City Atty., Dion R. Holm, Asst. City Atty., and A. E. Chandler, all of San Francisco, for appellant.

Charles F. Blackstock, of Oxnard, Glenn J. Fairbrook, of Seattle, Wash., and Dennett & Paul, of Modesto, for respondents.

KNIGHT, Justice.

The defendant, City and County of San Francisco, appeals from a judgment entered after trial on the merits in a suit involving the riparian and appropriative rights to the waters of the Tuolumne River. The appeal is presented on a clerk's transcript.

[1] The complaint contains two counts in which it is alleged that the plaintiffs are the owners of lands riparian to said river. By the first count they seek to quiet their titles thereto and to enjoin the alleged wrongful diversion by the defendant of the waters of said river. By their second count they seek to quiet their alleged titles to the waters of said river as against the defendant. The defendant in its answer denies the essential allegations of the complaint, and it then goes on to allege that it is a municipal corporation, and in the name of the Hetch Hetchy project has operated and used for many years, under the authorization of an act of Congress approved in 1913, called the Raker Act, 38 Stat. 242, large quantities of the waters from said river and adjacent streams to supply its inhabitants with waters for domestic purposes and hydro-electric power. In this connection it sets forth in detail the manner in which the water rights were acquired, together with the approximate quantities of water used, and the cost of the construction and maintenance of dams, reservoirs, power houses, works and equipment. It then denies that it has wrongfully diverted or intends to divert any of the waters of the Tuolumne River necessary for beneficial purposes on the lands of the plaintiffs. Furthermore, it alleges that it has acquired title to the waters it has thus diverted by adverse possession; that because of plaintiffs' knowledge of and acquiescence in defendant's appropriation and use of said waters for many years, plaintiffs are estopped from denying defendant's title thereto, and that plaintiffs' action is barred by several provisions of the Code of Civil Procedure and of the San Francisco Charter.

As set forth by the trial court in its decision herein, its conclusions of law from the facts found were: "The defendant is the owner by prescription of a right, prior and superior to the riparian rights of the Riverside and Fourth of July claims, to divert at Early Intake into its Hetch Hetchy aqueduct 700 cubic feet per second of the waters of Tuolumne River, and to use such waters for power purposes at its Moccasin Power House on Moccasin Creek. That each of the plaintiffs is the owner of the lands described in the findings of fact as belonging to such plaintiff, and that said lands are riparian to the Tuolumne River, *and that the plaintiffs have and each of them has riparian rights to the flow of the Tuolumne River and its tributaries, superior to any claim of rights by the defendant thereto.* That the plaintiffs are entitled to an interlocutory judgment declaring such rights and reserving jurisdiction in this court to modify said judgment, permitting the use of the waters of the Tuolumne River and its tributaries by the plaintiffs when, upon application and notice by plaintiffs, or any of them, showing is made that they can put said waters to beneficial use." (Italics ours.) The judgment conformed to the foregoing conclusions, and the one above italicized is the basis of the main controversy on this appeal.

The suit was commenced in Tuolumne County in September, 1932. The answer was filed in June, 1933, and on May 9, 1935, on motion of the defendant, the cause was transferred to Merced County. On April 29, 1935, the Supreme Court of the United States rendered a decision in the case of California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L.Ed. 1356, involving an interpretation of an act of Congress known as the Desert Land Act of 1877, 43 U.S.C.A. § 321 et seq., which decision defendant construed as holding that no public land located or entered after March 3, 1877, the effective date of said act, had a riparian right; that is, defendant contended that by said decision it was held that the effect of said act was to separate riparian rights from the land and that any subsequent grant of government owned land through which flowed a non-navigable stream, did not carry any common law riparian rights, and that any rights to such waters would have to be acquired under the law governing the appropriation of water; and claiming that all parcels of land owned by the plaintiffs herein were acquired by them or their predecessors by patent from the federal government subsequent to March 3, 1877, defendant in 1936 moved for judgment on the pleadings. At the hearing of the motion and in support thereof defendant was permitted to introduce in evidence certified copies of the records showing the dates of entry and patents under which plaintiffs claimed title, all of which, except one (Clio Mill Site), were subsequent to the effective date of the Desert Land Act of 1877. The trial court took judicial notice of those records, and adopting the interpretation contended for by defendant of the decision in the California Oregon Power case, held that plaintiffs had no riparian rights and gave defendant judgment on the pleadings. Plaintiffs appealed, and the judgment was reversed by the District Court of Appeal of the Third District, with directions to proceed to trial on the issues presented by the pleadings. Williams v. San Francisco, 24 Cal.App.2d 630, 76 P.2d 182, 186. Thereafter a petition to have the appeal heard by the Supreme Court was denied. In thus reversing the judgment the District Court of Appeal expressly rejected defendant's interpretation of the decision rendered in the California Oregon Power case, and construed that decision as holding that the Desert Land Act of 1877 does not withhold or abrogate from conveyances of public lands in arid districts the riparian or other water rights conferred by the provisions of constitutions or statutes of the respective jurisdictions in which the land is situated, but it is implied that the grantee shall take title to the real property and to such water rights incident thereto as may be recognized and conferred by local laws, customs, and judicial decisions of the jurisdictions in which the lands are situated. In this regard the court in summarizing its conclusions said: "It is therefore not true, as the respondent contends, that the appellants in this case possess no water rights incident to their lands merely because their titles were acquired from the government by patents issued subsequent to the adoption of the Desert Land Act. As the Supreme Court has definitely held, they may be entitled to any water rights which have been recognized and fixed 'by the customs, laws, and judicial decisions of the state' of California." The District Court of Appeal then goes on to point out that "Riparian rights to the beneficial use of water upon lands in this state adjacent to rivers and streams have been recognized by law and are uniformly upheld by the California courts. 25 Cal.Jur., p. 1060, § 58 et seq.; article 14, § 3, Const. of Calif.; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 472, 52 P. 2d 585."; although they are now limited to the extent declared by the 1928 amendment to section 3 of article XIV of the state Constitution.

On this appeal the defendant again urges the adoption of its construction of the California Oregon Power decision. In this regard it is argued that for the several reasons set forth in its brief the District Court of Appeal of the Third District has not only misinterpreted the real effect of the decision therein, but has reached its conclusion by unsound reasoning, and that therefore its decision on this point should in effect be repudiated. Plaintiffs take the position that so far as this main question is concerned the decision rendered on the former appeal became the law of the case, and that therefore the trial court was and this court is concluded thereby. Whether or not that be true, we are in accord with the construction of the decision rendered in the California Oregon Power case by the District Court of Appeal, and adopt as our own the following portion thereof:

"In construing the application of the Desert Land Act to water rights of every nature incident to lands which were thereafter conveyed, the Supreme Court said that subject to prior vested water rights acquired by appropriation:

"'As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public *under the laws of the states and territories named.* * * * The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that *the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location.*'

"It may not be contended that Congress has not delegated and conferred upon the Legislatures of the various so-called arid states the power to fix and determine the grantee's water rights incident to land conveyed by the government under the Desert Land Act. In the sentence following the preceding quotation, the court said:

"'If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, *the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.*'

"There can be no question from the preceding quoted language of the Supreme Court but that the water rights of a grantee of arid land from the government carries with it the absolute authority of the state in which it is located to fix and determine the extent thereof by appropriate legislation, or by acknowledgment of rules and customs with respect thereto. The court specifically says in that regard:

"'*Nothing we have said is meant to suggest that the act,* as we construe it, *has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest.*'

"Finally, to foreclose the possibility of misconstruing the language of the opinion, the court says:

"'What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states,* including those since created out of the territories named, *with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.*'

"It is therefore not true, as the respondent contends, that the appellants in this case possess no water rights incident to their lands merely because their titles were acquired from the government by patents issued subsequent to the adoption of the Desert Land Act. As the Supreme Court has definitely held, they may be entitled to any water rights which have been recognized and fixed 'by the customs, laws, and judicial decisions of the state' of California."

Some of the criticisms directed against the soundness of the decision of the District Court of Appeal are based upon certain statements made therein concerning the riparian and appropriative water rights of the state of Oregon as they existed prior to and after the adoption of the Oregon Water Code in 1909. It is our conclusion, however, that under the law as laid down by the California Oregon Power case, a grantee of public land acquired since the effective date of the Desert Land Act of 1877 takes title to such water rights incident thereto as may be recognized and conferred by local laws, customs and judicial decisions of the state of their location. And as pointed out, California, by law, judicial decision and custom has recognized riparian rights to the beneficial use of the waters upon lands in this state adjacent to rivers and streams. It would seem to be quite immaterial, therefore, so far as this case is concerned, what laws or legal doctrines have been followed in the state of Oregon.

Most of the other criticisms are in the nature of arguments advanced in support of defendant's interpretation of the decision in the California Oregon Power case. But we have found nothing therein to convince us that the construction placed thereon by the decision rendered on the former appeal is unsound.

[2] Defendant's second major point is that even assuming that the lands of each plaintiff herein had riparian rights, the power projects proposed to be constructed by them could not rest upon the riparian doctrine, as the plaintiffs as a group do not have continuous ownership or control of all the riparian parcels involved in any one of their several proposed power projects. It will be noted, however, that the portion of the judgment upon which this contention is based is merely declaratory. It reads: "That the plaintiffs have not shown that they can as yet put such riparian rights to a beneficial use and jurisdiction is hereby reserved in this court to modify this judgment permitting the use of the waters of the Tuolumne River and its tributaries by the plaintiffs when upon application and notice by plaintiffs, or any of them, showing is made that they can put such waters to beneficial use." In other words, the court held merely that plaintiffs as riparian owners were not entitled to any water for power project purposes until a sufficient showing is made to warrant the court in so finding. It is evident, therefore, that for the present at least the defendant is in no way affected by that portion of the judgment.

The judgment is affirmed.

PETERS, P. J., and BRAY, J. pro tem., concurred.

56 Cal.App.2d 645

WILLIAMS v. WELLS FARGO BANK & UNION TRUST CO. et al.

Civ. 6700.

District Court of Appeal, Third District, California.

Jan. 14, 1943.

1. Partition ⚷77(1, 2)

As between a partition in kind or sale of land for division, the courts favor a partition in kind and do not compel a person to sell his realty against his will, except in cases of imperious necessity, and it is no objection to a partition in kind that some of the cotenants prefer a sale to a partition.

2. Partition ⚷77(1)

At common law and in equity, in proceedings for partition of land, the cotenants are entitled to partition in kind regardless of the difficulty and inconvenience of partitionment.

3. Partition ⚷77(4)

The burden of proof to establish the necessary requisites to a sale of land for division rather than a partition in kind, is on the party alleging the necessity and advisability of such sale.

4. Partition ⚷77(3)

A sale of land for division cannot be decreed merely to advance the interests of one of the owners, but before ordering a sale, the court must ascertain that the interests of all will be promoted, and that the land may vary in quality, locality and improvements and is not of uniform value, and that a partition in kind would require some of the shares to be of small area does not necessarily warrant a sale.

5. Partition ⚷77(3)

Generally, the test of whether a partition in kind will result in great prejudice to the owners of realty so as to require sale of the realty for division, is whether the value of the share of each owner on partition will be materially less than his share of the money equivalent that could probably be obtained from the whole.

6. Partition ⚷77(4)

Evidence did not support finding that rectangular half section could not be partitioned in kind without great prejudice to owners of undivided interests therein so as to require sale for division where section was nearly flat with a gentle uniform slope from west to east and a more gradual slope from north to south, only improvements consisted of a well, windmill, pump, and tank, and there was no evidence that a sale would make the aggregate value of the land exceed its value as divided and that a fair price could be secured by sale thereof.

7. Partition ⚷77(3)

That three different surveys for a canal had been made across a tract did not make partition in kind impossible where condemnation would probably bring a better price to the owners after partition in kind and defendants seeking sale of tract for division were the only probable bidders of the tract if it were sold.

8. Partition ⚷114(6)

In partition proceedings, costs or attorneys' fees may not be allowed until the final judgment is entered. Code Civ.Proc. § 796.

9. Partition ⚷114(6)

Findings supporting order for sale of realty for division improperly included allegation that services of defendants' attorney were and would be for the common benefit of the parties so as to authorize an award of fees to such attorney, since such fees should not be included in an interlocutory decree. Code Civ.Proc. § 796.

10. Partition ⚷114(6)

In partition proceeding, whether the services of the attorneys for either of the parties have been for the common benefit and the reasonable value thereof was required to be determined at the conclusion of the litigation at which time such fees might be included in the final judgment. Code Civ.Proc. § 796.

11. Partition ⚷114(5)

Services of attorney for plaintiff in contested partition proceeding were for the common benefit of the parties authorizing allowance of fees to such attorney in proportion to the respective interests of the parties therein. Code Civ.Proc. § 796.

◆

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Flora J. Williams against Wells Fargo Bank & Union Trust Company, a banking corporation, and others to partition real property. From a judgment ordering the property sold for partition, plaintiff appeals.

Reversed with instructions.

See, also, 17 Cal.2d 104, 109 P.2d 649.

Edwin H. Williams, of San Jose, for appellant.

George H. Johnston, of San Francisco, for respondents.

ADAMS, Presiding Justice.

Appeal from a judgment in an action for partition of real property.

Plaintiff, the owner of an undivided one-fourth interest in 310 acres of land in Merced County, brought this action praying for partition of said land between herself and defendant bank, the owner of an undivided three-fourths held in trust for Helen P. Lansdale. The bank and Mrs. Lansdale filed a joint answer alleging that the property could not be partitioned in kind without great prejudice to the owners, and after trial the court so found and ordered the property sold. Plaintiff appeals, contending that the evidence is insufficient to support such finding. The case is before us on a bill of exceptions, containing the testimony of but two witnesses, both of whom were called for defendants.

The land in controversy consists of a half section, excepting a ten-acre piece belonging to Shell Oil Company. It is rectangular in shape, a mile long and half a mile wide. It is nearly flat, with a gentle uniform slope from west to east and a more gradual slope from north to south. The land is used to raise barley, and when the action was brought was leased to R. J. Butts, who owns and farms adjoining lands. For years the custom has been to let it lie fallow one year and to take off the barley crop the next year. The stubble is pastured after the barley is harvested. The main county road runs along the eastern boundary of the tract, there is a right of way running along the southern boundary for three-quarters of a mile, and another county road contacts the northeast corner of the property. There are no buildings on the land, and the only improvements consist of a well, windmill, pump and tank in the northwest corner. Title to the property is free and clear of all liens and encumbrances.

Defendants claim that the property cannot be partitioned in kind because it is spotted in character, different portions thereof varying in value from $20 to $27 an acre; that three different lines have been surveyed across the property for the proposed canal of the Central Valley Water Project, and as yet no one knows which line of survey (if any) will be actually used when the canal is constructed; and that the land, considered as *dry farming land,* is not of sufficient size to permit it to be divided without greatly increasing the cost of farming the portions as units.

The rule in California, and generally elsewhere, is that partition in kind is favored by the law, and that a sale will be ordered only when it is necessary to prevent great prejudice to the owners. In Mitchell v. Cline, 84 Cal. 409, 418, 24 P. 164, 166, it is said: "Under the Code rule, the party asking for a sale instead of a partition has the burden of proving that a partition cannot be made without *great* prejudice to the owners." (Italics by the court.)

[1] It is said in 47 Corpus Juris 442, section 436: "As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of *imperious necessity.* It is no objection to a partition in kind that some of the co-tenants prefer a sale to a partition. * * *" (Italics ours.)

[2-5] In 40 Am.Jur. 72–74, it is said that at common law and in equity as well, in proceedings for the partition of land, the cotenants were entitled to partition in kind if they so demanded, regardless of the difficulty and inconvenience of partitionment; that the right to have the premises sold if they are of an impartible nature has been provided for by statute, but that the burden of proof to establish the necessary requisites to a sale rather than a partition in kind, is on the party alleging the necessity and advisability of such sale, that a sale cannot be decreed merely to advance the interests of one of the owners; and that before ordering a sale the court must ascertain that the interests of all will be promoted. It is also said that the generally accepted test of whether a partition in kind will result in great prejudice to the owners is whether the value of the share of each in case of a partition will be materially less than his share of the money equivalent that could probably be obtained for the whole; that because the land may vary in quality, locality and improvements and is not of uniform value, and if a partition in kind be made some of the shares will be of small area, does not necessarily warrant a sale. See 20 R.C.L. 773–774 to the same effect.

In East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999, a tract of land to be partitioned consisted of tide-land and upland, and it was contended that great differences in value existed between the different portions of the tract and therefore it could not advantageously be partitioned in kind. But the court said that the presumption is that land held in common tenancy can be equitably divided between the parties by allotting to each a tract in severalty equal to his interest in the whole, measured by value; that it is only where the contrary appears by the evidence that a sale may be ordered; and that the burden of proof rests upon him who contends for a sale to show that it appears by the evidence that a partition would prejudice the owners.

In Thompson Estate Co. v. Kamm, 107 Or. 61, 213 P. 417, 28 A.L.R. 722, property held in common consisted of city lots with store buildings upon them. Because the property could not be divided, one-quarter to three-quarters, without cutting a store in two, the trial court ordered sale. The Supreme Court, however, reversed the judgment, saying that it was most desirable that a division of the property be had and least desirable that a sale be made; that it was practically agreed in the evidence that there was no great demand for realty in the part of the city in which the land was situated, and that a sale would be at a sacrifice; that plainly it would be disadvantageous to sell the property on a dull market since both parties would suffer by such a proceeding; that the financial interest of the parties should receive care at the hands of the court, and that accordingly an adjustment proposed by a majority of the referees whereby certain of the lands were to be set off to each of the parties and owelty paid by one party to the other was reasonable and fair.

In Williamson Inv. Co. v. Williamson, 96 Wash. 529, 165 P. 385, the question was whether a lot 50 feet by 90 feet should be partitioned between the parties or sold. A building covered it and an adjoining lot but a wall separated them on the property line. The building on the land in controversy was shown to be very old, and one of the referees said that the property could be partitioned without any great prejudice, though you could as a rule get a better price for a 50-foot lot than a 25-foot one. There was evidence that the real estate market was then depressed, also that to cut the lot in two would reduce the aggregate value 25 to 35 per cent, though another witness said it would be a "toss-up" as to whether sale or partition would be advisable. The trial court decided in favor of a partition, and the Supreme Court affirmed, saying that courts still favor partition in kind rather than a sale; that an owner has the right to retain his investment in the form in which he has it so long as it can be done without great prejudice to his cotenant; that the power to convert real estate into money against the owner is an extraordinary and dangerous power and ought never to be exercised unless the necessity therefor is clearly established (Vesper v. Farnsworth, 40 Wis. 357); that a sale should not be ordered unless partition in kind cannot be made without material pecuniary loss, and that unless the interests of the parties owning the land will be promoted by the sale such sale should not be made except in cases of imperious necessity. That court cited East Shore Co. v. Richmond Belt Ry. and Mitchell v. Cline, supra, to the effect that there is a presumption that land held in common can be equitably divided and that the burden of proof to show great prejudice rests upon him who asserts it. It also said that the fact that the aggregate value of the halves would be somewhat less after partition than the value of the whole would not force one of the owners to change the form of his holding and compel a sale.

In Blanchard v. Cross, 97 Vt. 370, 123 A. 382, the court said that the law favors a partition in kind rather than a sale, and it must be shown that a sale will be for the benefit of all the owners; that the test is whether the aggregate value of the several parts will be materially less than the value if owned by one person, or his share of the money more than the value of his share of the land in case of partition.

In Chittenden v. Gates, 18 App.Div. 169, 45 N.Y.S. 768, 771, there was a decree ordering sale of "a long, narrow beach or tongue of sand, lying between the ocean and Jamaica Bay * * * containing about one thousand acres." In reversing this decree the appellate court said that it was difficult to see how property of any description could be more susceptible of division into two portions; that any possible difference in value of the lots arising from their proximity to the extreme point of the peninsula and the part adjacent to the mainland could be adjusted. But, if there should be any injustice likely to arise from inequality of values in actual partition, the New York Code, section 1587, provided that the court might in the final judgment, award compensation to be made by one party to the other for equality of partition. And in that case the court cited and quoted from Clason v. Clason, 6 Paige, N.Y., 541, 546, to the effect that a farm containing 370 acres of land must be very peculiarly situated to render it impracticable to divide it into three parts without great prejudice to the owners, especially where the court might decree a pecuniary compensation to be made by one party to the other for owelty of partition; and that a suitor who would urge such an objection to actual partition of farm lands would be almost unheard to speak.

In Pigeon River Lumber Co. v. McDougall, 169 Minn. 83, 210 N.W. 850, the Supreme Court reversed a decree of the lower court ordering a sale rather than a partition of the land involved in the action. It said that the evidence indicated that plaintiff was the only bidder in sight (it owning adjacent land which would be necessary for a power development), that the evidence did not disclose that any outside party was ready to bid at a fair price, and that if the lands were ever to be acquired by condemnation, partition in kind would be fairest, and better than a forced sale.

In Croston v. Male, 56 W.Va. 205, 49 S.E. 136, 107 Am.St.Rep. 918, interests in three irregular adjoining tracts belonged to three different groups of owners. Commissioners recommended a sale, stating that the tracts varied in value, one being timbered, one almost valueless, and the third consisting of a farm. A decree directing sale was reversed, the court saying that the commissioners had not reported that a division in kind would make the aggregate value of the several parcels less than the value of the property as a whole; that a sale should not be made except in cases of imperious necessity, and that forcible conversion of property into money should be avoided wherever possible.

[6] In light of the principles set forth in the foregoing cases we believe that a partition in kind of the property here involved should be ordered. There is no evidence that a sale will make the aggregate value of the land any greater than the value of the parcels into which it may be divided, and there is no evidence that if sold, anything like a fair price may be secured. On the contrary, according to the testimony of Mr. Lansdale, husband of the defendant Helen P. Lansdale, it would be hard to sell the land; that the only way you can get a tenant is if you are fortunate enough to find a tenant who owns and controls adjoining property and has his equipment and operations there. This would appear to limit possible buyers to the Lansdales who own adjoining land on one side, and Butts owning land on the other side. On the other hand, Lansdale testified that there had been no difficulty in finding a tenant for the land; and no reason appears why, if it is partitioned it could not be leased for barley land in two parcels as well as one. Obviously no disadvantage in this respect could result to Mrs. Lansdale, since it could as well be used in connection with their adjoining land as with the land of Butts; also it appears that the Lansdales are now utilizing water from the well on the premises by piping it to the Lansdale property, also that Lansdale has bought the pasturage on the tract for his cattle. Furthermore he said that he had advised his wife to purchase her interest in the land in the hope and expectation that it would become irrigated land by virtue of the construction of a canal by the Central Valley Water Project.

[7] It is contended by respondents that the fact that three different surveys for such canal have been made across the land make partition in kind impossible. We are not impressed with this argument. The fact that surveys have been made is no assurance that a canal will be built on the line of any one of them, or at all; and, if such future development should occur it would be of advantage to plaintiff to hold her share of the land in contemplation of same rather than to sell it where there are no buyers in sight except the Lansdales to whose advantage alone a present sale would result. As was said in the Pigeon River Lumber Company case, supra, where condemnation (for a dam site) would probably bring a better price to owners after partition in kind, a sale should not be ordered, particularly where the only probable bidder was the plaintiff in the action whose interests would be best served by a low price.

Appellant also contends on this appeal that there was no evidence justifying the finding of the trial court that the services of the attorney for defendants "are and will be for the common benefit of plaintiff and defendants," and no justification for its conclusion that fees should be allowed said attorney, when no allowance is made for plaintiff's attorney. Respondents in their brief do not attempt to justify the inclusion of the foregoing finding of the court; they merely say that until the case is concluded it is not possible to determine what portion, "if any," of the services of plaintiff's attorney have been for the common benefit of all parties. This must be equally true as to the services of defendants' attorney. There is no allegation in defendants' answer that the services of their attorney are or will be of the common or any benefit to plaintiff and defendants, and no evidence as to attorney's fees or services was introduced by the parties.

[8] Section 796 of the Code of Civil Procedure provides that the costs of partition, including reasonable attorney's fees expended by the plaintiff or either of the defendants for the common benefit, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. It is said in 20 Cal.Jur. 639, that costs or attorneys' fees may not be allowed until the final judgment is entered, and should not be included in the interlocutory decree.

[9-11] We conclude that the allegation that the services of defendants' attorney are and will be for the common benefit of plaintiffs and defendants has no place in the findings, that whether the services of the attorneys for either or both parties have been for the common benefit, and the reasonable value thereof is matter for determination at the conclusion of the litigation, at which time such fees may be specified and included in the final judgment. But in view of the decisions in Capuccio v. Caire in 207 Cal. 200, 207, 277 P. 475, 73 A.L.R. 8, and in 215 Cal. 518, 11 P.2d 1097, it cannot be said that none of the services of counsel for plaintiff were for the common benefit.

The judgment is reversed with instructions to the trial court to order partition of the property in kind according to the respective rights of the parties.

SCHOTTKY, J. pro tem., and THOMPSON, J., concurred.

56 Cal.App.2d 42

AIROLA v. GORHAM et al.

Civ. 12107.

District Court of Appeal, First District,
Division 2, California.

Dec. 10, 1942.

Hearing Denied Feb. 4, 1943.

1. Executors and administrators ⇨315(6)

Distribution by probate court to distributee of his father's and brother's estates was not "res judicata" of subsequent action by administratrix of distributee's mother for decree that property of estates of father and brother was held in trust for mother's estate because of oral promise of distributee when mother conveyed such property to him, that he would reconvey it to her.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Limitation of actions ⇨102(9)

On transfer of trust property to stranger, stranger becomes an "involuntary trustee", and statute of limitations ordinarily commences to run from date of transfer.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Trustee".

3. Limitation of actions ⇨102(9)

Where son, instead of reconveying realty to his mother as orally agreed, conveyed realty to his wife, she, though an innocent donee, took realty charged with son's fraud, so that "trust" was impressed on realty in her hands, and statute of limitations did not begin to run until son's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

4. Trusts ⇨110

Statements of son after conveyance of realty to him and his brother by their mother acknowledging that the rest of the family would ultimately have a share in the realty, though too indefinite to establish that son took realty subject to a trust, when coupled with express testimony of a trust under terms of which realty was to be reconveyed to mother, tended to prove both son's knowledge of and acquiescence in trust agreement.

5. Appeal and error ⇨996, 1012(1)

Inferences to be drawn from the testimony as well as the weight of the testimony, are for the trial court, and circumstantial as well as direct evidence will support a finding.

6. Trusts ⇨96

A promise need not be express to raise a trust, but silent acquiescence of grantee is sufficient where he has knowledge of grantor's intention.

7. Trusts ⇨96

Acceptance of deed from mother by son with knowledge that another son promised the mother that the sons would reconvey the realty to her, bound son, who did not make the promise to the promise previously made by the other son.

8. Evidence ⇨121(6)

Where deed from mother to sons was prepared and in mother's hands for execution, and she exhibited deed to granddaughter and asked for advice, testimony as to their conversation was admissible as a "verbal act" directly connected with the transaction. Code Civ.Proc. § 1850.

See Words and Phrases, Permanent Edition, for all other definitions of "Verbal Act".

9. Evidence ⇨269(1)

When the belief, feeling and mental state of a person at a particular time is material, evidence of such person's declarations indicative of his then mental state is admissible.

10. Evidence ⇨269(2)

In action by administratrix to have trust declared in favor of estate on ground that grantees agreed to reconvey realty to deceased, declarations of deceased concerning existence of trust were admissible to prove her state of mind that she did not believe that grantees had repudiated or intended to repudiate trust.

11. Trusts ⚷110

Judgment declaring that sons of deceased grantee held realty in trust for deceased's estate, on ground that she conveyed realty to sons in trust on their oral agreement to reconvey, was proper, though deceased had independent advice of third person, where at time of conveyance, deceased was 86 years old and reposed confidence in her sons.

12. Limitation of actions ⚷103(2)
Trusts ⚷365(2)

Neither statute of limitations nor laches began to operate as to voluntary constructive trust until repudiation of trust was brought home to beneficiary.

◆

Appeals from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action by Sarah Gorham Airola, as administratrix of the estate of Lucinda Gorham, deceased, against Frank E. Gorham and Dorothy L. Gorham for a decree that defendants held certain realty in trust for the plaintiff. From a judgment in favor of the plaintiff the defendants appeal.

Judgment affirmed.

Hearing denied; EDMONDS, J., dissenting.

Jos. H. Huberty, of San Andreas, and Harder & Missall, of Sacramento, for appellants.

Bush & Ackley, of Oakdale, for respondent.

DOOLING, Judge pro tem.

Separate appeals were taken by the two defendants from a judgment of the trial court decreeing that they held certain real property in trust for the plaintiff as administratrix of the estate of Lucinda Gorham, deceased. Appellant Frank E. Gorham is a son of the decedent, and appellant Dorothy L. Gorham is the widow of George G. Gorham, another son of the decedent. For convenience these two sons of decedent will be referred to in this opinion as Frank and George and the decedent as Lucinda.

Prior to March 27, 1928, the estate of the deceased father of Frank and George and of a deceased brother William were both in course of probate. Their mother Lucinda was entitled to succeed to all of the property of both estates. The trial court found that on or about March 27, 1828, Frank and George requested Lucinda to deed the property in both estates to them because this property, a large part of which was owned by her with them as tenants in common, was heavily incumbered and in danger of being lost and upon their promise that they would hold such property in trust for her and reconvey it to her as soon as pending business transactions involving said property, and upon which depended the saving of said property were completed; and that relying upon this promise Lucinda on March 27, 1928, executed and delivered a deed to such property to Frank and George. The trust found by the trial court to exist as a result of these facts is the type recently characterized by this court in O'Brien v. O'Brien, 50 Cal.App.2d 658, 123 P.2d 877, 878, as a "voluntary constructive trust" or a "positive, voluntary trust resting in parol."

The appeal of Dorothy L. Gorham is taken on the judgment roll alone and two points only are made for a reversal by her. 1. That the cause of action as to her is barred by the four-year statute of limitations; and 2 that the distribution of the property to George, whose successor she is, by the probate court in the two estates of his father and brother William is res adjudicata against Lucinda and her estate.

[1] The second ground is foreclosed by Parr v. Reyman, 215 Cal. 616, 12 P.2d 440, wherein the precise question was presented to the court and it was expressly ruled that a prior agreement with regard to the property of an estate is not merged in a decree of distribution so as to foreclose the enforcement of the agreement. Cf. Lamb v. Lamb, 171 Cal. 577, 581, 153 P. 913.

The first ground depends on the following facts: On March 4, 1936, George unconditionally delivered to a third person a deed conveying the property to his wife, to be delivered to her upon his death. George died August 1, 1936, and the deed was recorded August 10, 1936. This action was commenced on April 24, 1940. It thus appears that if the statute began to run on March 4, 1936, the date of the unconditional delivery of the deed, the action was not brought within the four-year period. The question is presented whether a voluntary trustee can start the statute of limitations running against the beneficiary of the trust by secretly delivering a deed to the property to a third person to hold until his death.

[2] It is unquestionably the law that upon the transfer of trust property to a stranger to the trust the transferee becomes an involuntary trustee and the statute of limitations ordinarily commences to run from the date of the transfer. Lezinsky v Mason Malt W. D. Co., 185 Cal. 240, 196 P. 884. However, there is a recognized exception to the general rule which is thus expressed in 25 Cal.Jur. 275: "In some circumstances, the currency of the statute commences, not at the time of the wrongful act by which the trust was created, but only at a subsequent date when the plaintiff became cognizant of the facts."

For applications of the rule to involuntary trusts see Wills v. Pauly, 116 Cal. 575, 582, 48 P. 709; Truesdail v. Lewis, 45 Cal.App.2d 718, 115 P.2d 218; Hillyer v. Hynes, 33 Cal.App. 506, 510, 165 P. 718.

This is also the rule in the case of fraudulent conveyances generally. Adams v. Bell, 5 Cal.2d 697, 703, 56 P.2d 208; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am.St.Rep. 314; Marshall v. Buchanan, 35 Cal. 264, 95 Am.Dec. 95. The transfer of trust property to a stranger being a conveyance in fraud of the beneficiary's rights should on principle follow the same rule. Indeed the rule is one of broader application and has been extended to cover other types of case. Huysman v. Kirsch, 6 Cal.2d 302, 311-313, 57 P.2d 908; Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093.

In Huysman v. Kirsch, supra, 6 Cal.2d at page 312, 57 P.2d at page 913, a malpractice case, the Supreme Court said: "The principle running through all these authorities, and approved by our decision, was that the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause."

[3] It seems to be the position of this appellant that since she had no knowledge of the trust she took the property from her husband innocently and without fraud on her part and that as to her the statute should therefore commence to run from the date of the deed's delivery. By making the conveyance of the trust property to his wife George was guilty of an active fraud. To start the statute of limitations running in favor of his wife before discovery of the fraud would work at least a constructive fraud on Lucinda. The wife, though an innocent donee, being the beneficiary of her husband's fraud, takes the property charged with the fraud so as to impress a trust upon it in her hands. Civ.Code, § 2243; Allen v. Meyers, 5 Cal.2d 311, 54 P.2d 450. To hold that where the gift was made secretly to an innocent donee the statute would at once commence to run might well result in barring the cause of action before its discovery by the defrauded party. We are satisfied that this is not the law and that the statute under the facts of this case did not commence to run until the death of George (Barritt v. Barritt, 132 Cal.App. 538, 543, 23 P.2d 54) which occurred within four years of the commencement of the action.

Frank's appeal is brought to this court on a reporter's transcript and in addition to the claim of res adjudicata, already disposed of in the consideration of the other appeal, he states and argues as grounds for reversal the matters hereinafter discussed:

1. That the evidence does not support the finding of a trust as to Frank.

The evidence relied upon in this regard is undoubtedly stronger against George than against Frank. It consists almost entirely of evidence of conversations had with Lucinda, George and Frank by the various witnesses. Of the statements of these three persons so given in evidence we will quote only those which we have determined were properly admissible to prove the existence of the trust.

The witness Mrs. Airola testified to a statement made by George before the deed was signed: "George told me they had a deed made out to get Mother to sign, for George and Frank, for to get the property straightened out. She would have to deed to them and get it in their name to get that property straightened out, and then they would turn it back to her after the business was settled. Then they would turn it back to her, and he wanted to know if she would sign it, and I told him he would have to talk to her."

The witness Miss Questo testified to the following conversation with Lucinda, her grandmother, at a time when the deed had been prepared, but before its execution: "My grandmother asked me if I would look at the deed and tell her if she should sign it, and I told her I could not tell her whether she should sign the deed or not, but that she was signing away all her property when she signed it, and she told me that my uncles were to make an agreement protecting her interest in the property, and the next time my uncle went to Stockton, he was to have the agreement made out."

The testimony of the same witness as to what occurred when Lucinda signed and delivered the deed to Frank, George not being present: "My grandmother told him (Frank) that she had asked me whether she should sign the deed or not, and she told him about what I had told her about signing the deed, and then he—My uncle Frank—He said he didn't know much about it, but uncle George said the deed would have to be signed, and it would not take long until everything was cleared up. * * * That was before the deed was signed."

Various statements testified to have been made by Frank to other members of Lucinda's family after the property had been deeded to George and Frank, of which the following are typical:

"Uncle Frank was going to see the Tri-State, and he mentioned that they might have to sell the cattle or the lower ranch, and my Mother said, 'Is it going to take everything to settle up the bills?' Uncle Frank said, 'No, I think there will be a little something left for all of us.'"

"Well, in the Post Office, he was talking about the property—sickness—one thing another, and he said, 'When everything is settled up, we will get something but there won't be any of us rich.'"

"He said, 'When everything is settled up everybody will get what is coming to them.'"

"Don't get riled up. You girls will all have a share in the property."

[4, 5] It will be observed of this testimony that as to George there is direct evidence in his statement as testified to by Mrs. Airola and the conversation with Lucinda testified to by Miss Questo to support a finding that George promised Lucinda to hold the property in trust for her and that she deeded the property in reliance upon that promise. As to Frank while there is no direct evidence that he made a similar promise to Lucinda we are satisfied that from the evidence the court could reasonably draw the inference either that he knew of and impliedly agreed to the promise made by George to Lucinda in accepting the deed, or that he made George his agent to arrange with Lucinda for the transfer and afterwards recognized and ratified George's promise that they would hold the property in trust. These inferences find support in Frank's statement just before the execution of the deed: "He said he didn't know much about it, but uncle George said the deed would have to be signed, and it would not take long until everything was cleared up." This not only amounted to a statement recognizing George as the negotiator with Lucinda, but the words, "it will not be long until everything is straightened up" are meaningless if Frank understood that the deed from Lucinda was to be absolute and become meaningful only if Frank knew of and acquiesced in the promise previously made by George to hold the property in trust. Frank's subsequent statements acknowledging that the rest of the family would ultimately have a share of the property, while too indefinite in themselves to establish that he took the property subject to a trust, when coupled with the express testimony of the trust, tend to prove both his knowledge of and acquiescence in the trust arrangement. Taylor v. Morris, 163 Cal. 717, 127 P. 66; Cooney v. Glynn, 157 Cal. 583, 589, 590, 108 P. 506; Taylor v. Bunnell, 77 Cal.App. 525, 533, 534, 247 P. 240. Not only the weight of the testimony but the inferences to be drawn therefrom are for the trial court and circumstantial as well as direct evidence will support a finding. Silva v. Gustine Creamery Co., 217 Cal. 146, 149, 17 P.2d 699; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; Hall v. Susskind, 120 Cal. 559, 563, 53 P. 46; Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 617, 98 P.2d 239.

This case falls well within the provisions of Civil Code, section 1589: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

[6] The rule is thus expressed in 65 C.J. 472: "The promise need not be ex-

press in order to raise a trust, silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction."

[7] The acceptance of the deed by Frank with knowledge of George's promise to Lucinda, and the evidence will support the inference that this is what occurred, was enough to bind him to the obligations previously assumed by George. Simons v. Bedell, 122 Cal. 341, 346, 347, 55 P. 3, 68 Am.St.Rep. 35.

2. That the testimony of Miss Questo as to Lucinda's conversation at the time that Lucinda showed her the deed and asked her advice about executing it was hearsay and improperly admitted over this appellant's objection.

[8] At the time of this conversation the deed was already prepared and in Lucinda's hands for execution. She exhibited the deed to her granddaughter and asked her advice about its execution. The conversation was a verbal act directly connected with the pending transaction. It falls within an exception recognized both by our statutory law and the decisions following the statute. Code Civ.Proc. § 1850; Sethman v. Bulkley, 9 Cal.2d 21, 68 P.2d 961; Rodriguez v. Rodriguez, 69 Cal.App. 399, 231 P. 375; Simons v. Bedell, supra, 122 Cal. at pages 349, 350, 55 P. 3.

The case of Sethman v. Bulkley, supra, is so apposite as to justify an extensive quotation from pages 24, 25 of 9 Cal.2d, page 962 of 68 P.2d:

"The principal contention of the defendants on this appeal is that the evidence is insufficient to support the finding of the trial court that the mother had prior to her death made said transfers of real and personal property to the defendants upon their promise to pay to the plaintiff the sums of money mentioned in said letter. This contention rests for support mainly upon the alleged error of the trial court in admitting in evidence the letter of February 18, 1926. If said letter was properly admitted in evidence—which the defendants do not concede—it is contended by the plaintiff that it furnishes ample evidence to support the findings of the court in the respect just mentioned.

"As we have seen, the letter and three transfers of property by the mother to her two daughters bore the same date. It is presumed that a writing is truly dated. Subdivision 23, § 1963, Code Civ.Proc. There is no evidence in this case to overthrow this presumption. The uncontradicted evidence, therefore, in this case is that the mother wrote this letter, in which she stated that she had arranged with her daughters to make the payments called for in the letter, at the date on which she conveyed to her two daughters the two pieces of real property and assigned to them a mortgage given to secure a promissory note in a substantial amount. From these proven facts, the trial court drew the inference that said letter was written and said transfers of property were made as one transaction, and that the letter was admissible to show the true intent and purpose of the parties involved therein. As a part of the same transaction, the letter was admissible under the res gestæ rule which, as stated in section 1850, Code of Civil Procedure, is as follows: 'Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction.' The fact in dispute in this action is whether the mother arranged with her daughters that upon her death they would pay to their brother certain sums of money. The letter expressly states that such an arrangement had been made by her with her daughters. It was, therefore, evidence of the fact in dispute, and was admissible for the purpose of proving that fact. It is true that the letter was not delivered, and was left by the mother in her safe deposit box, where it was found in a sealed envelope with her will immediately after her death. The fact that the letter was not delivered before the death of the writer did not destroy its admissibility as part of the res gestæ or render it insufficient as proof of the statements therein contained. Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 P. 348. With this evidence properly admitted in evidence, the least that can be said in favor of the defendants' contention that there is a lack of evidentiary support of the findings is that the evidence as a whole upon the issue involved is in conflict, and that the trial court's conclusion is final upon appeal."

This appellant seeks to distinguish the holding in the Bulkley case from the facts of this case on the ground that in the Bulkley case the letter was written on the same day as the execution of the deeds, whereas the conversation here in question took place a day or two before Lucinda executed the deed. The suggested distinction in our judgment is not sound. The conversation clearly "formed a part of the transaction" within the meaning of Code of Civil Procedure, section 1850. It not only related to the execution of the deed, but the deed was already in Lucinda's hands for execution. She was then in the very process of deciding whether she should execute it or not. It would be sacrificing substance to form to hold that if the conversation were held on the same day as the execution of the deed it would fall within the rule of the Bulkley case, but because it took place a day or two in advance of the execution it falls without that rule. The proper inquiry is not whether the conversation was contemporaneous with the physical execution of the deed, but whether it was a part of the transaction culminating in its execution. From the time the deed was delivered to Lucinda with the request that she execute it and while she was weighing in her mind the wisdom of its execution, the transaction culminating in the execution was in progress. Such is the logical conclusion from Rodriguez v. Rodriguez, supra, 69 Cal.App. at page 402, 231 P. at page 376, where the conversation in question took place the day before the execution of the deed, this court saying: "It will be noted that those declarations were made on the day before the deed was made, but it will also be noted that the declarations were made by the deceased at the very time that he was engaged in arranging the transfer which is in litigation. The court did not err in receiving such declarations in evidence."

Parenthetically, it may be remarked, that George's statement to Mrs. Airola, made after the preparation, but before the execution of the deed, equally falls within this rule of evidence.

[9] It is useless for appellant to argue to an intermediate court that Sethman v. Bulkley is out of harmony with earlier decisions. It is the latest expression of our Supreme Court on the subject, and we are bound to follow the rule of evidence therein announced. However, even accepting the limitation on this rule of evidence, contended for by appellant, the evidence of this conversation was properly admitted. That limitation is well expressed in Bridge v. Ruggles, 202 Cal. 326, 330, 331, 260 P. 553, 555: "It is a well settled exception to the hearsay rule that, when the belief, feeling, and mental state of a person at a particular time is material to the issue, evidence of such person's declarations indicative of his then mental state are admissible, and it is immaterial whether or not such declarations were made in the presence of the adverse party or what the character of the litigation may be so long as evidence of such state of mind is material to the issue. [Citing cases.] Such evidence is admissible, not to prove the truth of the statements made, for which it is incompetent, but for the purpose of supporting the issue to which proof of state of mind is material."

Even if evidence of the statement made to her granddaughter by Lucinda "that my uncles were to make an agreement protecting her interest in the property" was not admissible as evidence of the fact, it would be none-the-less admissible to prove Lucinda's state of mind, her understanding of and reliance upon the agreement of George and Frank, otherwise proved by evidence of their conduct and declarations.

[10] 3. That evidence of declarations made by Lucinda in derogation of her deed and after its execution were improperly admitted.

Among other defenses urged were laches and the statute of limitations. Material to these defences was the question of whether any repudiation of their trust by George and Frank had been brought home to Lucinda. To prove her state of mind, that she did not believe that George and Frank had repudiated or intended to repudiate the trust assumed by them, declarations of the existence of the trust were competent and material under the rule of Bridge v. Ruggles, quoted supra. The record is clear that this evidence was in fact admitted only for the limited purpose of proving Lucinda's state of mind.

[11] 4. That Lucinda had the independent advice of Miss Questo as evidenced by the testimony of the conversation between them prior to the execution of the deed.

The trial court found: "That at all times prior to, and at the time of the execution and delivery of the aforesaid deed from Lucinda Gorham to her said sons, Frank E. Gorham and George G. Gorham, the most confidential relations existed between Lucinda Gorham and her aforesaid sons, and said Lucinda Gorham reposed the greatest confidence and trust in her said sons, advising with them on business affairs, depending upon them for the protection of her interests, and trusting and believing that her said sons would deal fairly and justly with her in all things and would take no advantage of her."

The truth of this finding is not disputed and it finds ample support in the record. Lucinda at that time was eighty-six years old, an age when confidence is more likely to be reposed in members of the family.

This point is fully answered by the following quotation from Grider v. Maniscra, 11 Cal.App.2d 355, 357, 53 P.2d 982, 983: "Nor is respondent's claim to be defeated by the fact that she procured independent advice from her attorney before making the transfers. Her legal advisor warned against the prospective alienation of her properties, but in spite of this and, as she claimed, at the insistence of her daughter and granddaughter, she executed and delivered the conveyances. It has been held that the mere fact that independent advice was sought and given cannot of itself validate a deed given where fraud and undue influence motivated the transfer, but is merely a circumstance to be considered by the court in connection with other facts."

5. That the action is barred by laches and the statute of limitations.

[12] This being a voluntary constructive trust neither the statute of limitations nor laches would begin to operate until its repudiation was brought home to the beneficiary. O'Brien v. O'Brien, 50 Cal. App.2d 658, 660, 123 P.2d 877; Chard v. O'Connell, 48 Cal.App.2d 475, 480, 120 P.2d 125; England v. Winslow, 196 Cal. 260, 272, 237 P. 542; Cooney v. Glynn, 157 Cal. 583, 589, 108 P. 506; Taylor v. Morris, 163 Cal. 717, 725, 127 P. 66.

There is evidence of continuing declarations of both Frank and George in recognition of the trust. One witness testified that in 1935 she heard George tell Lucinda: "It won't be long now, Mother, until everything will be straightened up and the property will be deeded back to you."

Something is attempted to be made of earlier declarations of Lucinda that the boys had not kept their promise to deed the property back to her. However the weight and effect of this evidence was for the trial court. The trial court may well have concluded that subsequent promises made to Lucinda satisfied her that her sons had not repudiated their trust and had every intention of carrying it out in good faith.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

CAMINETTI v. EDWARD BROWN & SONS et al.

Civ. 12141.

District Court of Appeal, First District, Division 2, California.

Jan. 11, 1943.

Hearing Granted March 11, 1943.

1. Appeal and error 🔑607(1)

Appellant in addition to filing notice of appeal, requesting a transcript, and arranging for reporter's compensation, was also required to file reporter's transcript within proper time. Code Civ.Proc. §§ 953a, 953b.

2. New trial 🔑117(1)

One moving for new trial on ground of the death or disability of reporter, must act with diligence. Code Civ.Proc. § 953e.

3. Appeal and error 🔑607(1)
Mandamus 🔑57(1)

Where appellant was unable to obtain transcript, appellant could demand that reporter complete and file transcript, secure order of trial court directing reporter to prepare and file transcript, or file a petition for writ of mandate to compel reporter to prepare and file transcript. Code Civ.Proc. § 953a.

4. New trial 🔑22

Where appellant who was unable to obtain transcript from reporter within time allowed because reporter was busy reporting another action and was ill, and appellant did not obtain extensions of time for filing of transcript until after time had expired on several occasions, appellant was not entitled to a new trial. Code Civ. Proc. §§ 953a, 953b, 953e.

5. Appeal and error 🔑760(1)

District Court of Appeal would not consider appellant's point that trial court erred in construing a certain statute, where appellant neither quoted nor gave any reference to any passage in record showing that such statute was involved. Code Civ. Proc. § 953c; Civ.Code, § 2344.

6. Appeal and error ⚿905

Where record did not present appellant's contention that statute was improperly construed by trial court, District Court of Appeal assumed that statute was not improperly construed, since trial court's ruling was presumptively correct. Civ. Code, § 2344.

7. Appeal and error ⚿607(1)

The fact that defendants appealed after plaintiff appealed, did not "waive" any objections by defendants to plaintiff's delay in filing transcript.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

◆

Appeal from Superior Court, City and County of San Francisco; Benjamin C. Jones, Judge assigned.

Action by A. Caminetti, Jr., as insurance commissioner, etc., against Edward Brown & Sons and others to recover a certain sum and interest, wherein the defendants filed a cross-complaint. From an order denying plaintiff's motion for a new trial, the plaintiff appeals.

Order affirmed.

Hester W. Webb, of San Francisco, for appellant.

Arthur B. Dunne, Elden C. Friel, and Dunne & Dunne, all of San Francisco, for respondents.

STURTEVANT, Justice.

This is an appeal from an order denying the plaintiff a new trial and terminating proceedings in the preparation of a transcript on appeal.

Prior to January 12, 1933, Union Indemnity Company, a corporation organized under the laws of the State of Louisiana, was transacting a general insurance business in the State of California. The defendant Edward Brown and Sons, a corporation, was carrying on a general agency insurance business. Under certain written instruments the latter was constituted the agent of the Union Indemnity Company. The transactions involved large sums of money. Thereafter the Union Indemnity Company became insolvent. In an action, No. 240815, the Superior Court of the State of California in and for the City and County of San Francisco, entered its decree that the business of the Union Indemnity Company, in this state, be liquidated by the Insurance Commissioner of the State of California. Thereafter the Insurance Commissioner entered upon the discharge of the trust imposed on him under and by virtue of the terms of said decree. Thereafter and prior to the commencement of this action, A. Caminetti became the duly appointed and acting Insurance Commissioner of the State of California and was substituted in said action. On January 11, 1936, the Insurance Commissioner commenced an action, No. 263383, against the defendants Edward Brown and Sons et al. The complaint in said action was pleaded in five separate counts. Said counts were but different statements of a claim to recover $11,702.29 with interest. Thereafter the defendants appeared and filed an answer. They denied the material averments contained in the plaintiff's complaint and in addition thereto they filed a cross-complaint claiming the sum of $91,743.52. Later the defendants filed an amended cross-complaint. It contained two counts. In those counts the defendants sought to recover five separate sums which they claimed were owing from Union Indemnity Company. The plaintiff answered the amended cross-complaint. Prior to the trial the plaintiff filed an amended complaint and counsel stipulated that the answer to the original complaint should stand as an answer to the amended complaint. The issues presented by said pleadings were heard by the trial court sitting without a jury. The trial court made findings in favor of the defendants which specifically indicated the items allowed and those disallowed. The plaintiff made a motion for a new trial. On the hearing of the motion the trial court reached the conclusion that one item, $15,000, was improperly included in the judgment. Accordingly it made an order modifying its judgment entered November 25, 1939 and it now stands in the sum of $24,267.31. Thereafter the plaintiff served and filed a notice of appeal from the said judgment. The defendants also served and filed a notice of appeal.

The plaintiff's notice of appeal was filed February 16, 1940; the defendants' notice of appeal was filed February 17, 1940. On June 11, 1941 the plaintiff filed a notice of intention to move for an order vacating and setting aside the judgment and granting a new trial. One of the grounds of that motion was "* * * (3) Written notice of appeal and request for the preparation of the transcript in accordance with the provisions of section 953a of the Code of Civil Procedure was filed on February 16, 1940; because of the illness of Harry O. Williams, the official shorthand phonographic reporter who reported all the testimony given during the trial, whose illness has and will hereafter continue to disable and prevent him from making a full, true and correct transcript of the testimony given, and the inability of other reporters to read the shorthand notes of said Harry O. Williams it is impossible to prepare a full, true and correct transcript of said testimony. * * *" On the same day defendants served and filed a notice of motion to terminate proceedings. The plaintiff's motion and the defendants' motion came on for hearing at the same time. Both were supported by affidavits, the material averments of which will hereinafter be noted. On July 19, 1941 the trial court made a finding in effect that the plaintiff had not diligently proceeded to obtain a reporter's transcript and thereupon denied the plaintiff's motion for a new trial. From that order the plaintiff appealed and said appeal is the one that is now before us. The plaintiff states the question involved to be as follows: "Did the trial court err in refusing to grant appellant's motion for a new trial made under section 953e of the Code of Civil Procedure and in ordering termination of proceedings for preparation of the transcript?" We think the trial court did not err.

On February 16, 1940 the plaintiff filed his notice of appeal and request for a transcript. Under the statute, unless the time was extended by order of court, said transcript should have been filed on or before March 7, 1940. On that date the transcript was not filed. If an extension of time was needed the statute (Code Civ. Proc. § 953a) provides that the reporter should file an affidavit with the court and serve the parties at least three days before applying for such order. No such affidavit was made, served, or filed at any time. However an order was made March 7, 1940 purporting to extend the time twenty days. Thereafter fourteen other orders were made. Between the due date and the date of the order at times there was an hiatus during which time there was no protecting order. Between December 2, 1940 and February 3, 1941, there was no order. But on April 7, 1941 an order covering said time was made and filed.

The only excuse tendered is as follows: The attorney for the plaintiff in her affidavit averred that "in March, 1940" she was told by the reporter's typist that Mr. H. O. Williams, the court reporter, was reporting a case, herein called the Pacific States case. When that work commenced, how long it continued, or how long it was expected to take, does not appear. Nor does it appear that Mr. Williams could not have substituted others in his place to report the Pacific States case. "In October, 1940" affiant was advised that Mr. Williams was still reporting said case; "in October, 1940" she was advised Mr. Williams had suffered a severe heart attack; "in February, 1941" she was advised that Mr. Williams was still in the hospital; on April 14, 1941 she was advised Mr. Williams was unable to complete the transcript. Later said attorney learned that the trial of the Pacific States case recessed April 11, 1940 until July 16, 1940. She also learned that in May, 1940 Mr. Williams was busy taking depositions in McDonald v. Bank of America. Down to June 16, 1941 the plaintiff never spoke to the court reporter about the delay. Plaintiff communicated at times with the reporter's typist. What authority the typist had in the premises does not appear. During the same period of time plaintiff never applied to the trial court for any order directing the reporter to file the transcript.

[1] The plaintiff claims that he was bound (1) to file a notice of appeal; (2) to request a transcript; (3) to arrange for compensation of the reporter and nothing more. (Code Civ.Proc. §§ 953a, 953b.) That claim is too narrow. It could have been made with the same force if the delay had been ten years. But such is not the law. Dorcy v. Brodis, 153 Cal. 673, 675, 96 P. 278; Clemmens v. Clemmens, 13 Cal.App.2d 651, 652, 57 P.2d 529. In the case last cited, on page 652 of 13 Cal.App.2d, on page 530 of 57 P.2d, the court said: "Here was a long delay in the proceedings for preparation of the reporter's transcript. The spirit of the law is in favor of early appeals and against delay. We cannot say that in making

the order the trial court exceeded the bounds of reason; all the circumstances before it being considered."

Prior to 1931 the trial court would not have had jurisdiction to grant plaintiff's motion on the grounds stated. Diamond v. Superior Court, 189 Cal. 732, 210 P. 36. In the year mentioned section 953e was enacted. It is as follows: "When it shall be impossible to have the phonographic report of the trial transcribed by a stenographic reporter as provided by section 953a of this code because of the death or other disability of a reporter who participated as a stenographic reporter at the trial, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been or is to be taken and to order a new trial of the action or proceeding." A similar action was before the court in Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 18 P.2d 82. In construing said section, on page 665 of 128 Cal.App., on page 83 of 18 P.2d, the court said: "There is no intimation or suggestion that there is imposed upon the court a duty to grant a new trial. The words 'shall have power' are not equivalent to 'must.' We are of the opinion therefore that the statute under consideration vests in the trial court jurisdiction to entertain a motion for a new trial under the circumstances herein appearing, and a discretion to grant or refuse such motion. Nor is it a violent assumption that the discretion thus conferred is a wide discretion. The granting or denial of motions for new trial generally is a matter in which the trial court is vested with so wide a discretion that its abuse must be made clearly to appear before an appellate court is warranted in disturbing its action. In the instant case the trial court had heard all of the evidence produced during the trial, and upon the evidence thus presented had arrived at a decision. It would be anomalous, at least, to anticipate that the court should arrive at a different result upon a retrial where, so far as appears, the evidence would be identical with that which had theretofore been presented. Under the circumstances disclosed by the record, we are of the opinion that no abuse of discretion was committed by the trial court in denying appellant's motion for a new trial." In Kroeker v. Jack, 51 Cal.App.2d 272, at page 274, 124 P.2d 619, at page 620, the court said: "There may be an occasional hardship in denying a motion for a new trial in a case such as this. On the other hand, an injustice may easily be worked if the rule were otherwise than to vest a wide discretion in the trial court in passing upon such a motion. Every presumption is in favor of the fairness and regularity of the proceedings in the trial court which led to the judgment. The party in whose favor the judgment is rendered is entitled to the benefit of those presumptions and should not be forced to reestablish his claim unless it is clear that the trial court abused its discretion in denying the motion. Taking the entire record in this proceeding into consideration we do not believe it can be held that the denial of the motion by the trial court was an abuse of discretion."

The plaintiff attempts to excuse his delay on two grounds. One ground is that Mr. Williams, the court reporter, was busy reporting another action, hereinafter called the Pacific States case. That is not a legal excuse. O'Banion v. California C. P. Growers, 109 Cal.App. 328, 292 P. 975. Furthermore, upon proper demand Mr. Williams should have substituted someone in his place in the Pacific States case and prepared the transcript in this action. The other ground involves the health of Mr. Williams. As early as October, 1940—less than seven months after plaintiff had requested a transcript—the latter was informed that Mr. Williams had suffered a heart attack. For that attack Dr. Robert H. Miles attended him, commencing June 13, 1940 and continuing until the 23d day of June, 1941. In his affidavit made on the date last stated Dr. Miles averred: "In my opinion he has not been able to do any work during the course of his illness, and he is unable at the present time to complete unfinished work." It thus appears that as early as October, 1940, when the plaintiff's attorney was informed of Mr. Williams' illness further inquiry would have shown the necessity of making the motion which he delayed to make until June, 1941.

[2, 3] In view of the rule that the moving party must act with diligence, when the plaintiff was first informed of the delays of the court reporter he had three remedies. Harris v. Burt, 47 Cal.App. 480, 190 P. 1058. The first was to make a demand upon the reporter to complete and file the transcript; the second was to secure an order of the trial court di-

recting the reporter to prepare and file the transcript; the third was to file a petition for a writ of mandate to compel the reporter to prepare and file the transcript. But in the instant case the plaintiff, the appellant in this action, did not attempt to exercise any one of those remedies.

The plaintiff states that he was "* * * entitled to rely on court orders extending reporter's time to prepare and file transcript." The answer is he did not do so. The record shows an hiatus on five different occasions. That is, there was at one time no outstanding court order for twenty-two days. Others respectively in length two days, twenty-nine days, sixty-four days, and three days. Furthermore, neither party saw any one of said orders until about the date of plaintiff's motion and neither party knew until that time that said orders were not based on any affidavit whatever.

[4] Again the plaintiff contends that the delay was caused solely by an officer of the court. Of course that is not the fact. When on March 7, 1940 the plaintiff was not served by the reporter with a copy of his affidavit the plaintiff was put on notice of the noncompliance with the provisions of section 953a of the Code of Civil Procedure, and further inquiry would have informed him of the facts. He did nothing to protect himself. He was therefore not without fault. Under those circumstances he may not rely on the derelictions of court officers. 4 C.J.S., Appeal and Error, § 869, p. 1374. Again the plaintiff contends that he was entitled to rely on the representations made by the reporter's transcriber who was employed by him and represented him in this case. We think it is sufficient to state that he made no attempt to introduce any evidence showing the authority of the transcriber.

[5, 6] The plaintiff contends that the trial court, during the trial of the basic action, erred in construing and applying to the facts of the case the provisions of section 2344 of the Civil Code. We find no merit in that contention. That contention was not made on the hearing of plaintiff's motion in the trial court. In support of his motion the plaintiff presented the affidavit of his attorney and he called and examined two witnesses, the assistants of the court reporter. Neither in the affidavit nor in the testimony of those two witnesses does any fact appear which purports to state what occurred on the trial of the basic action. In presenting plaintiff's motion for a new trial the parties stipulated that all the records and papers on file in the basic action should be admitted in evidence. They are contained in the transcript but are not helpful in disposing of the contention we are now discussing for two reasons. In the first place the plaintiff neither quotes nor gives any reference to any passage showing that section 2344 of the Civil Code was involved on said trial. If such passages were contained in said record he should have done so. (Code Civ.Proc. § 953c.) On the record as made a court of review will not consider the point. Town of St. Helena v. Merriam, 171 Cal. 135, 137, 152 P. 299. In the second place we have examined said record and we find nothing which necessarily presents the contention which the plaintiff now makes. As the trial court's ruling was presumptively correct, in support of said ruling we must assume no statute was improperly construed by the trial court.

[7] As recited above, on February 16, 1940 the plaintiff appealed from the judgment rendered November 21, 1939 and on February 17, 1940 the defendants also appealed. Calling attention to those facts the plaintiff contends the defendants waived any objections to the said delays. We think not. The mere fact the defendants took an appeal did not show an intention to waive any right. In the absence of evidence to show such intention there was no waiver. Howell v. Pedersen, 41 Cal.App. 45, 48, 181 P. 674. As each party appealed, each was an actor and each was bound to act with diligence in perfecting the appeal taken by such party. Dorcy v. Brodis, 153 Cal. 673, 675, 96 P. 278. The plaintiff relies on Campbell v. Deville, 163 La. 575, 112 So. 491. But that case was based on a statute of Louisiana that is not similar to the statute above mentioned.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

BORROUGHS v. McCOLGAN, Franchise Tax Commissioner.
Sac. 5458.

Supreme Court of California.
Jan. 22, 1943.

As Modified on Denial of Rehearing
Feb. 19, 1943.

1. Taxation 🔑104

The provision of income tax law that income of trust which is distributable to grantor or may be distributed to him in his discretion shall be taxable to him is not concerned with what is in fact done under trust agreement but with what might have been done thereunder. Gen.Laws 1937, Act 8494, § 12(h).

2. Taxation 🔑104

Where taxpayer transferred stock to himself as trustee for benefit of his minor children and reserved right to use trust income for support of children during their minority, the trust income was subject to state tax as "income" of taxpayer, even though no part of income was used during taxable year for maintenance of the children, since it might have been used to discharge taxpayer's legal obligation to support children. Gen.Laws 1937, Act 8494, §§ 7(a), 12(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Income".

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Joseph N. Borroughs against Charles J. McColgan as State Franchise Tax Commissioner to recover amount paid under protest as state income tax. From an adverse judgment the defendant appeals.

Reversed.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Valentine Brookes, Deputy Atty. Gen., for appellant.

Fitzgerald, Abbott & Beardsley and M. W. Dobrzensky, all of Oakland, for respondent.

CURTIS, Justice.

During the month of December, 1934, plaintiff, John N. Borroughs, transferred a number of shares of stock in the Oakland California Towel Company to himself as trustee, for the benefit of his two minor children. The trusts were declared to be irrevocable and were to terminate on the death of the beneficiaries or when they became thirty years of age. The declaration of trust provided that all dividend and income received from said shares of stock "now are and shall become the absolute property of my said children." It further provided that discretion is vested in the trustee to accumulate the income from said property during the minority of his said children "and to use so much of said income for the education, support, maintenance and amusement of each of said beneficiaries, as said trustee shall in his discretion determine."

During the year 1935, the trustor plaintiff herein chose to accumulate the entire income from the trust property, and he supported his two minor children, the beneficiaries named in said declaration of trust, through other means. The defendant, Charles J. McColgan, as Franchise Tax Commissioner of this state, was of the opinion that as the income from the trust property could be used for the support of the children of plaintiff, the father of said children, such income was taxable as income of the plaintiff; and accordingly assessed a tax against plaintiff on said income. The tax so assessed was paid by plaintiff under protest, and this action was instituted by him for the recovery of the amount of money so paid. Defendants filed a demurrer to the complaint in said action, which was overruled, and judgment thereafter was given by the trial court in favor of plaintiff, from which judgment the present appeal was taken.

The legal question presented on the appeal we think is fairly stated by the respondent as follows: "Is the income of an irrevocable trust taxable to the grantor under the Personal Income Tax Act of 1935 where the trust agreement names the grantor as trustee and provides that in the trustee's discretion the trust income may be used for the education, support, maintenance and amusement of the beneficiaries, grantor's minor children, but where none of the trust income has been so used?"

The appellants contend that both under section 7(a) and section 12(h) of the California Personal Income Tax Act (Stats. of 1935, p. 1090, Deering's Gen.Laws 1937, p. 3907, Act 8494), the income from said trust property is taxable to the respondent. Section 7(a) of the act reads as follows:

"Gross income includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, and includes any salary, wages or compensation of any officer or employee of this State, or any political subdivision, district or municipality thereof."

Section 12(h) in part reads:

"Where any part of the income of a trust—

"(1) Is, or in the discretion of the grantor * * * may be held or accumulated for future distribution to the grantor; or

"(2) May, in the discretion of the grantor * * * be distributed to the grantor; * * * then such part of the income of the trust shall be included in computing the net income of the grantor * * *."

Section 12(h) is identical with section 167 of the Federal Revenue Act, 26 U.S.C.A. Int.Rev.Code, § 167, and section 7(a) is substantially the same as section 22(a) of the federal act, 26 U.S.C.A. Int.Rev.Code, § 22(a). These two sections of the California statute have received no interpretation by the courts of this state. On the other hand, the corresponding sections of the Federal Revenue Act have frequently been before both the Supreme Court of the United States and the other federal courts as well as before the Board of Tax Appeals. Each of the parties to this action concedes that the construction given to these sections of the Federal Revenue Act by the federal courts is applicable to the corresponding sections of the statute of our own state, and they depend almost entirely for the support of their respective contentions upon the decisions of the federal tribunals concerning the federal statute.

In the case of Glendinning v. Commissioner of Internal Revenue, 3 Cir., 97 F.2d 51, the taxpayer created a trust fund providing for the payment to the wife during her life of a portion of the trust fund income in lieu of support money. The Circuit Court of Appeals of the Third Circuit held that trust income paid to the wife was taxable income to the taxpayer. In so holding the court stated (97 F.2d at page 51): "* * * If the trust fund was a gift of its creator, the income derived therefrom is the income of the donees, not of the donor. If the trust was the payment of a debt of the creator the income is taxable to him as his income paid to his divorced wife. * * * The distinction is that the income from a gift is the income of the donee but the income from a trust fund put up to meet an obligation of the creator of the trust, is the income of the debtor."

The case of Douglas v. Willcuts, 296 U. S. 1, 56 S.Ct. 59, 80 L.Ed. 3, 101 A.L.R. 391, involved a trust created by a husband for the purpose also of having the income therefrom paid to his divorced wife in satisfaction of his obligation to pay alimony to her, and it was held that the income which satisfied the obligation of the husband to pay alimony was taxable to him. A brief statement of the court in that case is as follows (296 U.S. at page 9, 56 S.Ct. at page 63): "The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. * * * In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly."

In the case of Helvering v. Stokes, 296 U.S. 551, 56 S.Ct. 308, 80 L.Ed. 389, the Supreme Court reversed a judgment of the Circuit Court of Appeals, Com'r of Internal Revenue v. Stokes, 3 Cir., 79 F.2d 256, holding that income from a trust in favor of minor children and in other respects like the trust involved here was not taxable to the father, who had actually paid out the income in pursuance of the trust during the taxable year in which the income was received. The judgment was reversed upon the authority of Douglas v. Willcuts, supra, which had been decided by the same court during the previous month. By this decision the court extended the rule announced in Douglas v. Willcuts, supra, to a trust like that before us, where the children of the grantor were the beneficiaries of the trust. In each of the two cases just cited the income from the trust estate had actually been paid out by the trustees. They differ therefore from the present case, where the income has been accumulated and is still in the possession of the trustee. However, the case of Whiteley v. Commissioner of Internal Revenue, 3 Cir., 120 F.2d 782, 785, involved a trust created by the father, where the income from the trust property was to be paid by the trustee to the father upon the latter's order and to be used solely for the use of his minor children. During the calendar year the income from the trust property was $5,878, only $450 of which was paid to the father. The Board of Tax Appeals held that the entire income for the year was taxable to the father, the donor of the trust. On appeal the ruling of the board was sustained. The conclusion of the court is contained in the following statement: "In this case the settlor of these trusts [there were four of them] by its terms could have received its income and applied it to the support of his minor children. He did not choose to do so, but left it to accumulate for them. He controlled the use of the money and had the same non-material satisfaction as that of the taxpayer in the Horst case [infra]."

In Helvering v. Horst, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75, 131 A.L.R. 655, a father was the owner of negotiable bonds. He detached from them negotiable interest coupons shortly before their due date and delivered them to his son as a gift, who in the same year collected them at maturity. The commissioner ruled that under section 22 of the Revenue Act of 1934, 26 U.S.C. A. Int.Rev.Acts, page 669, the interest payments were taxable in the years when paid to the father. This ruling was sustained by the Board of Tax Appeals, Horst v Com'r, 39 B.T.A. 757, but reversed by the Circuit Court of Appeals, 2 Cir., 107 F.2d 906, and the judgment of the latter court was reversed by the Supreme Court. The case of Helvering v. Eubank, 311 U.S. 122, 61 S.Ct. 149, 85 L.Ed. 81, was decided the same day and involved a factual situation similar to that in the Horst case and was decided upon the authority of the last named case.

Two recent decisions of the Board of Tax Appeals are in harmony with the conclusion reached by the court in Whiteley v. Commissioner, supra. In J. S. Pyeatt v. Com'r of Internal Revenue, 1939, 39 B.T.A. 774, the grantor was held taxable under a provision of the federal act which is identical to section 12(h) of the California Personal Income Tax Act, because he held it within his power to use the income of the trust for the support and education of his minor daughter. The fact that he had elected not to use it in that manner was held immaterial in view of the language of the statute.

In George H. Whiteley, Jr., v. Com'r of Internal Revenue, 1940, 42 B.T.A. 402, 416, the grantor had created a trust for the benefit of his minor daughter, reserving to himself the right to use the income therefrom for the support, benefit and enjoyment of his minor children. The income was not used during the taxable year involved and notwithstanding that fact the board held that it was taxable to the grantor in language as follows: "Moreover, since the income might be spent for the 'enjoyment' of the minors, an element which is beyond the legal obligation of the father and under which it would appear that he might spend the income almost at his will, there is in such respect no essential difference or distinction from a mere distribution to the grantor." See, also, Kaplan v. Commissioner of Internal Revenue, 1 Cir., 66 F.2d 401; Corliss v. Bowers, 281 U.S. 376, 50 S.Ct. 336, 74 L.Ed. 916; Henry A. Loeb v. Com'r of Internal Revenue, 40 B.T.A. 517; Rollins v. Helvering, 8 Cir., 92 F.2d 390.

[1] In the last cited case we find this exceedingly apt language (92 F.2d at page 395): "Section 167 is not concerned with what is done under a trust agreement but with what might be done thereunder. The controlling statutory consideration is the existence of the described 'discretion,' not the way in which that discretion is actually exercised."

The foregoing decisions all held the income taxable to the grantor under section 167 of the federal act which, as we have seen, is the same as section 12(h) of our own statute.

In the case of Helvering v. Clifford, 1940, 309 U.S. 331, 60 S.Ct. 554, 84 L.Ed. 788, it was held that the income from the trust involved in that case was taxable to the grantor under section 22(a) of the federal act which, as we have noted, is virtually the same as section 7(a) of the state statute, defining gross income. (This section is set out in full above.) The grantor of the trust which was the subject of that decision, provided in the declaration setting up said trust, that the net income to be derived therefrom was for the "exclusive benefit" of his wife; that it was to continue for a term of five years and terminate earlier on the death of his wife. During the continuance of said trust, the trustee, the husband, was to pay over to his wife the whole or such part of the net income as he in his "absolute discretion" might determine. There were other provisions of the declaration of trust not materially different from those of the trust before us. We find the following language in the opinion which we think is pertinent to our present controversy (309 U.S. at page 336, 60 S.Ct. at page 557, 84 L.Ed. 788): "It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had. To exclude from the aggregate those indirect benefits would be to deprive § 22(a) of considerable vitality and to treat as immaterial what may be highly relevant considerations in the creation of such family trusts. For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain in substantially the same financial situation as before."

That case was relied upon by the Circuit Court of Appeals in the decision of the case of Commissioner of Internal Revenue v. Berolzheimer, 2 Cir., 116 F.2d 628, 629. In the latter case there were four trusts involved, in one of which a father declared himself a trustee of certain specified securities for the benefit of his son, Kenneth. The father was to apply "at such times, in such amounts and in such manner as said Trustee may in his uncontrolled discretion decide, so much of the net income from this trust fund as in the sole and absolute discretion of the Trustee may be necessary and proper for the maintenance, education and well-being of said Kenneth * * * and shall accumulate the balance of such net income for said Kenneth * * *, if any."

The three other trusts involved in that case were by a different grantor, with the same family name of the grantor in the first trust. These trusts were created one for the benefit of the wife, the two others for the son and daughter respectively of the grantor. They were similar to those created by the grantor of the first trust, except that to the wife was not restricted as to use. In at least two of these trusts only a portion of the income was distributed for the use of the beneficiaries and the remainder was retained by the trustee as an accumulation. The Board of Tax Appeals, 40 B.T.A. 645, held that only that portion of the income from these two trusts, which had been actually expended for the use of the respective beneficiaries, was taxable against the respective grantors. After discussing the applicability of the case of Helvering v. Clifford, supra, to the facts then before the court, the following conclusion was reached (116 F.2d at page 631): "It is to be observed that the Board made its orders before the decision in Helvering v. Clifford was rendered and doubtless would have reached another determination if that authority had been available. Because of the similarity between the trusts before us and the trust before the court in Helvering v. Clifford, we think that decision applies and it will be necessary to reverse the orders. * * * the orders are reversed, and the proceedings remanded to the Board with direction to determine the grantors' income taxes for the year 1934 in accordance with the views expressed in this opinion."

In the case of Helvering v. Elias, Aug. 1, 1941, 122 F.2d 171, 172, the Circuit Court of Appeals of the Second Circuit, on the authority of Helvering v. Clifford, supra, reversed an order of the Board of Tax Appeals, Elias v. Com'r of Internal Revenue, 41 B.T.A. 1109, holding that income of separate trusts created by the wife in favor of her four children, in which her husband was named as trustee, was not taxable as the income of the wife. In that case the husband was to use the income from the trust property "in his sole discretion" for the support of the beneficiaries until he or she should reach the age of twenty-one years, whereupon he was to pay the accumulations to the beneficiary and thereafter the whole annual income until the beneficiary's death, or the settlor's, on either of which the trust should cease and the trustee should receive the whole corpus.

In answer to the foregoing authorities the respondent cites the dissenting opinions in the cases of George H. Whiteley, Jr., v. Com'r of Internal Revenue, supra, and Dorothy Whitney Elmhirst v. Com'r of Internal Revenue, 41 B.T.A. 348, 368 and 369. While these dissenting opinions present able arguments in support of the respondent's position, yet they were not only not accepted by the Board of Tax Appeals, but they are contrary to the authorities hereinbefore cited, and particularly the case of Whiteley v. Commissioner of Internal Revenue, supra, which affirmed a decision of the Board of Tax Appeals against said George H. Whiteley, Jr., involving a trust substantially like that considered in the case of George H. Whiteley, Jr., v. Com'r of Internal Revenue, supra. It is not necessary to further discuss the dissenting opinions.

Respondent further relies upon the following decisions of the Board of Tax Appeals; E. E. Black v. Com'r of Internal Revenue, 36 B.T.A. 346; Martin F. Tiernan v. Com'r of Internal Revenue, 37 B.T. A. 1048; Percy M. Chandler v. Com'r of Internal Revenue, 41 B.T.A. 165, 178; Frank E. Wolcott v. Com'r of Internal Revenue, 42 B.T.A. 1151, 1157. The three last cases follow the Black case, the decision in which is very brief, consisting of a half of one page of the report in which it is found. The complete facts in the case are not stated in the decision, if we may rely upon a statement in the Pyeatt case, supra, respecting the Black case. We have already referred to the Pyeatt case. A further quotation from the opinion of the board in that case will not only confirm our previous reference to it but will also clarify the decision in the Black case. Beginning on page 780 of the opinion in the Pyeatt case, 39 B.T.A. 774, the board reviews the Black decision and states the law applicable to the facts of that case, which, as we view those facts, are substantially like those in the case now before us. The language of the decision respecting those matters is as follows:

"Petitioner relies upon E. E. Black [v. Com'r of Internal Revenue], 36 B.T.A. 346, and other similar Board and court cases to support his contention that he is taxable only on the small amounts of income which he actually received from the trust in the two taxable years. These amounts are shown in our findings of fact. The Black case held in substance that, where the trust instrument confers upon the trustee the discretion to use all or part of the income of the trust for the support and maintenance of the minor and the evidence shows that none of the income was so used, then none of the income of the trust is taxable to the grantor who was legally liable for the support and maintenance of the minor. To the same effect is Hudson v. Jones [D. C., 22 F.Supp. 938], supra; Higgins v. White [1 Cir.] 93 F.2d 357. See G.C.M. 18972, Cumulative Bulletin, 1937-2, page 231, which cites the Black case.

"We do not think the foregoing authorities are applicable to the facts of the instant case. The discretion as to what part of the income of the trust should be used for the support and maintenance of the minor was not left to the trustee. That discretion was left to the settlor of the trust, petitioner herein, upon whom rested the legal obligation to support and maintain Martha during her minority. He was limited, however, to $3,000 which he could draw in any one year. The income in 1934 was ample to pay the full $3,000 without invading any part of the principal. It is true petitioner drew only $236 from Martha's trust in 1934, but he might have drawn the full $3,000 if he had so desired. The only reason that he did not draw it was because he did not care to, but preferred to pay most of Martha's expenses out of his own pocket. We think that in such a situation section 167(a) (2) of the Revenue Act of 1934 would be applicable to $3,000 of the income of the trust, even though only $236 was withdrawn. That section reads: '(a) Where any part of the income of a trust * * * (2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor * * * then such part of the income of the trust shall be included in computing the net income of the grantor.'

"In such a case the doctrine of the Supreme Court in Corliss v. Bowers, 281 U.S. 376, [50 S.Ct. 336, 74 L.Ed. 916], as well as the express language of the foregoing statute applies. 'The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.'

"The situation in the instant case, as we have already remarked, is distinguishable from that which existed in E. E. Black [v. Com'r of Internal Revenue], supra, and that line of cases. In those cases the settlor could not go to the trustee and demand all or part of the income within his own discretion. He could get only such part of the income as the trustee, within the exercise of his discretion, might pay to the settlor. In such latter circumstances, as we have already pointed out, the Board and the courts have held that, where the evidence shows that none of the income was used for the support and maintenance of the minor, the income of the trust is not taxable to the settlor."

The "line of cases" referred to in the above quotation undoubtedly refers to at least two cases cited above and referred to as following the Black case. The Tiernan and Chandler cases were decided expressly upon the authority of the Black case (37 B.T.A. at page 1054 of the opinion in the Tiernan case; 41 B.T.A. at page 178 of the opinion in the Chandler case.) The Wolcott case, supra, cites the Black case as authority for its decision. Like the Pyeatt case, however, it calls attention to the distinction between a trust in which the father retains the discretion to use the income for the maintenance of his minor children, and a trust created by the father in which he is not the trustee, but a bank or other individual is made the trustee, with authority to pay over so much of the income as is necessary for the support of the grantor's children in the judgment and discretion of the trustee. While in the first class of trusts the entire income is taxable income of the grantor whether paid out or accumulated, in the latter class only that portion of the income which is actually paid out by the trustee for the maintenance of the minors is taxable income of the grantor or father of the children. This is made clear by the following statement in the Wolcott opinion (42 B.T.A. at page 1157): "Our construction of this [trust] indenture is that it authorizes the trustee in the exercise of its discretion to pay over such amounts of income as are necessary, in the judgment and discretion of the trustee, for the support, maintenance, and education of Janet and directs the trustee to accumulate the superfluous balance. Since here the trustee was a bank and not the grantor, the Douglas case thus may be applied only to the extent of taxing to petitioner [the grantor] the amounts actually paid over for Janet's support, maintenance, and education."

The only other authority cited by the respondents, which appears to support the position taken by him in this action is the case of Hudson v. Jones, 22 F.Supp. 938, a decision by the United States District Court, and was rendered before the decision in the case of Whiteley v. Commissioner of Internal Revenue, supra. Hudson v. Jones was cited in the Whiteley case, but the court refused to follow it and rendered a decision at variance with the views therein expressed. The decision in Hudson v. Jones cannot therefore be regarded as an authority upon any question now before us. The foregoing authorities construing the sections of the federal statute which are in all substantial respects like those of our State Income Tax Act, are in our opinion applicable to our present controversy, and should govern our decision of the questions before us.

[2] Not only the weight of authority but practically without serious dissent all the more recent decisions both of the Board of Tax Appeals and the courts sustain the position of the appellant, that the income from the trust created by the respondent in behalf of his minor children, the grantor reserving the right to use the income of said trust to the extent provided in said trust instrument, is taxable to the grantor notwithstanding the fact that no part thereof is used during the taxable year for the maintenance of said minors. Not only do we think that this was the clear intent of the statute, but any other construction would open wide the door for wholesale evasion of the Personal Income Tax Act of the state. If a father could establish a trust like that created by the respondent, and during any year of the trust refrain from using the income for the purpose of the trust but under its terms should accumulate the whole of it, under the trust instrument he could during the next year expend the entire income accumulated during the first year for his children's support and this proceeding could continue from year to year, with the result that practically the entire trust income could be used by the father to discharge his legal obligation to support his children and he would escape entirely the payment of any tax thereon. If he could so manipulate his property in behalf of his legal obligation to support his minor children, there would be nothing to prevent him from including his

wife in such an arrangement. If successful in those two instances what would prevent him from establishing trusts for the purpose of paying the wages of his office force and also for the help in his home? In our opinion the act of the appellant in levying a tax on the entire income from the trust property during the taxable year 1935 against the respondent was legal and in accordance with the Personal Income Tax Act of this state.

The judgment is reversed.

GIBSON, C. J., SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., and SPENCE, J., pro tem., concurred.

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21 Cal.2d 518

H. A. S. LOAN SERVICE, Inc., v. McCOLGAN, Franchise Tax Com'r, etc.

Sac. 5541.

Supreme Court of California.
Jan. 29, 1943.

1. Taxation ⇨10

In determining whether Bank and Corporation Franchise Tax Act discriminates against national banks as prohibited by federal statutes, court must consider state's tax structure as a whole and ascertain therefrom whether tax burden is greater on national banks than on state banks or mercantile, business, manufacturing, and financial corporations. Gen.Laws 1937, Act 8488, §§ 1, 2, 4, 4a; 12 U.S.C.A. § 548.

2. Taxation ⇨10, 126

The manifest purpose of Legislature in establishing classification of financial corporations which were made subject to bank and corporation franchise tax was to avoid tax discrimination against national banks, denounced by federal statute. Gen.Laws 1937, Act 8488, §§ 1, 2, 4, 4a; 12 U.S.C.A. § 548.

3. Taxation ⇨10, 126

In determining whether a corporation was taxable as financial corporation under Bank and Corporation Franchise Tax Act, the court was required to look to intent of federal statute prohibiting tax discrimination against national banks. Gen.Laws 1937, Act 8488, §§ 1, 2, 4, 4a; 12 U.S.C.A. § 548.

4. Taxation ⇨10

The purpose of federal restriction on state taxation of national banks is to render it impossible for state to create and foster an unequal competition with national banks by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to banking business. 12 U.S.C.A. § 548.

5. Taxation ⇨10, 126

Where loan service corporation negotiated small loans for borrowers from finance company, for which a fee was charged, and guaranteed payment of loans, and evidence authorized finding that corporate device was used as means of thwarting usury and franchise tax laws, and that the two corporate entities were engaged in single business, and were in competition with national banks in small loan field, loan service corporation was a "financial corporation" within franchise tax law and within federal statute prohibiting tax discrimination by state against national banks. Gen.Laws 1937, Act 8488, §§ 1, 2, 4, 4a; 12 U.S.C.A. § 548.

See Words and Phrases, Permanent Edition, for all other definitions of "Financial Corporation".

6. Corporations ⇨1
Evidence ⇨587

Circumstantial evidence is sufficient to sustain finding, particularly in case involving disregard of a corporate entity. Code Civ.Proc. §§ 1957, 1958.

7. Appeal and error ⇨1008(1)
Corporations ⇨1

Each case involving disregard of the corporate entity must rest on its special facts, and the determination is peculiarly within the province of the trier of fact.

8. Corporations ⇨1

Evidence sustained finding that corporate device was used by loan service corporation and finance company as means of thwarting usury and franchise tax laws, and that the two corporate entities were controlled by same persons, and were engaged in single business, so that corporate entities might be disregarded in determining whether loan service corporation was a "financial corporation" within state franchise tax law. Gen.Laws 1937, Act 8488, §§ 1, 2, 4, 4a.

9. Corporations ⚷**1**

A corporate entity may be disregarded when it is used to evade the law.

10. Taxation ⚷**10, 126**

Evidence sustained finding that loan service corporation in negotiating small loans for borrowers through a finance company was in active competition with national banks, so as to require loan service corporation to be classified as a "financial corporation" subject to state franchise tax, in view of federal law prohibiting state tax discrimination against national banks. Gen.Laws 1937, Act 8488, §§ 1, 2, 4, 4a; 12 U.S.C.A. § 548.

11. Appeal and error ⚷**1010(1)**

Finding of trier of fact supported by substantial evidence is conclusive.

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In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by H. A. S. Loan Service, Inc., against Charles J. McColgan, as State Franchise Tax Commissioner, to recover amount paid under protest as franchise tax. From an adverse judgment, plaintiff appeals.

Affirmed.

L. J. Styska, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Valentine Brookes, Deputy Atty. Gen., for respondent.

CARTER, Justice.

A tax at the rate of 8 per cent on the net income of plaintiff corporation was levied by the State of California for the year, August 31, 1936, to August 31, 1937, pursuant to the Bank and Corporation Franchise Tax Act. Stats.1929, p. 19, as amended in 1935; Deering's Gen.Laws, 1937, Act 8488. The tax was paid under protest and plaintiff commenced this action to recover the amount so paid. The trial court rendered judgment in favor of defendant, and plaintiff prosecutes this appeal therefrom.

The tax was based upon a classification of plaintiff as a financial corporation under the Bank and Corporation Franchise Tax Act. That act, Stats.1929, p. 19, § 1, as amended, adopted method number 4 set forth in the United States Statute for the taxation of national banking associations, 12 U.S.C.A. § 548. The United States Statute, and plan 4 to which reference is made, reads: "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may * * * (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. * * * (c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: * * *." By the terms of the Bank and Corporation Franchise Tax Act, the tax is according to or measured by the income. Stats.1929, p. 19, § 1, as amended. And the rate of tax on national banks, other banks, and financial corporations is the same and may not be in excess of 8 per cent. Stats.1929, p. 19, §§ 1, 2, 4, 4a, as amended. The tax system is designed to eliminate inequalities in the tax burdens imposed upon business corporations and banks. Financial corporations are classed with banks both national and state in order that the tax burden they must bear shall not be less than that of banks, and thus in harmony with the federal statute. 12 U.S.C.A., § 548.

[1-4] In determining whether there exists the discrimination prohibited by the federal statute it is necessary to take into consideration the state's tax structure as a whole and ascertain therefrom whether the tax burden is greater on national banks than on state banks or mercantile, business, manufacturing and financial corpora-

tions. Tradesmens Nat. Bank v. Oklahoma Tax Comm., 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947. The manifest purpose of the Legislature in establishing the classification "financial corporations" was to avoid the tax discrimination denounced by the federal statute. Thus we must look to the intent of the federal statute. It is expressed in First Nat. Bank v. Anderson, 269 U.S. 341, 347, 46 S.Ct. 135, 138, 70 L. Ed. 295, as follows: "The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking."

[5] The court in the instant case found that: "During the period involved plaintiff was doing business in Los Angeles in active, substantial competition with national banks operating in the same locality, and both were then and there engaged in seeking and securing capital investments of the same class, and as herein found, and plaintiff used its capital for the purposes herein stated. Plaintiff made small loans of amounts up to Five Hundred Dollars ($500), and national banks operating in Los Angeles made small loans of similar amounts." Without determining whether plaintiff's conduct as a separate corporate entity would establish its classification as a financial corporation it cannot be doubted that its activity coupled with that of the Marshall Finance Company, a corporation, fall within the operations contemplated by that term. The operations of the two corporations consisted of making small loans in the Los Angeles area. National banking associations were also making small loans in the same area, and there is direct evidence that the small loan companies were in competition with the national banks in that field. Therefore, within the meaning of the federal statute and Bank and Corporation Franchise Tax Act, the two corporations considered as a unit were operating as a financial institution. See Morris Plan Co. of San Francisco v. Johnson, 37 Cal.App.2d 621, 100 P.2d 493.

In the foregoing discussion we have treated plaintiff and the Marshall Finance Company as one, although they are separate corporate entities. In this connection the court found: "Plaintiff and Marshall Finance Co. were controlled by the same persons, the majority of the stock of each was owned by the same persons or their families, and the two corporations were formed and utilized to conduct the small loan business in a manner which was a subterfuge to avoid the California usury laws, as well as the Franchise Tax law; * * *. Plaintiff and Marshall Finance Co. operated as a unit and the unit was in competition with national banks. Marshall Finance Co. could not have operated at a profit without its connection with plaintiff." Those findings are supported by the evidence. The mode of operation of the business was as follows: Plaintiff advertised that it would arrange and negotiate loans. Its advertising intimated that it would make loans. A prospective borrower would call at plaintiff's office and apply for a loan executing an agreement between him and plaintiff, the printed form of which provided that plaintiff would act as his agent or broker to obtain a loan from the Marshall Finance Company, for which he was to pay plaintiff a fee. Plaintiff agreed to "procure and/or negotiate" the loan and to guarantee the repayment thereof by the borrower. The borrower agreed that he would give as security for plaintiff's guarantee a chattel mortgage or wage assignment; that he would reimburse plaintiff for any sums expended by it in the collection of any part of the loan. Plaintiff would make a credit investigation of the borrower and submit it to the Marshall Finance Company. The borrower signed a draft upon the Marshall Finance Company, and if the latter approved the loan, it would transmit the money to him through plaintiff. Plaintiff deducted therefrom the amount of its fee. If the borrower defaulted on his loan the plaintiff paid the Marshall Finance Company, and for that purpose maintained a 10 per cent cash reserve with that company. In case of default plaintiff collected or endeavored to collect from the borrower by suit or otherwise.

In addition to the foregoing method of doing business, it also appears that the plaintiff's business was more profitable than that of the Marshall Finance Company because it was not restricted in respect to the amount of fees it could collect. There was little profit in the Marshall Finance Company's business as it could charge only the legal rate of interest, and in the language of one of its officers "had to operate through brokers in California." One witness testified that plaintiff was "put out of business" by the state Legislature in 1939, presumably referring to the Personal Property Brokers Act as amended in 1939, Stats. 1909, p. 969, as amended in 1939, Deering's Gen.Laws, 1939 Supp., Act 5825, and the California Small Loan Act, Stats.1939, ch. 1045, Deering's Gen.Laws, 1939 Supp., Act 7700. The two corporations were incorporated under the laws of Delaware, qualified to transact business and ceased doing business in California at about the same time. A number of the officers and directors of both corporations were residents of Michigan. Apparently neither of the corporations transacted business elsewhere than in California. Plaintiff had an "understanding" with the Marshall Finance Company that the latter would be the lender for loans negotiated by the former when they commenced doing business in California. Although there is testimony that plaintiff negotiated loans for one or two other lenders, it is vague and indefinite, and the printed form of agreement used by plaintiff contained the name of Marshall Finance Company as the one from whom the loan would be obtained for the borrower. The two corporations occupied offices in the same building, and Samuel Goldstein was the manager of plaintiff and Benjamin Goldstein was president of Marshall Finance Company. The same persons held some of the stock of both corporations, and the great majority of stock of each corporation was owned by persons with similar surnames from which it may well be inferred that they were related. From all of those circumstances it is reasonable to infer that the corporate device was being used by the two corporations as means of thwarting the law.

[6-8] Plaintiff refers to conflicting evidence, testimony that neither of the corporations held any stock nor had any interest in the other and operated independently of each other; that the plaintiff did not loan any money; that Marshall Finance Company was the sole lender; that plaintiff was merely a broker holding a state license as a personal property broker; and that the directorate of the corporations were different. Giving effect to the inferences which may be drawn from the business methods of these corporations as disclosed by the record, the above-mentioned evidence does nothing more than create a conflict which the trial court has resolved against plaintiff. An inference is a deduction which the reason of the trier of fact makes from the facts proved, Code Civ. Proc. § 1958, and is indirect evidence. Code Civ.Proc. § 1957. It is well settled that evidence of this character is sufficient to support a judgment. Particularly in cases involving the disregard of a corporate entity, the evidence although circumstantial is sufficient; each case must rest upon its special facts, and such determination is peculiarly within the province of the trier of fact. See Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390. The manner in which the business was conducted, particularly the guarantee of the payment of the loans by plaintiff and the other circumstances above outlined furnished convincing evidence to support the findings. The testimony by the officers of plaintiff and Marshall Finance Company was that of interested witnesses.

[9] Under the circumstances here presented the two corporate entities were in fact one, or if they be considered separate, two, in effect, engaged in a single business. The corporate entity may be disregarded when it is used to evade the law.

Plaintiff cites Pittsburgh & Buffalo Co. v. Duncan et al., 6 Cir., 232 F. 584, 146 C.C.A. 542, Schmitt v. Northern Counties Land & Cattle Co., 108 Cal.App. 688, 292 P. 173, and Hollywood Cleaning & P. Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709, but as above stated each case must be decided upon its own peculiar circumstances, and those cases did not involve the facts here considered.

[10] In addition to the findings hereinabove-mentioned, the court found that plaintiff made small loans, and was in active competition with national banks and used its moneyed capital for that purpose; that the borrower signed an agreement with plaintiff to obtain the money from the Marshall Finance Company, and only funds borrowed from the latter were loaned; that plaintiff was nominally the broker and Marshall Finance Company was nominally the lender but the effect of the arrangement between the two was that plaintiff actually loaned money to the public. These findings are supported by the evidence heretofore discussed and manifestly are in harmony with the major finding that the two corporations were operating as a unit. The activity of one corporation may also be said to be the activity of the other.

[11] Plaintiff argues that in order to authorize the disregard of a corporate entity

the evidence must be convincing and satisfactory and that a presumption of separate entity is present. However that may be, such rules are for the guidance of the trier of fact, and the rule on appeal is the same as in other cases; the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence. The same principle is pertinent in analogous instances involving the proof of fraud. See 12 Cal.Jur. 834.

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, and EDMONDS, JJ., and SPENCE, Justice pro tem., concurred.

TRAYNOR, J., did not participate herein.

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21 Cal.2d 493

GOLDEN STATE THEATRE & REALTY CORPORATION v. JOHNSON.

Sac. 5528.

Supreme Court of California.

Jan. 22, 1943.

1. Taxation 🔑376(1)

A corporation which during income year for a profit authorized indorsement of notes of its subsidiaries, authorized various real estate transactions and acted as landlord with reference to various real estate holdings to aid subsidiaries was not a "holding company" within meaning of Franchise Tax Act provisions for deduction from gross income of dividends received from a corporation doing business in the state except holding companies engaging in no activities other than the receipt and disbursement of dividends. St.1935, pp. 960, 962, 996, §§ 4, 5, 8(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Holding Company".

2. Taxation 🔑376(1)

The word "actively" as used in Franchise Tax Act provision for deduction from gross income of dividends received from a corporation doing business in the state and defining "doing business" as actively engaging in any transaction for the purpose of financial or pecuniary gain or profit, is the opposite of "passively" or "inactively" and means active participation in any transaction for pecuniary gain or profit. St.1935, pp. 960, 962, 996, §§ 4, 5, 8(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Actively", "Doing Business", "Inactively" and "Passively".

3. Taxation 🔑376(1)

The holding company amendment to Franchise Tax Act provision for deduction from gross income, dividends received from a corporation doing business in the state declared from income arising out of business done in state, and excluding certain holding companies from the term "doing business" did not exclude holding companies for first time but limited exclusion to corporations of a more restricted class than those previously regarded as holding companies. St.1935, pp. 960, 996, §§ 4, 8(h).

4. Taxation 🔑376(1)

Corporation which received and distributed dividends from wholly owned subsidiaries but which also authorized loans, the purchase of real estate, arranged for improvements in rented premises and gave certain tenants notices to quit was "doing business" in the state and under provisions of Franchise Tax Act dividends received from such corporation were deductible from gross income. St.1935, pp. 960, 962, 996, §§ 4, 5, 8(h).

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In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Golden State Theatre and Realty Corporation against Charles G. Johnson, as State Treasurer etc. for a refund of portion of franchise tax paid under protest. From a judgment for defendant, plaintiff appeals.

Reversed with directions.

L. S. Hamm and B. E. Kragen, both of San Francisco, and John J. Hamlyn, of Sacramento, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Valentine Brookes, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

The plaintiff, Golden State Theatre and Realty Corporation, during the year 1936 owned 50 per cent of the stock of East Bay Theatres, Inc., which in turn owned 100 per cent of the stock of Hayward Theatre, Inc., and 100 per cent of the stock of San Leandro Theatre, Inc. During that year plaintiff received dividends from East Bay Theatres, Inc., representing one-half of the dividends received by the latter from its two subsidiaries. Plaintiff did not include the dividends it received in its return under the Bank and Corporation Franchise Tax Act, Stats.1929, ch. 13, p. 19, as amended, Deering's Gen. Laws, 1937, Act 8488, for the income year 1936, but paid under protest an additional tax, with interest, measured by the amount of such dividends. The present appeal is from a judgment denying plaintiff a refund of such tax and interest.

Plaintiff contends that the dividends are deductible from its gross income as "dividends received during the income year from a * * * corporation doing business in this State declared from income arising out of business done in this State * * *." § 8(h), Stats.1935, ch. 281, p. 996. Plaintiff maintains that the corporation declaring the dividends was doing business as defined in section 5 of the act, and was not a holding company within the meaning of section 4. When the tax was levied section 5 provided: "The term 'doing business,' as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Stats.1935, ch. 275, p. 962. Section 4 provided: "Any corporation organized to hold the stock or bonds of any other corporation or corporations, and not trading in such stock or bonds or other securities held, and engaging in no other activities than the receipt and disbursement of dividends from such stock or interest from such bonds, shall not be considered a corporation doing business in this State for the purposes of this act." Stats.1935, ch. 275, p. 960.

[1] Whether East Bay Theatres, Inc. was a holding company or was doing business in 1936 turns upon its activities during that year. The record discloses that East Bay Theatres, Inc. engaged in the following transactions in 1936: On January 20th its board of directors authorized the endorsement of a note of San Leandro Theatre, Inc. for $59,000. On May 12th the board of directors ratified the renting by its officers of certain theatre property to Hayward Theatre, Inc., for a monthly rental of $400. On August 3rd the board of directors authorized the purchase for $113,229 of certain theatre property, which Hayward Theatre, Inc. had previously leased from a third party for its theatre operations, and continued the lease to Hayward Theatre, Inc. The board of directors authorized the borrowing on August 6th of $84,000, and on September 30th of $32,000 for the completion of the purchase. Subsequent to the purchase and leasing of this property, East Bay Theatres, Inc. took actions, such as collecting rents, giving notices to quit, and arranging for improvements, as landlord for its principal tenant, Hayward Theatre, Inc., and for tenants who rented store space on the ground floor of the building.

The foregoing transactions make it clear that East Bay Theatre, Inc. was not a holding company in 1936. Section 4 of the act specifically limits holding companies to corporations that engage in "no other activities" than the receipt and disbursement of dividends from stock or interest from bonds. East Bay Theatres, Inc. engaged, as a holding company could not, in several other activities in 1936.

[2] It is also clear that these transactions were entered into for pecuniary gain or profit, for they were designed to aid the subsidiaries of East Bay Theatres, Inc. and thus to increase the dividends that it would receive. Defendant contends that East Bay Theatres, Inc. was not "actively" engaged in any transaction for pecuniary gain or profit since its purpose was not to operate a business but merely to acquire property and derive income therefrom, and since none of the transactions occurred regularly. Such an interpretation of "actively" would nullify the 1933 modification of the definition of doing business by reading into it the meaning given the term under the 1931 amendment St.1931, p. 65, defining it as "any transaction or transactions in the course of its business" by a domestic or foreign corporation. The doing of business, however, does not necessarily mean a regular course of business under the 1933 amendment, for by its plain terms a corporation is doing business if it actively engages in any transaction for pecuniary gain or profit. Defendant would identify "doing business" with "carrying on a trade or business." A series of trans-

actions regularly engaged in may be necessary to establish the "carrying on of a trade or business" but the Legislature made it clear that it had no such concept in mind when it referred to transaction in the singular as "any transaction." The word "actively" must therefore be interpreted as the opposite of passively or inactively, and as used in section 5 it means active participation in any transaction for pecuniary gain or profit. Within this meaning East Bay Theatres, Inc. was doing business in 1936.

[3] Defendant lays great stress on the case of Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 296, 98 A.L.R. 1499, which held that under the Bank and Corporation Franchise Tax Act as amended in 1931 (Stats.1931, ch. 1066, p. 2225) a corporation organized to hold the stock of another corporation and to distribute the dividends thereon to its own shareholders was a holding company and as such was not subject to the tax measured by net income. The court relied upon a number of decisions of the United States Supreme Court, referred to as the federal decisions, in which holding companies were held not to be doing business within the meaning of certain federal tax statutes. Following the decision in the lower court the Legislature amended the definition of doing business and added the provision that holding companies as therein defined should not be regarded as doing business. It was contended that since the 1933 amendment was deemed necessary to exempt holding companies, they must previously have been subject to the tax. The court rejected this contention, holding that the 1933 amendment, St.1933, pp. 693, 694, was merely a clarification of existing legislation, and that "the corporations expressly declared not to be 'business corporations' in the amendment of 1933 to the Bank and Corporation Franchise Tax Act likewise would not be 'business corporations' under the federal decisions, but holding companies." It does not appear that the Union Oil Associates engaged in any activities other than those specified, and it would therefore have been regarded as a holding company under the amendment. It does not follow, however, that all corporations that would be regarded as holding companies under the federal decisions, and therefore under the state act before the amendment, would thereafter be regarded as holding companies under that act. To so hold would nullify the limitation in section 4 that the corporation engage in no other activities than those specified, for under the federal decisions a corporation could engage in other activities and still be regarded as not doing business. Von Baumbach v. Sargent Land Co., 242 U.S. 503, 37 S.Ct. 201, 61 L.Ed. 460; McCoach v. Minehill & S. H. R. Co., 228 U.S. 295, 33 S.Ct. 419, 57 L.Ed. 842; United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 35 S.Ct. 499, 59 L.Ed. 825; Rose v. Nunnally Inv. Co., 5 Cir., 22 F.2d 102, certiorari denied 276 U.S. 628, 48 S.Ct. 321, 72 L.Ed. 739; Clallam Lumber Co. v. United States, D.C., 34 F.2d 944. The effect of the 1933 amendment was not to exempt holding companies for the first time but to limit the exemption to corporations of a more restricted class than those previously regarded as holding companies. This limitation definitely changed the previous legislation. The statements to the contrary in the opinion in the Union Oil Associates case were not necessary to the decision therein and are disapproved.

[4] The only conclusion possible under the facts presented and the applicable provisions of the Bank and Corporation Franchise Tax Act is that in 1936 East Bay Theatres, Inc. was a corporation doing business in this state.

The judgment is reversed with directions to the trial court to enter judgment in favor of plaintiff for the tax refund as prayed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., and SPENCE, J. pro tem., concurred.

21 Cal.2d 479

ANDREWS v. POLICE COURT OF CITY OF STOCKTON.

Sac. 5550.

Supreme Court of California.

Jan. 21, 1943.

Rehearing Denied Feb. 18, 1943.

1. Mandamus ⚷4(1)

Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise. Code Civ.Proc. § 1086.

2. Mandamus ⚷4(4)

Where police court refused to expunge judgment from its record, mandamus would not lie to compel police court to so expunge its records even if judgment were void on its face, since "adequate remedy at law" by appeal was available. Penal Code § 1466, subd. 2(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy at Law".

3. Mandamus ⚷3(1)

The fact that a legal remedy equally convenient, beneficial and effective has been lost by reason of neglect does not require granting of writ of mandate in absence of a sufficient showing of excuse for failure to timely pursue such legal remedy.

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In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Mandamus proceeding by John Andrews against the Police Court of the City of Stockton to compel expunging of certain documents from court records. From a judgment denying petition for writ of mandate, plaintiff appeals.

Affirmed.

For prior opinion, see 123 P.2d 128.

Alfred J. Hennessy, of San Francisco, for appellant.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment of the superior court denying a peremptory writ of mandate.

On June 20, 1935, appellant entered a plea of guilty in the respondent police court to a charge of contributing to the delinquency of a minor. Judgment was entered against him on such plea. In July, 1940, some five years later, appellant moved the respondent police court to "set aside and expunge" the complaint and judgment on the ground that under the Juvenile Court Act, Gen.Laws 1937, Act 3966, jurisdiction of the offense was in the superior court and that therefore the judgment entered in the respondent police court was void on its face. Six months after denial of the motion to vacate, appellant commenced this proceeding in mandamus in the superior court to compel the respondent police court to set aside its judgment. An alternative writ was issued but after hearing and consideration it was discharged and a peremptory writ was denied. Appellant thereupon noticed this appeal from the judgment of the superior court denying a writ.

We find it unnecessary to determine whether, as urged by appellant, the judgment of the respondent police court is void on its face for lack of jurisdiction of the offense. Assuming such to be the case and that appellant's motion to vacate was therefore timely, though made five years after entry, we cannot say that the superior court erred in this proceeding in denying a peremptory writ of mandate to compel the vacating of such judgment.

[1-3] Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise. § 1086, Code Civ.Proc.; Irvine v. Gibson, 19 Cal. 2d 14, 16, 118 P.2d 812; McPherson v. City of Los Angeles, 8 Cal.2d 748, 752, 68 P.2d 707; 16 Cal.Jur. 787, § 19. In Petaluma, etc., District v. Superior Court, 194 Cal. 183, 184, 228 P. 24, 25, it is said that "The writ of mandate will not issue solely to serve the purpose of a writ of review in order to pass upon claimed errors which are properly reviewable by means of an appeal." If, as here assumed, the judgment is void on its face, appellant could have appealed from the order of the respondent police court denying his motion to vacate the judgment. § 1466, subd. 2(b), Pen.Code; People v. Zolotoff, 48 Cal.App.2d 360, 364, 119 P.2d 745; People v. Carkeek, 35 Cal.App.2d 499, 505, 96 P.2d 132. No reason is advanced for his failure to take such appeal. If taken, it could have accomplished everything sought in this mandamus proceeding. The

fact that a legal remedy "equally convenient, beneficial, and effectual" has been lost by reason of neglect does not require the granting of a writ of mandate, in the absence of a sufficient showing of excuse for the failure to timely pursue such legal remedy. Tulare County v. Woody, 132 Cal.App. 459, 22 P.2d 743, 744; Howland v. Superior Court, 127 Cal.App. 695, 16 P.2d 318; Jones & Co. v. Wheeler, 121 Tex. 128, 45 S.W.2d 957; Jenkins v. State, 24 Ala.App. 185, 132 So. 437; Casey v. Wait, 229 Mass. 200, 118 N.E. 297; Crittenden v. Reilly, 97 Mich. 637, 57 N.W. 192; Ex parte Riddle, 255 U.S. 450, 41 S.Ct. 370, 65 L.Ed. 725; Minnesota, etc., Co. v. Molyneaux, 8 Cir., 70 F.2d 545. In the Tulare case, supra, which, as here, involved an appeal from a superior court judgment denying a writ of mandate, it is stated: "It may be conceded that the remedy afforded by the aforesaid section is not now equally beneficial and effective since the statute provides a definite period of limitation of six months after rejection of the claim. Nevertheless, petitioner did have a legal remedy which was 'equally convenient, beneficial, and effective,' and, if by reason of its neglect that remedy is no longer available, the remedy here sought should not be granted. 18 R.C.L., p. 132; 38 C.J., p. 562." See, also, Howland v. Superior Court, supra. This being so, we find no error in the action of the superior court in denying a writ of mandate under the circumstances here presented.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and SPENCE, J., pro tem., concurred.

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21 Cal.2d 531

PEOPLE v. CRAMER.

Cr. 4454.

Supreme Court of California.

Jan. 29, 1943.

1. Criminal law ⚷625

In murder prosecution, evidence on hearing as to defendant's sanity *held* to warrant trial court's determination that defendant was presently sane and comprehended nature and object of proceedings and hence was able to make proper defense.

2. Homicide ⚷253(1)

Evidence *held* sufficient to support judgment determining murder to be of first degree and imposing death penalty. Penal Code, §§ 189, 190, 1239.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Alden Ames, Judge pro tem.

Warren Cramer was convicted of first degree murder, and he appeals.

Affirmed.

Warren Cramer, in pro. per., for appellant.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Leslie C. Gillen, Asst. Dist. Atty., both of San Francisco, for respondent.

PER CURIAM.

This is an automatic appeal from a judgment of conviction of first degree murder imposing the death penalty on the defendant. See § 1239, Pen.Code.

[1] The District Attorney of the City and County of San Francisco filed an information charging defendant with the murder of one Ernest Saxton on July 5, 1942, and with prior convictions of robbery and grand theft. At the time set for arraignment, defendant expressed a desire to discharge his attorney and to enter a plea of guilty, but his counsel, over defendant's objection, suggested that a doubt existed as to defendant's sanity. Further proceedings under the information were suspended and, a jury having been waived, a hearing was had before the court to inquire into defendant's sanity. To assist it in the determination of this issue, the court appointed three eminent psychiatrists to examine defendant and to submit findings. An exhaustive hearing was had at which evidence was adduced tending to show insanity in certain of the defendant's ancestors and also prior adjudications of insanity against the defendant himself. There is also evidence of defendant's subsequent discharge as sane and, in addition, his own

testimony that he had made a study of insanity and had successfully feigned its symptoms on prior occasions in order to avoid the penal punishment that otherwise would have resulted for earlier misdeeds. Defendant's testimony reveals a detailed knowledge of insanity and its symptoms.

One of the experts testified that it is possible to feign certain symptoms of insanity and stated it as his opinion that upon former occasions the defendant had "accomplished his purpose of being declared insane" by feigning some of such symptoms. All three experts testified that defendant is sane and knows right from wrong. In addition, the chief psychiatrist at San Quentin penitentiary was called as a witness by defendant's counsel. He testified that on numerous occasions between 1937 and 1942, when the defendant was an inmate of the institution, he had opportunity to observe and examine him, and he was of the opinion that the defendant was not insane, but represented a self-willed, spoiled and undisciplined individual.

The four doctors agreed that the defendant was of superior intelligence, could rationalize as to what he had done, was capable of fully understanding and appreciating the significance and seriousness of his trial on the murder charge, and was wholly capable of rationally defending himself. With this evidence before it, as well as the defendant's testimony wherein he reveals himself to be highly intelligent, the trial court properly determined that the defendant was "presently sane" and "comprehends the nature and object of these proceedings and as a consequence of that is able to make a proper defense."

Upon arraignment for plea the defendant stated that he would represent himself, and requested his counsel to withdraw from the case. The court, however, in order to protect defendant's rights, requested counsel to remain and give any advice required in the presentation of the defense. Defendant thereupon entered a plea of guilty to the murder charge and admitted the prior offenses.

[2] The evidence addressed to the degree of the crime showed that the deceased, a drug store attendant, was shot by the defendant while the latter was attempting to rob his store. Prior to the shooting, defendant had purchased the gun from a taxicab driver and had stolen the automobile used in fleeing from the scene of the crime. He was apprehended later when the stolen automobile was recognized by policemen. Shortly after his arrest, defendant made and signed two statements, which the evidence discloses to have been voluntary, in which he set forth the details surrounding commission of the homicide and wherein he freely admitted his guilt. The evidence amply supports the judgment determining the murder to be of the first degree and imposing the death penalty. See §§ 189, 190, Pen.Code.

The judgment is affirmed.

21 Cal.2d 524

NORTHWESTERN PAC. R. CO. v. STATE BOARD OF EQUALIZATION OF CALIFORNIA.

Sac. 5548

Supreme Court of California.

Jan. 29, 1943.

1. Licenses 🔑15(1)

Where subsidiary railroad obtained a retailer's permit and subsidiary made appreciable amount of retail sales, it was a "retailer" within Retail Sales Tax Act and was liable for tax on sales of surplus or retired rolling stock to parent corporation and another subsidiary. Gen.Laws Supp. 1935, Act 8493, §§ 2(b, c, e, f), 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Retailer".

2. Licenses 🔑15(1)

A retailer cannot by departmentalizing its business set up for tax purposes a distinction between the types or kinds of sales made by it whereby the effect would be to cause some of its sales to escape tax aimed at all such sales. Gen.Laws Supp. 1935, Act 8493; St.1941, p. 532.

3. Licenses 🔑15(1)

Specific sales of a licensed retailer cannot be segregated from the bulk of its sales and treated separately as isolated or occasional sales. Gen.Laws Supp.1935, Act 8493; St.1941, p. 532.

4. Licenses ⚿15(1)

Where railroad obtained permit to engage in sale of personalty at retail, transfers of surplus or retired rolling stock representing five sales at a total price approximating $100,000 constituted "retail sales" within Retail Sales Tax Act. Gen. Laws Supp.1935, Act 8493, § 2(b, c, e, f).

See Words and Phrases, Permanent Edition, for all other definitions of "Retail Sale".

5. Licenses ⚿15(1)

Where subsidiary railroad obtained permit to engage in sale of personal property at retail and transferred surplus or retired rolling stock to parent corporation and another subsidiary and received credit against outstanding indebtedness due to the parent corporation, the price received by the subsidiary railroad constituted "gross receipts" within the Retail Sales Tax Act. Gen.Laws Supp.1935, Act 8493, § 2 (f).

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Receipt".

6. Corporations ⚿1, 182, 318

Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies nor render the stockholding company the owner of property of the other and identity of officers of the two corporations does not establish identity of the corporations, and such rule applies with respect to tax problems.

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In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action to recover sales taxes paid under protest by the Northwestern Pacific Railroad Company against the State Board of Equalization of the State of California. Judgment for plaintiff and defendant appeals.

Reversed with directions.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for appellant.

C. W. Durbrow and Harry H. McElroy, both of San Francisco, for respondent.

GIBSON, Chief Justice.

Defendant appeals from a judgment for plaintiff in this action brought to recover taxes paid under protest under the Retail Sales Tax Act. (Stats.1933, p. 2599, Deering's Gen.Laws Supp.1935, Act 8493; see Rev. and Tax.Code, part I, Stats. 1941, p. 532, ch. 36.)

Plaintiff, a California corporation, is a railroad common carrier. Its capital stock is wholly owned by the Southern Pacific Company, also a common carrier engaged in operating a system of related railroads and truck lines, of which plaintiff is one and the Pacific Motor Trucking Company, also a California corporation, is another. These companies are operated as separate entities, though some of the officers are common to the three companies. It has long been the practice of the Southern Pacific Company and its several subsidiary transportation companies to transfer surplus and retired rolling stock or operating equipment from one company to another at depreciated value. During the year 1935 plaintiff on five occasions transferred varying numbers of passenger coaches, totalling thirteen in all, to the Southern Pacific Company. In April, 1936, the Southern Pacific Company approved an authority for expenditure of $78,832.14 for these thirteen coaches. It was recited in the "authority" that the accounting for the transaction was to be merely a bookkeeping transaction. A bill collectible was issued by plaintiff to the Southern Pacific Company, which item was eventually applied against an outstanding indebtedness due from plaintiff to the Southern Pacific Company.

In 1936 plaintiff similarly transferred two passenger coaches and one baggage car to the Southern Pacific Company at a depreciated value of $290. In 1927 plaintiff transferred to the Pacific Motor Trucking Company, also a subsidiary of Southern Pacific Company, a truck-trailer at the depreciated value of $1,096.21. The same general bookkeeping procedure was followed with respect to these latter transfers as is detailed above with respect to the transfer of the thirteen coaches.

In addition to its transportation operations, plaintiff engaged in selling articles of tangible personal property at retail and held a permit therefor. Such sales have been made generally from its "Stores Department" and included various types of railroad materials and supplies. Plaintiff has filed returns of gross receipts from such sales since the effective date of the act, copies of the returns appearing in the record now before us. By way of illustration, the amounts of total taxable sales shown on these returns for the years 1935, 1936 and 1937 are, respectively, $36,639.24, $13,636.20 and $8,678.70.

Plaintiff made no sales or transfers of rolling stock during the period covered by its several returns except a sale of flat cars to the California Barrel Company, a sale of a locomotive to Hammond-Little River Lumber Company, both for cash, and the transactions with the Southern Pacific Company and Pacific Motor Trucking Company here involved. The sales to the first two named companies were reported by plaintiff as taxable sales and the tax paid thereon. Plaintiff did not consider the transactions involving the several transfers of railroad coaches to the Southern Pacific Company and the truck-trailer to the Pacific Motor Trucking Company, representing a depreciated transfer value of $80,218.35, as being transactions subject to the Retail Sales Tax Act, and it did not therefore report them on any filed return. The defendant levied an additional assessment covering these latter transactions based on the amounts shown on plaintiff's records as the price received for such equipment. Plaintiff paid the additional tax under protest and in this action recovered judgment for its refund. Defendant appealed.

At all times material to this litigation, the taxing act provided that "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * * at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State * * *." (§ 3.) The act defines a sale as "any transfer of title or possession, or both, * * * in any manner or by any means whatsoever * * *." (§ 2(b). A "retail sale" is defined in section 2(c) as "a sale to a consumer or to any person for any purpose other than for resale * * *." Section 2 (e) defines "Retailer" as "every person engaged in the business of making sales at retail." Section 2(f) describes "gross receipts" as "the total amount of the sale * * * price * * * of the retail sales of retailers, including * * * all receipts, cash, credits and property of any kind or nature * * *."

Plaintiff's theory with respect to the asserted nontaxability of its several transfers to the Southern Pacific Company and to Pacific Motor Trucking Company of surplus or retired rolling stock is that such transfers were not a part of, nor incidental to, the retail sales business carried on by its "Stores Department," but instead represented occasional and casual sales which were incidental to and "a part of a separate business, to-wit, the common carriage of freight and passengers." The defendant taxing body, on the other hand, contends that a "department" of a business or company does not make a sale but that the company itself makes the sale. It urges that the taxpayer by departmentalizing its business may not escape the tax on certain sales while conceding the taxability of and paying the tax on other sales. Defendant also argues that plaintiff's sales of surplus or retired rolling stock were not occasional and casual but represented a definite and repeated course of conduct on its part.

This case is not distinguishable from Bigsby v. Johnson, 18 Cal.2d 860, 118 P.2d 289. In that case the taxpayer was a printer who, in addition to selling printing at retail, sold a single used printing apparatus described as a Monomelt pot and its accessories. The board levied a tax measured by the gross receipts from that sale. The taxpayer there urged that "since the sale of used equipment was merely incidental to his principal business and was made in order to salvage the investment upon machinery that he could no longer use, it was not the kind of sale that the legislature intended to tax under the retail sales tax statutes." In rejecting the contention this court held that "The tax is imposed upon retailers for the privilege of doing a retail sales business * * * and the measure of the tax is the gross receipts of any such retailer from the sale of 'all tangible personal property sold at retail * * *' The plaintiff is a retailer. He sold the personal property in question at retail as a part of his business operations, and the plain language of the act requires the inclusion of the gross receipts therefrom in the measure of the tax. He can claim no exemption merely by virtue of the fact that the sale of used printing equipment was not the kind of retail sale ordinarily made by him."

[1-3] Plaintiff herein applied for a permit to engage in the sale of personal property at retail stating in its application that "applicant is a common carrier of persons and property but incident to such business it sells articles of tangible personal property, which sales may constitute it a retail dealer within the meaning of the California Retail Sales Tax Law. * * *" A permit was accordingly issued to it. Under it plaintiff was free to make sales of any kind at retail and the record discloses

that over the years it did make an appreciable amount of retail sales for which it made returns and paid the tax due thereon. Plaintiff was therefore a "retailer," defined in section 2(e), as "every person engaged in the business of making sales at retail." It concedes that sales made by its "Stores Department" are subject to the provisions of the taxing act. It contends, however, that the sales of rolling stock here involved were unrelated to its other sales and represented casual and isolated sales wholly incidental to its railway business as distinguished from its retail sales business. The trial court erred in accepting this contention. While for reasons considered desirable plaintiff corporation may departmentalize its business, it cannot by such process set up for tax purposes a distinction between the types or kinds of sales made by it where the effect would be to cause some of its sales to escape the tax aimed at all of such sales. Specific sales of a retailer cannot be segregated from the bulk of its sales and treated separately as isolated or occasional sales.

But, even if we were to assume that plaintiff, as urged by it, is engaged in two separate kinds of business, viz., retail sales business and transportation business and that the transfers or sales of rolling stock here involved were connected with or related to the latter business and were entirely foreign to its retail business for which it is licensed, it would avail plaintiff nothing. The number, scope and character of the transfers of rolling stock would still serve to bring them within the purview of the taxing act. Even if we were to treat the transfers of the thirteen coaches, made from time to time in 1935, to the Southern Pacific Company as one transaction, the transfer of the three coaches to the same company in 1936 as one transaction, the transfer of the truck-trailer to Pacific Motor Trucking Company in 1937 as one transaction, and the transfer of twenty flat cars to California Barrel Company and the transfer of a locomotive to Hammond-Little River Lumber Company as two transactions, these transfers represent five sales at a total price approximating $100,000.

[4] Such transfers, and others of a similar nature to follow, may not be regarded as casual or isolated sales. They were "retail sales" within the meaning of the act in that they entailed the transfer of "title or possession" to a consumer for a "purpose other than for resale." (§ 2(b), (c), and (e).

[5] And, in our opinion, the sale price received by plaintiff from the Southern Pacific Company and the Pacific Motor Company constituted "gross receipts" within the statutory definition thereof which includes money, cash, credits or property of any kind or nature. (§ 2(f). The procedure adopted with respect to these transactions was for plaintiff to execute an authority to retire and to "sell" to the Southern Pacific Company or a subsidiary thereof a specified number and kind of rolling stock. The net amount to be credited to plaintiff was set forth. The transferee or purchaser then executed an "Authority for Expenditure" which specified the "net cost" to it. Plaintiff then would execute an "Inter-Company Bill Collectible" against the transferee or purchaser for said amount, described therein "as the depreciated value as of date of transfer of the following passenger coaches sold to the Southern Pacific Company." The latter company then issued an "Inter-Company Voucher Payable" in favor of plaintiff. It is stipulated that the amounts set forth in these vouchers payable were not intended to be settled in cash but were to be credited to the open account of plaintiff and the transferee or purchaser. Under these circumstances, the parties performed all acts essential to the consummation of a sale and the buyer gave the seller credit on its books for the amount of the purchase price. The buyer and seller were operated as separate corporate entities and the transactions therefore come within the statutory definition of "gross receipts."

[6] The case of Southern California Edison Co. v. State Board of Equalization, 220 Cal. 420, 31 P.2d 384, relied on by plaintiff, is distinguishable from the present case. It involved section 14 of article XIII of the Constitution which section, contrary to the act now before us, did not delineate the type of gross receipts included within the term as there used. The statute involved here expressly includes "credits" as gross receipts. Moreover, the cited case involved a taxation of the parent company on its gross proceeds which, under the statute and decisions, were held to include the gross proceeds of the subsidiary, thus requiring a disregard of the corporate entity in the case of inter-corporate payments. There is a distinction between taxing a subsidiary for the privilege of doing an act and measuring the tax by the amounts it receives or is entitled to receive, which is the present case, and tax-

ing a parent company, as in the cited case, on its gross receipts and including, in a tax levied on the parent company, amounts credited by the parent for bookkeeping purposes to the subsidiary for acts done by the subsidiary for the parent. In the present case the subsidiary, operated as a separate and distinct corporate entity despite complete stock ownership by the parent corporation, is paying for the privilege which it (the subsidiary) has exercised. It is stated in Superior Coal Co. v. Department of Finance, 377 Ill. 282, 36 N.E.2d 354, 358, that "As a general rule a corporation and its stockholders are deemed separate entities, and this is true in respect to tax problems. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348. Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies, nor render the stockholding company the owner of the property of the other, nor create the relation of principal and agent, representative, or alter ego between the two. United States v. Delaware, L. & W. R. Co., 238 U.S. 516, 35 S.Ct. 873, 59 L.Ed. 1438 * * *. Nor does the identity of officers of two corporations establish identity of the corporations. * * *"

The judgment is reversed with directions to the trial court to amend its findings and to enter judgment in conformity with the views herein expressed.

SHENK, CURTIS, EDMONDS, and CARTER, JJ., and SPENCE, J. pro tem., concurred.

TRAYNOR, J., did not participate herein.

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56 Cal.App.2d 825

FABER v. BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES et al.

Civ. 13509.

District Court of Appeal, Second District, Division 3, California.

Jan. 27, 1943.

1. Mandamus 🔑**168(4)**

Evidence sustained grant of writ of mandate to compel award of pension to city policeman's widow on ground that mental derangement resulting from injuries suffered in course of duty was proximate cause of self-inflicted wound causing policeman's death.

2. Mandamus 🔑**187(9)**

Reviewing court should not pass on weight of evidence on which trial court granted writ of mandate.

3. Mandamus 🔑**174**

In mandate proceeding to compel award of pension to city policeman's widow, finding that policeman was unable to understand the physical character, nature, quality or consequences of his act in shooting himself could not be construed as meaning that policeman was entirely devoid of understanding, and need not be so construed to support judgment granting the writ, but should be construed as referring to immediate time of the fatal act.

4. Municipal corporations 🔑**187**

Where Los Angeles policeman was mentally deranged as result of injuries suffered in course of duty, so that he frequently fired guns in irrational manner, and finally shot himself fatally, his widow was entitled to pension for death as "result" of injury received during performance of duty, whether death be deemed an accident or intentional suicide.

See Words and Phrases, Permanent Edition, for all other definitions of "Result".

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Proceeding by Gladys Faber against the Board of Pension Commissioners of the City of Los Angeles, and others for writ of mandate requiring defendants to award a pension. From a judgment granting the writ, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., and Robert J. Stahl, Leonard Husar, and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for appellants.

Jerome J. Mayo and Guy H. Hayes, both of Los Angeles, for respondent.

SHINN, Justice.

Defendants and appellants are the Board of Pension Commissioners of the City of Los Angeles and certain individuals who constitute the board. They appeal from a judgment granting petitioner, widow of Fred Faber, a peremptory writ of mandate requiring them to award petitioner a pension pursuant to Article XVII, § 183, of the Los Angeles City Charter, under which the dependent widow of a policeman is entitled to a pension if her husband "shall die as the result of any injury received during the performance of his duty." The court found that Fred Faber's death did occur by reason of such injury; that the immediate occasion of his death was a gunshot wound of the head inflicted upon himself; that injuries which he received while on duty were the direct and proximate cause of his mental condition, which was such that he was unable to understand the physical character, nature, quality, or consequences of his act; that the act itself was a direct result of said mental condition and was directly and proximately caused by and resulted from said injuries received during the performance of his duties.

Defendants challenge the sufficiency of the evidence to sustain findings (1) that Fred Faber's mental condition was the cause of the shooting, (2) that the injury received while on duty was the proximate cause of his mental condition in August of 1939, and (3) a finding (which the court did not make) that he committed "suicide."

Fred Faber entered the Police Department of the City in the year 1925 at the age of 24 years. He was a reserved, well poised, dependable, and normal young man with a high school education. He was of good mentality, industrious, diligent, and in good health. After he went into the department he did some drinking but not to an immoderate degree. He was first assigned to vice and liquor investigation work. He was injured on the 28th of April, 1930, in the course of duty apprehending violators of the liquor laws, at which time he was hit over the head with a bottle, for which he received treatment at the receiving hospital. There was evidence that when he returned home that evening he staggered, his eyes were "dazed and slightly crossed," and the head wound was bleeding underneath the bandage. The cut on the head was a deep one in the right occipital region and it was surrounded by a swelling about the size of an egg. From the time of his injury he was extremely nervous, drank heavily, and was unable to sleep without sedatives, of which he took excessive amounts of nembutol, barbital and amytol. He became irritable, abusive toward his wife, frequently complained of headaches, became critical and suspicious, irregular in his habits, and careless of his personal appearance. He had frequent dizzy spells and was guilty of much erratic and irrational conduct, which continued over a period of years and to the day of his demise. On the day of his death his wife was absent from home visiting her parents. At about 10 o'clock in the evening he was conversing with his mother in his home and appeared to be more rational than usual. He went to his room and lay down without removing his clothes, but did not go to sleep. He did some telephoning and a married couple came to see him and with the mother entered the bedroom where he was reclining on the bed. Their conversation with deceased continued until about 1 a.m.; while he lay on the bed his revolver was beside him; his mother suggested that he put it on the table, whereupon he picked it up, held it to his head, pulled the trigger and fired the shot which caused his death.

[1, 2] Our attention will first be directed to the finding that the injury was the proximate cause of the deranged mental condition. Defendants upon the trial conceded and now concede, quite properly, that deceased did suffer from mental derangement. There was an abundance of evidence, which it is unnecessary to recite in the present connection, that this mental condition first manifested itself almost immediately after he received the head injury on April 28, 1930. This condition of mental aberration continued, accompanied by some physical deterioration, down to the time of his death. Before he received the injury to his head he had been entirely rational. The fact that the unbalanced mental condition immediately followed the receipt of the head injury would be somewhat convincing evidence to the lay mind that it resulted from the injury, but the finding of the court is also supported by expert testimony. In reply to a hypothetical question, a physician, admittedly a specialist in psychiatry, testified on behalf of petitioner that in his opinion the injury of April 28, 1930, was the cause of the mental unbalance. Another psychiatrist, testifying for defendants, expressed a contrary opinion. The trial judge heard the examination of these witnesses by counsel at great length and was fully warranted in accepting the opinion of the physician who testified in petitioner's favor

as the more reasonable. Defendants argue at length the weight of the evidence upon this issue, which, of course, is not for us to pass upon, but it is worthy of note that, in the evidence which they produced, no facts were established and no medical theory was advanced in an attempt to attribute the mental derangement to a cause other than the head injury. Our attention has not been called to any evidence and our search of the record discloses none which, in our opinion, would have justified a finding that the mental condition was due to any other cause.

Defendants also discuss extensively the evidence as to the causal connection between the mental condition and the act of self-destruction, contending that there was no evidence to support a finding that the act was the direct and proximate result of the condition. In their analysis of the evidence upon this point, defendants accept as the controlling rule of law a statement of the court in Daniels v. New York, N. H. & H. R. Co., 1903, 183 Mass. 393, 67 N.E. 424, 426, 62 L.R.A. 751, as follows: "* * * the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in dilirium or frenzy caused by the collision [injury], and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues. * * * That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant." This statement was made in criticising a charge to the jury which was held to be too favorable to the plaintiff. In the same connection the court said: "All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life; that he closed the door, and locked it, with a view to exclude others and prevent interruption; and that he then took the napkin, and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a willful and intelligent purpose to accomplish it." The same court in In re Sponatski, 1915, 220 Mass. 526, 108 N.E. 466, L.R.A. 1916A, 333, in approving the statement we have quoted from the Daniels case, upheld a finding that an employee met death in the course of and arising out of his employment, where as the result of an injury he became insane and threw himself from the window of a hospital, which act of self-destruction, it was found, "did result from 'an uncontrollable impulse and without conscious volition to produce death.'"

[3] At the inception of the trial defendants took the position, which they still maintain, that the act of self-destruction could not be held to have resulted from the insane condition of mind unless it was established that the deceased was unable to understand "the physical character, nature, quality or consequences of his act"; but expressions in the cases upon which they rely must be construed in the light of the facts under consideration and within the limits of the matters which were decided. The cases we mention and others of similar import do hold that one who is mentally unsound may nevertheless be capable of a voluntary and willful act of suicide, and that the act will be deemed voluntary if it is shown to have resulted from the exercise of "a moderately intelligent power of choice." But they do not hold that one possessing moderate intelligence may not fail to use it and act under the influence of an insane impulse. If, as the court found, Fred Faber was wholly devoid of understanding and took his life without consciousness of what he was doing, it would have been, unquestionably, the act of an insane man and in law an involuntary act. Defendants would have us construe the finding as meaning that he was at all times wholly without capacity to understand the nature and consequences of an act of shooting himself in the head and they then assail the finding as unsupported by the evidence. They preface their argument with a recital of all of his acts and conduct which were admittedly rational and then assert that these facts conclusively show that he did have sufficient mental capacity and understanding to know the character, nature, quality and consequences of an act of self-destruction. We do not construe the finding as

having the breadth and meaning which defendants seek to attribute to it, that is to say, that Faber was entirely devoid of understanding, nor is it necessary to so construe it in order to have support for the judgment. The human mind is such that it may direct rational conduct at some times or in some situations and with relation to some subjects of action and yet without the employment of reasoning processes at other times may direct irrational or insane conduct in the same or other situations and with relation to the same or other subjects of action.

It has been held in this state, and in a proceeding such as the one before us, that self-destruction resulting from insanity is involuntary and that the victim is without legal or moral responsibility for the act. As we understand the findings in our case they purport to decide the same questions of fact that were held in Baker v. Board of Fire P. F. Comm'rs., 1912, 18 Cal. App. 433, 436, 123 P. 344, 345, to support a conclusion that self-imposed death occurred "while in the performance of his duty." The court there said: "So, in the case at bar, Baker cannot be said to have been the cause, either morally or legally, of his own death. The primary and efficient cause of his death was the dreadful injuries he received. These injuries set in motion a chain of events that, operating in a direct line from cause to effect, and without the intervention of any independent force, resulted in his death. His death resulted without the intervention of any independent force, for the self-inflicted wound was the result of the insanity, which was in turn caused by the injuries. The injuries were thus the efficient and proximate cause of his death. 'An efficient, adequate cause, being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result.' Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 P. 774, 25 Am.St.Rep. 267."

The finding as to Faber's want of understanding should be construed as referring to the immediate time of the fatal act. The question before the court was whether his admitted insanity was the efficient cause of his self-destruction; in other words, whether at that time, he was capable of acting and did act of his own volition and rationally or whether he acted under the influence of an insane impulse. It may be conceded that ordinarily he conducted himself in a rational manner and yet, as we shall point out, he flourished, manipulated and fired his revolver upon innumerable occasions as no sane person would have done. A finding that the act of self-destruction was the proximate result of the unbalanced mental condition would have been sufficient upon this issue of proximate cause; it would necessarily have negatived the supposition that the act was voluntary. The finding in question is sufficient to determine the particular issue of proximate cause or, in other words, that the act was irrational and therefore involuntary; if it goes further than that, which we doubt was intended, it is still sufficiently supported if the evidence warranted a reasonable inference that the act of shooting resulted proximately from an insane impulse.

Attention will now be directed to evidence which, in our opinion, amply sustains the finding that the mental disorder was the immediate, proximate cause of the act which accomplished Faber's death. We shall not dwell upon the evidence which shows the rational and fairly normal nature of Faber's conduct while he was on duty as a police officer. It may be that he performed his duties in an intelligent manner and with reasonable efficiency, but if so it would not follow that his power to reason and to understand and appreciate the consequences of his act was not overcome or supplanted by a thoughtless and irrational impulse to commit the fatal act. The fact that a person acts rationally part of the time, or most of the time, is not irreconcilable with the fact that he consistently acts irrationally with reference to particular subjects of thought and action. The evidence which bears most directly and forcefully upon the issue of the proximate cause of the fatal shooting is that which relates to the conduct of the deceased in the performance of acts of a similar nature. There were many specific instances of insane conduct, which began shortly after his injury and extended through the following years to the time of his death.

He habitually carried his gun with five chambers loaded and one empty and frequently pointed it at objects and pulled the trigger so as to allow the hammer to fall upon the empty chamber. In May of 1930 he was first seen to put the gun against his head and pull the trigger and from that time on he frequently repeated this exhibition; at times he would put the barrel in his mouth and pull the trigger.

In June of 1930 he fired a shot in his bedroom and when his mother asked him what had happened, stating that she thought he knew how to handle a gun, he replied, "I do," and shot into the mattress of his bed. In 1931, in the living room of his home, while his 10-year-old niece was seated upon a davenport, he suddenly shot past her head, missing her by inches. In 1935 he came home about 3 o'clock in the morning; his wife hid behind a bedroom door; he shot all the shells in his gun into the floor around her feet. When she emerged from behind the door after about an hour, he was lying on the bed apparently asleep. In 1937 he arose from bed about 2 a.m. went outdoors and fired a shot at some birds which had been chirping outside the window and returned, saying, "Well, I guess I've killed them all right." In the same year, in the presence of his mother and wife, he shot through the upholstery of a divan. In 1939, when he was having dinner with his wife and another married couple in a Chinese restaurant, he abused the waiter, went outside and emptied his gun into the building. The party left the restaurant and Faber said, when questioned as to his conduct, "Oh, there's lots of rats out there that need to be cleaned out." On the way home he insisted upon riding in a rumble seat; his wife looked back, found that he was not in the seat but had been riding on top of the car. In 1937, while riding with his wife, he amused himself by shooting out street lights. In 1939 he went into his back yard where his wife had put flower pots on a ledge and shot them off, one by one. During the entire period in question he drove his car at frantic and reckless speed, apparently enjoying the discomfiture of his passengers. On one occasion he grabbed a Bible from his wife's hand and tore it to bits. Between 1930 and 1939 the Fabers lived in many different houses and in each one of them he shot holes in the walls and in the furniture. He frequently used violence upon the person of his wife, upon one occasion tore up her fur jacket and upon another occasion tore off a dress she was wearing. In 1933 he threatened to destroy the piano with an axe or hammer, was prevented from doing so by his wife and mother, but did break some windows in the house A fellow officer testified to having prevented him from stealing a pillow from an automobile. There were other shooting episodes and erratic actions similar to the foregoing.

Following his injury Faber began to drink to excess, although he continued to do his work as a police officer in a reasonably efficient manner. His irrational acts were usually committed when he had not been drinking. It does not appear that he was more violent or irrational when he had been drinking than when he was entirely sober. During all of that time Faber suffered from minor ailments such as colds and slight physical injuries, but to his wife and mother and intimate friends he complained constantly of pains in the head, nervousness, and inability to sleep. He occasionally made similar complaints to his fellow officers. He indulged heavily in sedatives and in liquor to produce sleep. He was occasionally under the care of physicians and complained to his wife and mother that the doctors could do nothing for him. He appears not to have sought treatment at the receiving hospital for his more serious condition although he was treated there for minor ailments.

Petitioner's expert witness, to whom we have referred, testified that in his opinion there was a causal connection between the mental condition and the fatal shooting.

Upon this evidence the trial court was well justified in finding that the act which caused Faber's death resulted directly and proximately from his deranged mental condition. It was but one of an infinite number of irrational acts which were of the same violent character. They were erratic, unreasonable and pointless; he made no effort to excuse or explain them. He acted suddenly, impulsively, and without regard for consequences. It would be useless to endeavor to understand the mental processes and impulses of such a man or to endeavor to convince ourselves that his violent actions were controlled by reason at all; it is too clear that he was governed by sudden impulses and not by the volition of a sane mind.

[4] The trial court found, "It is true that the immediate occasion of his death was a self-inflicted gunshot wound of the head; it is further true that said Fred Faber inflicted said wound upon himself as a result of his said unbalanced mental condition at said time." Counsel on both sides construe this to be a finding that Fred

Faber committed suicide. They use the word "suicide" loosely, as implying an act that was in some measure voluntary, as distinguished from one that was purely accidental. Defendants assail the finding, contending that the evidence shows conclusively that death was accidental. The court assuredly did not find that Faber knowingly or intentionally killed himself; the findings were to the contrary. But we cannot see that it makes any difference whether the shooting was suicidal (as counsel use the word) or purely accidental. If "suicidal" it could be more readily accounted for as having resulted from an insane impulse than from deliberate action. If death was accidental it was the unexpected but not unforeseeable result of one of a long series of impulsive, violent and irrational acts. The surprising part of it is that these acts did not result in other fatalities or serious injuries. The evidence strongly indicated that this whole course of conduct was due to mental derangement and we think there was no reason to believe that the final act was less irrational than those that had preceded it. The probability that the fatal shooting was due to mental unbalance was stronger if, as defendants contend, death was accidental and not intentional. In either event the consequences which followed in unbroken sequence Fred Faber's injury, received while in the performance of his duty, fully establish petitioner's right to a widow's pension.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

56 Cal.App.2d 834

JOHNSTON v. LONG et al.

Civ. 13694.

District Court of Appeal, Second District, Division 3, California.

Jan. 27, 1943.

Hearing Denied March 25, 1943.

1. Master and servant 🔑324

Generally, independent contractor is not liable for damages to third persons caused by defective construction after work is completed and accepted by owner even though he were negligent in carrying out contract, except where work was so negligently defective as to be imminently dangerous to third persons and contractor knew or should have known of dangerous situation and owner did not know of such condition and could not discover it by reasonable inspection.

2. Pleading 🔑225(1)

In action by deliveryman against contractor to recover for injuries sustained when lift-type door fell, which door contractor was alleged to have negligently repaired, on contractor's demurrer deliveryman should have been permitted to amend complaint to allege that work done was so negligently defective as to be imminently dangerous to third persons, and that contractor knew or should have known of such defect and that owner did not know and could not have discovered such condition by reasonable inspection.

3. Appeal and error 🔑863

When an order is made sustaining a demurrer without leave to amend, question as to whether court abused its discretion is open on appeal even though no request to amend was made. Code Civ.Proc. § 472c.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Harold R. Johnston against Ralph C. Long and others to recover for injuries sustained when a lift-type door fell and struck plaintiff. From a judgment for defendant San Diego Planing Mill, sued as San Diego Planing Mill Company, after its demurrer had been sustained without leave to amend, plaintiff appeals.

Reversed with directions.

Mortimer Kline and Albert W. Leeds, both of Los Angeles, for appellant.

Eugene Glenn, of San Diego, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendant, San Diego Planing Mill, entered after said defendant's demurrer to plaintiff's complaint was sustained without leave to amend.

There were four alleged causes of action. The first cause of action was in substance as follows: that certain defendants, as individuals, owned a certain bulding in San Diego in which they conducted an automobile agency, and in connection with said business they purchased gasoline and received delivery of the same in the building; that plaintiff was "a tank-truck salesman and made deliveries of gasoline" at said premises for use in said business; that such deliveries were made in the building through an entrance in which there was a large overhead lift-type door, operated by a lifting apparatus attached to the door; that plaintiff, with the acquiescence of defendants, used such entrance when entering and leaving the building in making deliveries; that on December 12, 1940, defendants negligently kept and maintained said door in an unsafe condition which condition was known to the defendants but unknown to plaintiff; that on said day while making a delivery of gasoline to defendants, plaintiff raised the door and it fell and struck plaintiff on his head, causing serious bodily injury.

The second cause of action was the same as the first except it omitted the allegation that defendants negligently kept and maintained the door in an unsafe condition, and alleged that said defendants, the "land-occupiers," as individuals, employed respondent, San Diego Planing Mill, in October, 1940, to repair said door and its lifting apparatus; that respondent, acting within the scope of its agency, did repair the door and apparatus in such a negligent manner that it was unsafe to use; that such unsafe condition was known to all of the defendants but was unknown to plaintiff.

The third cause of action was the same as the first cause of action except it omitted the allegation that said defendants (other than this respondent), as individuals, owned and conducted the business, and alleged that said defendants (other than this respondent) were copartners in conducting the business.

The fourth cause of action was the same as the second cause of action, except it was alleged therein that defendants (not including this respondent), as copartners, employed respondent to repair said door.

In other words, the first and third causes of action were based upon the theory that the individual defendants, as "land-occupiers," negligently maintained the door in an unsafe condition. In the first cause of action it was alleged that defendants (not including this respondent) were individuals and in the third cause of action that they were copartners. The second and fourth causes of action were based upon the theory that the "land-occupiers" had employed this respondent as their agent to repair the door. In the second cause of action it was alleged that the defendants, as individuals, employed respondent; and in the fourth cause of action that defendants, as copartners, employed respondent. This respondent was, as above shown, a defendant in the second and fourth causes of action only. The demurrer of respondent, which was sustained without leave to amend, therefore applied only to the second and fourth causes of action. The demurrer of the other defendants (the land occupiers) was overruled as to all causes of action. There was no special demurrer.

Apparently, the basis upon which the demurrer was sustained without leave to amend was that respondent was relieved from liability, whether its status as repairer was that of independent contractor or agent, by reason of its completion of the work and the acceptance of it by the land occupiers prior to the accident.

Appellant contends that he should have been permitted to amend the complaint with respect to the liability of respondent, and that the trial court abused its discretion in not granting such privilege; that he should have been granted an opportunity to amend the complaint, if he elected so to do, by setting forth the appropriate allegations to describe in detail that the door was a dangerous instrumentality; and by setting forth the appropriate allegations in an alternative count to allege knowledge of the defect on the part of the respondent and lack of knowledge on the part of defendants, the "land-occupiers."

[1] The general rule with respect to the liability of an independent contractor for damages to third persons caused by defective construction is that, after his work is completed and accepted by the owner, he is not liable to a third person for damages suffered by reason of the condition of the work even though he was negligent in carrying out the contract. 45 C.J., Negligence, § 320, p. 884; Kolburn v. P. J. Walker Co., 1940, 38 Cal.App.2d 545, 550, 101 P.2d 747. An exception to the general rule is that the contractor is liable if the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided the contractor knows, or should know, of the

dangerous situation created by him, and the owner does not know of the dangerous condition or defect and would not discover it by reasonable inspection. 45 C. J., Negligence, § 320, p. 884; Stultz v. Benson Lumber Co., 1936, 6 Cal.2d 688, 59 P.2d 100.

It was stated in Dahms v. General Elevator Co., 1932, 214 Cal. 733, at page 741, 7 P.2d 1013, at page 1016: "'To state the proposition clearly and distinctly, it is that, although a machine may not be in its nature inherently dangerous, yet, if it is made so by the neglect of a manufacturer having notice and knowledge that it is to be used by others than the purchaser, and injury results to others than the purchaser, directly traceable to that negligence, such manufacturer is liable to the person injured because of that negligence. * * *' Defendant as a matter of law is chargeable with knowledge that in undertaking to repair an instrumentality such as an elevator, and particularly the hoisting shaft and sheave thereof, any negligence on its part would cause injury to the operator of the car. * * * In such a case we think that defendant was under a duty to plaintiff to use ordinary and reasonable care in the repair and inspection of the elevator, and where, as here, the jury finds that defendant negligently performed its duties * * * the liability of defendant to plaintiff is clear."

In the case of Hall v. Barber Door Co., 1933, 218 Cal. 412, 23 P.2d 279, the defendant had installed an overhead lift-type door, but negligently failed to attach safety appliances properly, and plaintiff, an invitee, was injured while using the door. The defendant, in that case, intended to do further work on the installation, although there had been a cessation of his work thereon for two days prior to the accident. The court said (218 Cal. at page 416, 23 P.2d at page 280): "* * * we have no hesitancy in holding that from such evidence the jury could have inferred that defendant was negligent in installing the door, that defendant left the door in such a condition as to constitute an implied invitation to use it, and that defendant was negligent in failing to warn the plaintiff and others lawfully on the premises of the hidden danger of which defendant had knowledge or, by the use of ordinary care, should have had knowledge." The court also said (218 Cal. at page 420, 23 P.2d at page 282): "Under such circumstances, the jury could have found that defendant knew, or should have known, that persons rightfully on the premises were likely to use that door; that defendant knew or should have known that it would be dangerous to use the door under those circumstances. We think the jury could have inferred that, as left by defendant, there was an implied invitation to use the door. The jury could also have found that, as left by defendant, the door was a dangerous instrumentality within the meaning of that doctrine as recently enunciated by this court in Dahms v. General Elevator Co., supra, and that, as constructed and left by defendant, it was in legal effect a trap of the existence of which it was defendant's duty to warn even licensees."

Respondent relies upon the case of Kolburn v. P. J. Walker Co., supra, 1940, 38 Cal.App.2d 545, 101 P.2d 747, in support of its contention that it was proper to sustain the demurrer herein without leave to amend. In that case a person who was working on a roof, which had been constructed ten years previously, fell through the roof and sued the builder of the roof, claiming a defect in the original construction. The roof described therein and the large overhead lift-type door with its attached lifting apparatus involved herein were very different types of instrumentalities. The type of object there involved (the roof) was such that the non-liability of the original builder was determined under the general rule hereinabove stated. In the case of Hall v. Barber Door Co., supra, 1933, 218 Cal. 412, 23 P.2d 279, it was held that the jury could have found that the type of object there involved (the overhead door) was a dangerous instrumentality and that the liability of the contractor came within the exception to the general rule.

[2] In the present case, involving an overhead door and its lifting apparatus, the appellant should have been given an opportunity to amend his complaint to meet the requirements of the exception to the general rule.

[3] Appellant did not ask permission in the trial court to amend the complaint; however, such request was not necessary. When an order is made sustaining a demurrer without leave to amend, the question as to whether or not the court abused its discretion is open on appeal even though

no request to amend was made. Code Civ. Proc. § 472c.

Judgment is reversed with directions to the superior court to permit appellant to amend his complaint.

SHINN, Acting P. J., and SHAW, J. pro tem., concur.

56 Cal.App.2d 811

MARSH v. ARCH RIB TRUSS CO., Ltd.

Civ. 12283.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1943.

1. Master and servant 🔑**80(9)**

Evidence sustained judgment for plaintiff for balance of commissions due to plaintiff under oral employment contract.

2. Judgment 🔑**253(1)**

Where employee was unable to prove that full amount of commissions sued for were due, because of employer's failure to comply with demand to produce all of its books, the employer could not contend that because findings and judgment did not conform with complaint and testimony of employee award of sum less than that sued for was not justified.

3. Corporations 🔑**407(2, 5)**

One who was president and general manager of corporation had authority to execute contract employing plaintiff on a commission basis.

4. Corporations 🔑**308(3)**

An employment contract under which employee of corporation was entitled to commissions estimated on net selling price of business procured by employee, after deducting from contract price the cash discount and cash allowance to customers, was not objectionable as giving employee an interest in the net profits of the corporation.

5. Appeal and error 🔑**882(3)**

Where trial court based judgment for commissions due to employee under oral employment contract, on evidence offered by employer and on theory advanced by its counsel, employer could not base claim of error on ground that evidence was in conflict as to precise manner of estimating commissions due, and that the contract was too uncertain to permit any recovery.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by F. E. Marsh against Arch Rib Truss Company, Ltd., on oral contract of employment and for services rendered. From an adverse judgment, defendant appeals.

Affirmed.

Hahn, Graf & Ross, of Los Angeles, for appellant.

Carlos G. White and White, Wakefield, Leighton & White, all of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued and had judgment upon a complaint framed in two causes of action—the first pleading an oral contract of employment, the second pleading in general terms the indebtedness of defendant for services rendered.

The defendant appeals from the judgment on the grounds that the evidence is insufficient to support the judgment, that its general manager was without authority to make the contract, and that the contract is too uncertain to permit any recovery.

The trial court found that the contract of employment was executed as pleaded in the complaint, and as admitted by defendant; that it called for payment to plaintiff of commissions based upon seven and one-half percent of the net amount paid to defendant from business and contracts secured by plaintiff after deducting cash discounts and allowances made by defendant upon the gross sum of said business and contracts. Accepting the evidence offered by defendant taken from its books and records the trial court found that the net amount so paid to defendant was about $164,000, that plaintiff's commissions thereon amounted to $12,000, of which sum approximately one-half had been paid. The judgment for the balance was approximately $2,000 less than the sum sued for. The evidence offered by the plaintiff would have supported a judgment for the full amount.

[1, 2] Upon these facts there can be no argument that the findings are not support-

ed. They are based upon appellant's concessions of the execution of the contract, the evidence of the rate of commissions agreed to be paid, and of the full performance on the part of the respondent. The showing from appellant's books and records was sufficient proof of the volume of business done and the profits received under the contract. It was because of appellant's failure to comply with respondent's demand to produce all its books that respondent was unable to prove, by evidence in the possession of his adversary, that the full amount sued for was due. For these reasons there is no merit in appellant's contention that, because the findings and judgment did not conform with the complaint and the testimony of respondent, the award of a sum less than that sued for is not justified.

[3, 4] Secondly, it is argued that the general agent of the appellant was without authority to execute the contract of employment giving respondent "a share of the net profits of the business." The appellant refers to this party as the general "agent." He was the president of the corporation and testified that he was its general manager. The authority of a general manager to compensate an employee upon a commission basis can not be disputed. Greve v. Taft Realty Co., 101 Cal.App. 343, 353, 281 P. 641. The same case disposes of the argument that the contract purported to give respondent an interest in the net profits of the corporation. The trial court found that the parties agreed that the commissions should be estimated upon the net selling price of the business procured by respondent, after deducting from the contract price the cash discount and cash allowance to the customers. It is immaterial that some negotiations were had, or even that some promises may have been made, relating to allowing respondent a percentage of the net profits of the corporation, in addition to the commissions agreed upon.

[5] Finally, it is argued that the contract is too uncertain to permit any recovery. This is based upon the claim that the evidence is in conflict as to the precise manner of estimating the commissions due respondent. Since the trial court based the judgment upon the evidence offered by appellant, and upon the theory advanced by its counsel, there is no basis for a claim of error.

The judgment is affirmed.

SPENCE, J., concurred.

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56 Cal.App.2d 728

In re NEFF'S ESTATE.

FAUX et al. v. CAILOR et al.
Civ. 13870.

District Court of Appeal, Second District,

Division 1, California.
Jan. 20, 1943.

1. Executors and administrators ⚷497

Claims of executor and his attorney for fees for extraordinary services are not to be allowed unless it appears that they have rendered some extraordinary service and that the claims are just and reasonable. Probate Code, §§ 900, 902, 910.

2. Executors and administrators ⚷497

The allowance of fees for extraordinary services of executor and his attorney is a matter of discretion with the trial court not to be interfered with except for abuse. Probate Code, §§ 900, 902, 910.

3. Executors and administrators ⚷497

Where probate judge has before him all of proceedings of an estate together with evidence of exact nature of extraordinary services performed by executor and his attorney, it is province of probate judge in exercise of sound discretion to determine weight of evidence and value of services performed and allow to executor and attorney such sums as judge deems just and reasonable for any extraordinary services. Probate Code, §§ 900, 902, 910.

4. Executors and administrators ⚷497

Where deceased's estate consisted of bonds appraised at $318,476 and $9,100 in real property and miscellaneous personal effects, executor collected $12,317.04 interest and on selling bonds realized $14,254.36 more than their appraised value, executor and his attorney rendered services in connection with sale of bonds and in connection with federal estate tax, state inheritance tax, federal income tax, and state income tax matters, allowance of $5,000 each to executor and his attorney for extraordinary services was not an abuse of discretion. Probate Code, §§ 900, 902, 910.

◆

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge pro tem.

Proceeding in the matter of the estate of J. B. Neff, deceased, wherein O. T. Cailor, executor, and Syril S. Tipton, as attorney for the executor, filed petition for fee for extraordinary services, which was opposed by W. M. Faux and others. From judgment allowing fee, M. W. Faux and others appeal.

Affirmed.

Hooper & Miller, of Los Angeles, for appellants.

Syril S. Tipton, in pro. per., for respondents.

YORK, Presiding Justice.

This is an appeal from a judgment or order allowing the payment of $5,000 each to O. T. Cailor, as executor, and Syril S. Tipton, as attorney for said executor, for extraordinary services rendered by them in the administration of the estate of J. B. Neff, deceased, written objections having been interposed by appellant legatees under the will of said decedent.

Respondents' petition for fees for extraordinary services alleges that said estate was appraised at $327,576, all of which consisted of bonds except $9,100; that under the terms of the will it was necessary to sell said bonds and reduce them to cash for the purpose of distribution; that in connection with such sale respondents prepared and presented a petition to sell a portion of the securities over a recognized exchange, and as to the balance thereof, consisting of unlisted securities it was necessary for respondents to prepare and present a petition to sell them at a minimum price, which they did after many conferences with various brokerage houses concerning the price of the various bonds. Also, it appears from the record, that respondent attorney on behalf of respondent executor petitioned the court for instruction and direction for the reason that the inheritance tax department would not make its report fixing the tax until there was a determination by the court as to the construction of paragraph 3 of the will bequeathing to the legatee Lelia B. Bucher $7,000 in certificates of the Home Builders Association of Pomona, which were not a part of said estate, having been disposed of by testator prior to his death.

During the pendency of the appeal, this court, upon respondents' motion for diminution of the record, ordered that the affidavit of the trial judge be made a part of the record on appeal. This affidavit is now before us and avers as follows:

"Florence M. Bischoff, being first duly sworn, deposes and says:

"That upon stipulation of the attorneys in the above cause, she presided as Judge pro tem in the hearing held on May 25, 1942, concerning the Petition for Fees for Extraordinary Services on behalf of the executor and his attorney, and the objections thereto.

"That at said hearing no clerk or reporter were present. That during said hearing a motion was duly made by the petitioners to amend the Petition for Fees for Extraordinary Services by adding thereto an additional paragraph alleging the performance of extraordinary services on behalf of the executor and his attorney in connection with the determination of the Federal Estate Tax, the State Inheritance Tax, the Federal Income Tax and the State Income Tax. That said motion was granted and at said hearing testimony received, based upon said additional allegation."

It is here urged by appellants that (1) the services so rendered by respondents were ordinary and not extraordinary; (2) if such services were extraordinary, the compensation therefor is unreasonable.

Respondents assert in their brief on appeal that "decedent's estate consisted of bonds appraised at $318,476 and $9,100 in real property and miscellaneous personal effects. The executor elected to retain these bonds and to continue to collect interest on them, instead of reducing this property to cash immediately, as he would have been justified in doing, and in so doing assumed a personal responsibility if the bonds should drop in value; by this procedure the executor collected interest in the sum of $12,317.04 * * * the bonds were sold by the executor and his attorney at a time when they realized to the estate $14,254.36 more than their appraised value, or value at date of death; in other words, in effect the business of the deceased was carried on and realized for the estate $14,254.36."

With reference to the question of expenses and compensation of an executor, section 900 of the Probate Code provides that he "shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided. * * *"

Section 902 of the same code provides as follows: "Commissions for extraordinary services, etc. Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real or personal property, contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns which require the appointment of a tax counsel, tax auditor or other tax expert for the preparation thereof, the adjustment and payment of extensive or complicated estate or inheritance taxes, litigation in regard to the property of the estate, the carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform."

Section 910, Probate Code, provides: "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services."

[1-3] "The representative is not entitled to any allowance in addition to the statutory commissions unless it appears to the court that he has rendered some extraordinary service, and it must appear to the court that the claim is just and reasonable. The allowance is a matter of discretion with the trial court—not to be interfered with except for abuse—not only for it to determine whether the character of the services is such as to authorize extra compensation, but to determine the amount." 11B Cal.Jur. 469, § 1031, and cases therein cited. See, also, In re Estate of Pomin, 33 Cal.App.2d 544, 546, 92 P.2d 479, 480, where it was stated: "We are of the opinion a probate judge, who has before him all of the proceedings of an estate, together with evidence of the exact nature of extraordinary services performed incident to probating it, is not bound to fix the compensation therefor, under Section 902 of the Probate Code, at the estimated value testified to by expert witnesses produced by the executor, even though no witness is called to dispute their opinions in that regard. It is the province of the trial judge, under such circumstances, in the exercise of sound discretion, to determine the weight of the evidence and the value of the services performed and to allow the executor or attorney such sum 'as the court may deem just and reasonable for any extraordinary services.' Sec. 902, Probate Code;" and authorities there cited.

In Re Estate of Keith, 16 Cal.App.2d 67, 70, 60 P.2d 171, 172, wherein an appeal was taken from an order allowing attorneys for an executor the sum of $5,000 for extraordinary services, it was held: "In a probate matter, it is particularly within the power of the trial judge, who has all of the records before him, to fix and determine what fees are proper. [In re] Estate of Vaughan [14 Cal.App.2d 594], 58 P.2d 742. Section 910 of the Probate Code provides that attorneys for executors shall be allowed such amount as the court 'may deem just and reasonable for extraordinary services.' It is the duty of the court to determine whether or not services denominated 'extraordinary' were necessarily required in the administration of the particular estate, and if so, to decide what would be a just and reasonable allowance. In making its order fixing such fees, the court has a large discretion, and when the court has made its determination in respect thereto, its judgment will not be interfered with on appeal, except only in the face of a plain abuse of discretion. 11–B Cal.Jur. 506, § 1056; In re Estate of Parker, 186 Cal. 671, 200 P. 620; In re Estate of Iser, 52 Cal.App. 405, 198 P. 1014." See, also, In re Estate of Hardenberg, 18 Cal.App.2d 307, 310, 63 P.2d 1200.

[4] In the circumstances presented by the record herein, it cannot be held as a matter of law that the trial court abused its discretion in allowing compensation for extraordinary services performed by the executor and his attorney on behalf of the estate.

For the foregoing reasons, the judgment or order appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

56 Cal.App.2d 742

MADSEN et al. v. TURLOCK IRRIGATION DISTRICT.

Civ. 6642.

District Court of Appeal, Third District, California.

Jan. 21, 1943.

1. Appeal and error ⇨1

Right of appeal does not exist unless it is found either in the constitution or in enacted statutes.

2. Appeal and error ⇨102

A reviewing court is without jurisdiction to entertain a purported appeal from an order sustaining or overruling a demurrer to complaint, even though it is made without leave to amend the pleading.

3. Appeal and error ⇨337(2)

Where it did not appear that judgment had been entered pursuant to order sustaining defendant's demurrer to complaint without leave to amend pleadings, purported appeal taken from such order was "premature".

See Words and Phrases, Permanent Edition, for all other definitions of "Premature Appeal".

◆

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Action by I. B. Madsen and others against Turlock Irrigation District. From an order sustaining defendant's demurrer to complaint without leave to amend the pleadings, plaintiffs appeal.

Appeal dismissed.

F. M. Ostrander, of Merced, for appellants.

Griffin & Boone, of Modesto, for respondent.

PER CURIAM.

The plaintiff has attempted to appeal from an order sustaining defendant's demurrer to the complaint without leave to amend the pleading. There is no appeal from that order. It does not appear that a judgment was entered pursuant to that order. The record contains no reference to a judgment.

[1-3] The purported appeal in this case was prematurely and erroneously taken from the order sustaining the demurrer without leave to amend. The right of appeal is statutory. No right of appeal exists unless it is found either in the Constitution or in enacted statutes. (2 Cal.Jur. 111, § 4.) It has been uniformly held a reviewing court is without jurisdiction to entertain a purported appeal from an order sustaining or overruling a demurrer to the complaint, even though it is made without leave to amend the pleading. Rickert v. Zoeger, 169 Cal. 399, 146 P. 894; Ham v. Los Angeles County, 46 Cal.App. 148, 151, 189 P. 462; Braren v. Reliable Carpet Works, Inc., 125 Cal.App. 489, 13 P.2d 972; Doran v. Sherman, 18 Cal.App.2d 479, 64 P.2d 442; 2 Cal.Jur. 156, § 26. In the Rickert case, supra, which was based on a record which is exactly like the one which is involved in this case, it is said [169 Cal. 399, 146 P. 895]:

"An order sustaining or overruling a demurrer is not an appealable order. [Citing many cases.] This court is therefore without jurisdiction to act upon the so-called appeal, and it must be dismissed."

The purported appeal is therefore dismissed.

WEST KEY NUMBER SYSTEM

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56 Cal.App.2d 801

WALSH v. WALSH.

Civ. 12179.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1943.

Hearing Denied March 25, 1943.

1. Husband and wife ⇨258

Improvements made upon wife's separate property by husband do not give him any interest in the property, and it is immaterial whether advances so made are community funds or come from husband's separate property.

2. Husband and wife ⇨265

Evidence failed to establish that husband was entitled to have a "trust" imposed upon an undivided one-half interest in real property held in name of former wife on ground that husband during time they were living together paid one-half of the purchase price and of improvements placed thereon. Civ.Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Suit by Richard J. Walsh against Mary Walsh to impose a trust upon an undivided one-half interest in real property acquired by the parties in part while living together as husband and wife, wherein the defendant filed a cross-complaint seeking to quiet her title in the property. From a judgment declaring that full title was in defendant and foreclosing the plaintiff from asserting any adverse interest, the plaintiff appeals.

Affirmed.

Frank J. Comaich, of San Francisco, for appellant.

James W. Harvey and Eric J. Robertson, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to impose a trust upon an undivided one-half interest in real property acquired by the parties in part while living together as husband and wife. The defendant filed a cross-complaint seeking to quiet her title to the same property. The judgment declared that the full title was in defendant and foreclosed the plaintiff from asserting any adverse interest.

Plaintiff's appeal from the judgment raises the question of the sufficiency of the evidence to support the judgment, and attacks the legal conclusions supporting the defendant's claim of exclusive right and title. While living together as husband and wife the parties agreed to purchase a parcel of unimproved real property, each to pay therefor out of their separate funds. The defendant made the down payment of $120 on a total purchase price of $1,200. Then the parties separated. Thereafter the defendant arranged to complete the purchase—paid $530 of her own funds, took title in her own name, and gave a note and deed of trust for the balance. At this time the plaintiff gave to defendant a quitclaim deed to complete her title. The parties then became reconciled and prepared to improve the property for their family abode. Plaintiff paid to defendant a portion of the agreed purchase price and advanced additional sums from time to time, and also contributed labor in the erection of a house and garage, and in the improvement of the premises. The parties again separated and this action was commenced on the theory that defendant held an undivided one-half interest in the property in trust for appellant.

The trial court found that the defendant took full title in her own name and as her separate property, that, while the parties were separated, the defendant commenced the construction of a dwelling house upon the property, which was "practically" completed at the time of the reconciliation; that thereafter the plaintiff gave to defendant $827 to apply upon the cost of the property and improvements, but at no time demanded a deed, or made any claim of a separate interest or paid his share of the cost of the premises. From these facts the trial court concluded that defendant held title as her separate property, and that all payments of money and all contributions of labor made by plaintiff were gifts to the defendant.

On this appeal the appellant does not contend that there is no evidence to support these findings, and such contention could not be made in view of the record. The evidence is found in the testimony of the respective parties which is just as conflicting as such testimony could be. Looking at this testimony in the light most favorable to the appellant it would appear that the parties first agreed to purchase the land for themselves, that appellant dropped out of the deal and conveyed all his interest to his wife, that the wife then commenced the construction of a home, that, when the parties were again reconciled, the appellant agreed to pay his share of the purchase price and of the improvements, which he did not do.

The questions of law involved do not require elaboration. There was no allegation or proof of fraud, undue influence, or mistake. There was no proof of a confidential relationship upon which a presumption of a resulting trust could be based, except the relationship of husband and wife. If this presumption is invoked upon a showing that the wife obtained an undue advantage from her husband, it would merely create a conflict in the evidence. Here proof of advantage gained is not clear. From all that appears the husband may have enjoyed full compensation, while living in the home, for the small portion of the purchase price he advanced.

But the rule of law which is controlling here is based upon section 164 of the Civil Code, which declares that "whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property * * *." Kimbro v. Kimbro, 199 Cal. 344, 347, 249 P. 180, Nordquist v. Malmberg, 213 Cal. 394, 396, 2 P.2d 334.

[1, 2] It is equally well settled that improvements made upon the wife's separate property by the husband do not give him any interest in the property, and it is immaterial whether the advances so made are community funds or come from the separate property of the husband. Holtze v. Holtze, 2 Cal.2d 566, 567, 42 P.2d 323; Smith v. Smith, 47 Cal.App. 650, 654, 191 P. 60; Provost v. Provost, 102 Cal.App. 775, 780, 283 P. 842. If the parties would prevent this result by special agreement such agreement must be clear and in no uncertain terms. Here the undisputed evidence is that no agreement was made after the reconciliation and after appellant quitclaimed to respondent. It was subsequent to that time that appellant's contributions in money and labor were made.

The judgment is affirmed.

SPENCE, J., concurred.

56 Cal.App.2d 658

Ex parte JONES.

Cr. 474.

District Court of Appeal, Fourth District, California.

Jan. 14, 1943.

1. Animals 🔑16

The business of raising hogs and management and operation of such business is subject to reasonable regulations.

2. Constitutional law 🔑81

The "police power" which is the power to make laws to secure comfort, convenience, peace and health of a community is extensive and in its exercise a wide discretion is committed to legislative body.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

3. Counties 🔑21½

The exercise of police power by board of supervisors is not limited to regulations of nuisances but extends to everything expedient for preservation of public health.

4. Constitutional law 🔑81

Right to engage in a lawful and useful occupation cannot be taken away under guise of regulation, but such occupation may be subjected to regulation in a public interest even though regulation in some degree limits exercise of right regulated.

5. Constitutional law 🔑70(3)

The manner and extent of regulation of an occupation in a public interest are matters primarily for legislative determination with which courts cannot interfere unless it clearly appears that statute or ordinance enacted ostensibly for purpose of regulation imposes an arbitrary and unreasonable burden upon pursuit of occupation.

6. Health 🔑31

Orange county ordinance regulating commercial hog ranches and requiring a permit for operation thereof is not in conflict with statute requiring evidence of employment of unnecessary and injurious methods in operation of a use of property before such use may be declared a public nuisance. Code Civ.Proc. § 731a.

7. Health 🔑21

Where petitioner in habeas corpus who had been convicted of violating Orange county ordinance providing for regulation and licensing of commercial hog ranches challenged reasonableness of ordinance, showing that petitioner had received two permits which were canceled and that application for third was denied, in absence of claim that board of supervisors acted arbitrarily or abused discretion, was insufficient to establish such unreasonableness.

8. Health 🔑21

Requirement in Orange county ordinance regulating operation of commercial hog ranches that a person obtain a permit to maintain such a ranch is not "unreasonable".

See Words and Phrases, Permanent Edition, for all other definitions of "Unreasonable Requirement".

9. Constitutional law ⚷81

In enactment of a police regulation legislative body may look to the future and make such provisions as may be reasonably expected to be necessary to promote and preserve public health and welfare in immediate growth and progress in community.

10. Constitutional law ⚷70(3)

In consideration of police regulation unless court can say in light of facts properly brought to its knowledge that regulation has no just relation to object which it purports to carry out and no reasonable tendency to preserve or protect public safety, health, comfort or morals, decision of legislative body as to necessity or reasonableness of regulation is conclusive.

11. Constitutional law ⚷42

In habeas corpus proceedings to secure release after conviction of operating hog ranch without a license required by county ordinance, petitioner who was established in such business at time of enactment of ordinance could not attack validity of ordinance because it imposed greater burden on newcomers in such business.

12. Constitutional law ⚷48

In consideration of validity of Orange county ordinance which required persons opening new hog ranches or re-establishing hog ranches to install certain equipment and providing for inspection of equipment after installation by health officer before a license may issue, court could not assume that health officer would act arbitrarily.

◆

Original proceeding in the matter of the application of M. E. Jones for a writ of habeas corpus to secure his release from custody after conviction of violating county ordinance relating to commercial hog ranches.

Writ discharged and petitioner remanded.

Hugh G. Maddox, of Long Beach, for petitioner.

George F. Holden, Dist. Atty., of Anaheim, Lloyd S. Verry, Deputy Dist. Atty., of Fullerton, and Frank L. Bowman, Deputy Co. Counsel, of Santa Ana, for respondent.

GRIFFIN, Justice.

Petitioner was tried under a complaint charging a violation of Ordinance No. 366 as amended by Ordinance No. 370 of the county of Orange, in that he did unlawfully engage in and carry on a "Commercial Hog Ranch" without a permit. The ordinance is entitled "An ordinance regulating the operation and location of hog ranches and providing for the issuance of permits for such business in the county of Orange. * * *" Section 2 of the ordinance as amended provides that "it shall be unlawful for any person, firm or corporation to engage in, conduct, manage or carry on a commercial hog ranch, or use any property in the county of Orange for a commercial hog ranch without first having procured a permit therefor from the Board of Supervisors * * * provided, that any person, firm or corporation, which is and has been operating a commercial hog ranch may make application to the Board of Supervisors to increase the number of swine to be maintained on such hog ranch to a number in excess of that for which a permit has been granted. * * *" Section 6 provides in part that the board may "in the case of a commercial hog ranch, where garbage is not to be fed, issue a permit which may be revocable for cause; and in the case of a commercial hog ranch where garbage is to be fed, the said Board may issue a construction permit for a period of sixty (60) days, pending the installation of feeding and other equipment. When said equipment shall have been installed within said period, such fact shall be transmitted in writing to the County Health officer who shall cause an inspection to be made of said equipment and a general reinspection of the premises. If such inspection shows that satisfactory equipment and conditions exist, the Health Officer shall so report to the Board of Supervisors and said board shall then issue a permit which shall be revocable for cause."

It appears from petitioner's supplemental petition that on December 3, 1935, the board passed and adopted what is known as a zoning ordinance of that county. Among other things, it classifies certain districts in which the feeding of garbage to hogs is expressly permitted. § 17-M-3, Ordinance No. 351. It was stipulated that petitioner's hog ranch is in an unclassified zone, and that in said unclassified zone the feeding of garbage to hogs is expressly permitted by the zoning ordinance. After conviction on the above-mentioned charge, petitioner seeks this writ of habeas corpus.

It is now argued that ordinance No. 366, as amended, is in direct violation of section 731a of the Code of Civil Procedure; that it is unconstitutional and void for the reasons: (1) that Ordinance No. 366, as amended by Ordinance No. 370, could not declare any buildings or structures erected, set up, built, moved, or maintained, and/or any use of land or property established contrary to the provisions of this ordinance to be a public nuisance, owing to the fact that section 731a, supra, prohibits the designation of such uses to be a public nuisance without evidence of the employment of unnecessary and injurious methods in the operation of such uses; (2) because it discriminates unreasonably between persons or associations engaged in the business of feeding garbage to hogs, in this, that those persons who were so engaged in such business prior to the effective date of said act are not required to do the same things under said ordinance as those who subsequently go into such business, or subsequently decide to improve or move their ranch to other locations; (3) that the restrictions placed upon persons who desire to improve or move their ranch, or attempt to establish a new hog ranch in said county, are such that it is impossible so to do; (4) that it compels those who are not in business prior to the effective date of said ordinance to abide by additional requirements with respect to the regulation of such ranch and the manner in which the equipment, feeding floors, etc., are constructed, and with which it would be difficult and expensive, if not impossible, to comply; (5) that if petitioner desires to move his ranch he would be compelled under the ordinance as it now stands or as amended, to expend an enormous amount of money for the construction of the feeding floors, pens, and equipment, which he must do under the ordinance within sixty days, and at that time, after expending the money, he would be left to the whim of some person in the health department who might for some reason not like your petitioner, or not like the location, and such person could, after the expenditure of a great amount of money in construction of the feeding floors and equipment, fail to approve what had been done, and as a result the board of supervisors would not then be able to grant petitioner a permit; (6) that it is impossible for anyone to comply with the ordinance, and therefore the ordinance is unreasonable and void. It has been stipulated that petitioner is operating a hog ranch in the county of Orange on the land owned by the petitioner which is situated east and north of the city of Orange and that it is located in zone section 17-M-3, as described in Ordinance No. 351.

The application of the provisions of Ordinance No. 366, before amendment, was before this court for consideration in In re Fassett, 21 Cal.App.2d 557, 69 P.2d 865. The provisions of section 2 of that ordinance were therein set forth. It in substance provided that those who had been maintaining a hog ranch for a year or more at the same premises should be entitled to a permit to carry on the business, or to increase the number of hogs, without the payment of any fee, or the compliance with any regulations except those provided in prior ordinances, while all others who wished to engage in said business were required to pay a fee for such a permit and to comply with certain additional regulations, compliance with which would be onerous, difficult and expensive. We there held that Ordinance No. 366 was, in this respect, so patently discriminatory as between persons of the same class as to be unconstitutional and invalid. Ordinance No. 370, amending Ordinance No. 366, was adopted in an endeavor to overcome these objectionable features of Ordinance No. 366.

[1-6] It has heretofore been established that the business of raising hogs and the management and operation of such business under certain circumstances and conditions may be made subject to proper and reasonable regulations. In re Fassett, supra. The first question is whether the enactment of section 731a of the Code of Civil Procedure prevents the operation of County Ordinance No. 366, as amended by Ordinance No. 370, in its entirety. Section 9 of the original ordinance provides that any buildings or structures maintained and/or any use of the land or property maintained contrary to the provisions of the ordinance is declared to be a public nuisance. Petitioner was not charged with the violation of this section. Whether this section can be held to be effective since the enactment of section 731a of the Code of Civil Procedure is not material to a deter-

mination of the question before us, and we specifically refrain from deciding it. The ordinance provides that if any section of the ordinance is held to be unconstitutional or invalid, such decision shall not affect the invalidity of the remaining portions of the ordinance. Section 2 thereof makes it a misdemeanor for any person to engage in or carry on a commercial hog ranch without first having procured a permit therefor, irrespective of whether such hog ranch does or does not constitute a nuisance. It was this section of the ordinance that petitioner was accused of violating. The police power, the power to make laws to secure the comfort, convenience, peace, and health of a community, is an extensive one, and in its exercise a very wide discretion as to what is needful and proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested. County of Plumas v. Wheeler, 149 Cal. 758, 762, 87 P. 909. The exercise of this police power is not limited to the regulation of such things as have already become nuisances or have been declared such by the courts. Boyd v. City of Sierra Madre, 41 Cal.App. 520, 183 P. 230; In re Mathews, 191 Cal. 35, 214 P. 981; Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987. The power to regulate or prohibit conferred upon the board of supervisors not only includes nuisances but extends to everything expedient for the preservation of the public health, the prevention of contagious diseases, the right to prohibit slaughter houses, the feeding of swill slop to cows except in certain designated places, the keeping of more than two cows within certain limits, the erection of wooden buildings, and the maintenance of carpet-beating establishments. Ex parte Shrader, 33 Cal. 279; Johnson v. Simonton, 43 Cal. 242; Ex parte Casinello, 62 Cal. 538; Ex parte Heilbron, 65 Cal. 609, 4 P. 648; Ex parte Fiske, 72 Cal. 125, 13 P. 310; In re Linehan, 72 Cal. 114, 13 P. 170; McCloskey v. Kreling, 76 Cal. 511, 18 P. 433; Ex parte Lacey, 108 Cal. 326, 41 P. 411, 38 L.R.A. 640, 49 Am. St.Rep. 93. The keeping of animals may be a proper subject of municipal regulation and by such regulation the number of animals which may be kept may be limited. In re Mathews, supra; Miller v. City of Arcadia, 121 Cal.App. 660, 9 P.2d 587; In re Ellis, 11 Cal.2d 571, 81 P.2d 911; Ex parte Mirande, 73 Cal. 365, 14 P. 888. While the right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, such occupation may be subjected to regulation in a public interest even though the exercise of the power to regulate involves in some degree a limitation upon the exercise of the right regulated, and the manner and extent of the regulation are matters primarily for legislative determination with which the courts cannot interfere unless it clearly appears that a statute, or ordinance, enacted ostensibly for the purpose of regulation, imposes an arbitrary and unreasonable burden upon the pursuit of the occupation. In re Carlson, 87 Cal.App. 584, 262 P. 792; County of Plumas v. Wheeler, supra; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418. We therefore see no merit to the contention that section 731a of the Code of Civil Procedure is in conflict with or repugnant to the operation of section 2 of the ordinance as amended.

[7-10] The next question presented is whether the section of the ordinance, for a violation of which petitioner was convicted, is so unreasonable in character, in respect to the matters complained of, as to transcend the proper exercise of the law-making power or render it unconstitutional because of class discrimination. The amended ordinance has removed the one-year discriminating clause referred to in the previous decision. In re Fassett, supra. Petitioner, on June 3, 1937, filed three separate applications for the operation of commercial hog ranches with the board of supervisors of Orange County. Thereafter, two of those applications were granted and permits issued therefor which have never been canceled. The third application (being the application for the premises involved in this proceeding) was denied. From the record before us it appears that the particular hog ranch here involved has been in operation "since the early part of 1936." The record likewise shows that there are no commercial hog ranches now in operation in that county without a regular permit except the ranch of petitioner and two others, one of which has been civilly enjoined and the other has filed its application for a permit, which application is still pending. Since the adoption of the amended ordinance on July 13, 1937, 18 of such permits have been granted and three denied. The reason for the denial of the permit to petitioner is not set forth. So far as the record discloses, the board of supervisors may have been fully justified in de-

nying it. Petitioner does not contend otherwise. No claimed abuse of discretion or that the board acted arbitrarily is alleged or presented by petitioner. There is nothing unreasonable in requiring a person to obtain a permit to maintain a commercial hog ranch and regulate its operation in Orange County. In the enactment of police regulations the legislative body is not confined to present conditions alone, but may look to the future, and make such provisions as may be reasonably expected to be necessary to promote and preserve the public health and welfare in the immediate growth and progress of the city. Except where the court can say, in the light of facts properly brought to its knowledge, that a police regulation has no just relation to the object which it purports to carry out and no reasonable tendency to preserve or protect the public safety, health, comfort or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation is conclusive. In re Mathews, supra; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A. 1916B, 1248; Odd Fellows' Cemetery Ass'n v. San Francisco, supra.

[11, 12] The complaint that the ordinance discriminates between those persons already engaged in the hog-raising business and those who might, subsequent to the enactment of the ordinance, engage in that business, does not appear well founded as to this petitioner. It is conceded that the petitioner was engaged in that business on the hog ranch in question when this ordinance was enacted. It would seem that petitioner, who is already established in the hog-raising business, should not, here and now, be heard to complain if greater burdens are imposed upon those who intend to engage in that business in the future. The discrimination charged, insofar as it could be shown to exist at all, would therefore appear to be in his favor. Notwithstanding this conclusion, petitioner does not contend that the ordinances in question have operated, in practical effect, to exclude hog ranches from Orange County. The statistics set forth in respondent's answer repels any such suggestion. The force of petitioner's argument in this respect, as we understand it, is that a person who might, for the first time, be required to obtain a permit and engage in the hog-raising business in Orange County after the enactment of the ordinance referred to, or reestablish a commercial hog ranch at some other location, as distinguished from a person who was previously in such established business, would be so restricted by the requirements and subjected to the caprice and whims or prejudices of a public health officer in making a determination of the actual requirements of construction rather than a reasonable, unbiased decision of those questions by the board of supervisors. This same point was raised in In re Hartmann, 25 Cal.App.2d 55, 76 P.2d 709, where a much more absolute and final authority was conferred upon the chief of police. The court there stated that the presumption is that every officer will perform his full duty in a fair and lawful manner and under such an ordinance it cannot be assumed that the chief of police will arbitrarily refuse to grant permits to canvass for subscriptions without good cause. The same point was raised and considered and decided adversely to petitioner's contention in Boyd v. City of Sierra Madre, supra. We see no merit to this contention. We cannot assume that the health officer authorized by the ordinance to make the necessary inspections will act arbitrarily.

Writ discharged and petitioner remanded.

BARNARD, P. J., and MARKS, J., concurred.

56 Cal.App.2d 689

McCUTCHEON v. THOMPSON et al.

Civ. 3063.

District Court of Appeal, Fourth District, California.

Jan. 18, 1943.

1. Appeal and error 🔑1008(1)

In action for death of 3½ year old boy who was struck by defendants' delivery truck while he was attempting to cross highway, whether defendant driver took reasonable precautions under all circumstances was a question of fact for trial court.

2. Automobiles 🔑244(7)

In action for death of 3½ year old boy who was struck by delivery truck while he was attempting to cross highway, evidence which indicated that driver saw boy and traveled 25 or 30 feet while expecting boy to stop at middle of road and did not apply brakes until he saw boy was not going to stop, sustained judgment for plaintiff.

3. Death ⚿75

In action for death of 3½ year old boy who was struck while attempting to cross highway, evidence that boy's father was at work when accident happened, that boy had not previously played on highway and that three minutes before accident he had been at home, sustained finding that boy's parents did not negligently permit boy to cross highway.

4. Death ⚿99(3)

Award of $4,000 for death of 3½ year old boy was not excessive.

◆

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by Irving McCutcheon against Harold J. Thompson and others to recover for death of plaintiff's 3½ year old son who was struck by a delivery truck driven by named defendant and owned by other defendants. From a judgment for plaintiff, defendants appeal.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages resulting from the death of a minor son of the plaintiff. The boy, who was about three and one-half years of age, was struck by a light delivery truck driven by the defendant Thompson and owned by the other defendants, by whom he was employed. The accident happened about 1 o'clock p. m. on August 14, 1941, on North Chester Avenue, near Bakersfield. North Chester Avenue is the leading traffic arterial connecting Bakersfield with a suburb. It had a 20-foot concrete pavement with a white center line and with eight-foot oiled shoulders, beyond which there were dirt shoulders of about the same width. The parents of the boy lived near the intersection of Belle Avenue with North Chester Avenue, which runs north and south, and the accident occurred a short distance north of this intersection at a point where a driveway came out of a clump of trees on the west side of North Chester Avenue. At that time some men with a tractor were removing some trees on the east side of North Chester Avenue and about opposite this driveway. Shortly before the accident the boy in question had been seen in this driveway with two older boys. The other boys crossed the highway and a little later as this boy was attempting to follow them, running from west to east across the highway, he was struck by the defendants' automobile and killed.

This action which followed was tried by the court without a jury. The court found in all respects in favor of the plaintiff and the defendants have appealed from the judgment.

It is first contended that there is no substantial evidence to support the finding of negligence on the part of the defendant driver. It appears that Thompson was driving north on the east side of North Chester Avenue for the purpose of delivering a pump for which there had been a "hurry" call. As he approached the scene of the accident another car was coming south on the west side of North Chester Avenue, driven by a man named Dailey. Dailey testified that when he was about 100 feet north of the driveway to which we have referred he saw the boy run out from the opening and start toward the road; that he slowed down a little because he was afraid the boy might run into the street; that the boy stopped about four feet west of the edge of the concrete; that the boy was "dancing around" and was obviously "poised waiting to go across the highway"; that after he passed the boy he looked in his rear view mirror and saw the boy run across the street until he was hit by the other car; and that he had just passed the Thompson car and estimated that he was only 40 feet past the child when it was struck.

Thompson testified that he observed the Dailey car approaching him from the north; that each car was traveling approximately 30 miles an hour and was on its proper side of the highway; that he was watching the roadway ahead of him but did not see the boy during the time the other car was approaching him because "I wasn't looking way off on the other side of the road"; that there was no obstacle which would have interfered with his vision of the boy except while the Dailey car was passing the boy; that he first saw the boy after his car had passed the Dailey car; that he was then 20 to 25 feet away from the boy; and that he then applied his brakes but was unable to avoid hitting the boy. There is evidence that his car left tire marks on the highway for a distance of 63 feet, angling toward the east edge of the pavement, and evidence justifying the inference that the impact occurred about seven feet south of where those marks ended. The boy's body came to rest on the west oiled shoulder of the highway, about opposite the broken glass on the pavement and near the driveway from which he had emerged.

[1, 2] It is argued that it thus appears that Thompson did not see the boy until he was about 25 feet from him, that he could not have seen the boy earlier, and that he immediately applied his brakes and kept them applied continuously until the truck stopped. While Thompson testified that he did not see the boy until after he had passed the Dailey car, no reason appears why the boy would not have been plainly visible to him before that time, if he had been watching the road. Dailey observed the boy come out and stop at the roadside and Thompson must have had an equal opportunity to see him. The evidence strongly indicates, moreover, that he did see him at a much greater distance than 25 feet. A traffic officer testified that immediately after the accident Thompson told him "that he saw the little boy running across the road in front of him, but thought at first the little boy would stop about the middle, so he touched his brakes lightly, and, then after running 25 or 30 feet, he noticed that the boy wasn't going to stop at all, so he slammed on his brakes as much as he possibly could and skidded to a normal stop by the time he hit the boy." Thompson did not deny having made this statement to the officer although he said he could not remember it, but he rather confirmed that statement on the witness stand when he testified on cross-examination, "When I saw he wasn't going to stop then I tried to stop." It may reasonably be inferred from this evidence that the skid marks on the pavement represented the distance Thompson traveled after he "slammed on his brakes," and that he had theretofore traveled 25 or 30 feet while expecting the boy would stop at the middle of the road. In view of the child's age it cannot be said, as a matter of law, that Thompson took reasonable precautions under the circumstances which here appear. The entire question was one of fact for the trial court and there is very substantial evidence which sustains the finding made. Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675; Scott v. Shaw, 115 Cal.App. 400, 1 P.2d 531; Hoy v. Tornich, 199 Cal. 545, 250 P. 565.

[3] It is next argued that the evidence does not sustain the finding that the parents of this child were not guilty of negligence in allowing him to cross North Chester Avenue unattended. Several witnesses testified that prior to the accident they had seen the McCutcheon children, including the deceased, playing unattended in the vicinity of Chester Avenue. The McCutcheons lived in a four-room rented house on Belle Avenue, a short distance west of the highway. They had four children and Mrs. McCutcheon did her own housework. The father was away at work at the time and the mother testified that she was putting away the dishes after lunch and thought that the little boy was in the yard; that she had seen him about three minutes before the accident in the living room; that the oldest boy had gone out in the yard to shoot birds; that she knew the deceased habitually followed his brother and played with him; that she knew the children sometimes played on Belle Avenue, which is a short street and not a through street; that she had never known any of the children to play on North Chester Avenue; and that she had warned the children not to go on North Chester Avenue. A neighbor testified that prior to the accident she had seen the McCutcheon children playing unattended on Belle Avenue and in alleys and that she had seen Mrs. McCutcheon on several occasions looking for the children when they had strayed away from the house; that several times when the children crossed the alley into her yard Mrs. McCutcheon came after them; and that on these occasions she heard Mrs. McCutcheon warn the children about playing in the streets and alleys. The most that can be said is that this question was also one of fact, and the evidence sustains the finding in this connection.

[4] The last point raised is that the award of $4,000 as general damages is excessive. This contention is entirely without merit, and we consider it more charitable to refrain from setting forth the arguments advanced in its support.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

TRINDLE v. WHEELER.
Civ. 2987.

District Court of Appeal, Fourth District, California.

Jan. 22, 1943.

Hearing Granted March 22, 1943.

1. **Physicians and surgeons** ⚷14(3, 4)

Under an implied contract arising when a patient presents herself for treatment and physician accepts patient, the physician does not guarantee success of the treatment, but only represents that he possesses the ordinary training and skill possessed by physicians and surgeons of good standing practicing in same or similar communities and that he will employ such training, care, and skill in treatment of the patient.

2. **Physicians and surgeons** ⚷18(8)

Generally, testimony of experts is indispensable to establish standards of good practice by physicians and surgeons in a given community and the degree of skill employed by a physician or surgeon practicing in such community, and any departure therefrom by a physician or surgeon accused of malpractice; but rule does not apply to facts which may be ascertained by ordinary use of senses of a nonexpert.

3. **Physicians and surgeons** ⚷18(8)

In order to entitle patient to recover from physician for burns sustained on her ankle during diathermy treatment prescribed by physician for patient's sprained ankle, expert medical testimony was essential to establish negligence on part of physician.

4. **Trial** ⚷178

A directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given.

5. **Physicians and surgeons** ⚷18(6)

Negligence of a physician will not be presumed, but must be affirmatively proved.

6. **Physicians and surgeons** ⚷18(6)

In absence of expert testimony to contrary, a physician will be presumed to have exercised ordinary care required of him in treating patient.

7. **Physicians and surgeons** ⚷18(6)

The doctrine of "res ipsa loquitur" can be invoked in a malpractice case only where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

8. **Physicians and surgeons** ⚷18(6)

In malpractice action to recover for burns sustained by patient on her ankle during diathermy treatment prescribed by physician for patient's sprained ankle, necessity for and method of use of diathermy machine in treatment of a sprain required expert testimony, and patient could not invoke doctrine of "res ipsa loquitur" to aid her in presenting question for jury as to physician's negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

◆

Appeal from Superior Court, Riverside County; R. A. Moore, Judge pro tem.

Action by Lillian F. Trindle against O. W. Wheeler for malpractice. From a judgment rendered after trial judge had instructed jury to return a verdict for defendant, the plaintiff appeals.

Affirmed.

Hahn, Graf & Ross, of Los Angeles, for appellant.

Fred O. Reed, Richard L. Kirtland, and Henry E. Kappler, all of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment in a malpractice action, rendered after the trial judge had instructed the jury to return a verdict for defendant.

Plaintiff employed defendant, a physician and surgeon, to treat her sprained right ankle. Defendant prescribed diathermy and her ankle was burned during this treatment.

The treatment occurred in the city of Riverside. Plaintiff introduced no evidence showing the standards of good practice prevailing in that neighborhood in such cases and offered no evidence tending to show that the treatment given and the methods used by defendant were not in accordance with the requirements of good practice in the medical profession there. The only evidence to support her case was the fact of the burn during the diathermy treatment. She relies solely upon the doctrine of res ipsa loquitur. She states that the two questions to be decided here are: Under the circumstances here, is expert medical testimony essential to her case, and, is the doctrine of res ipsa loquitur applicable?

The facts, except the extent of the burn and the extent of her recovery from it, are not in serious dispute. About twenty years prior to the treatment given in this case, she had broken her right ankle and some signs of enlargement and traumatic arthritis were observed by physicians examining X-rays taken of it. She sprained this ankle in June 1939, and suffered a resprain on July 25, 1939. She went to defendant for treatment on July 26, 1939. He prescribed diathermy for the injury. Her shoe and stocking were removed and she was placed in a recumbent position on a bed. The defendant told the nurse, who was experienced and trained, to give her a diathermy treatment on the ankle at 3,000 milliamperes for twenty minutes. The nurse placed folded towels on both sides of the ankle against which two electrodes rested. These were connected with the diathermy machine by wires and were held in position by small sand bags. There was nothing to prevent plaintiff from removing her ankle from contact with the electrodes if the heat became painful. Heat was caused by the resistance furnished by the ankle to the short wave current passing through it. There was a call bell on a stand adjoining the head of the bed on which plaintiff was placed.

After the nurse had adjusted the electrodes she set the machine at 3,000 milliamperes for twenty minutes and left the room. Defendant had left the room a few minutes before and had gone to an adjoining office. After the lapse of about eight minutes plaintiff called that she was too hot, was burning up, but did not remove her ankle from the contrivance. Defendant reentered the room immediately and turned off the machine. Two trained nurses came to his assistance. There was a burned area on the inside of the ankle about the size of a half dollar or a dollar. Defendant treated the burn for a considerable time.

The diathermy machine had increased from 3,000 to 3,500 milliamperes during the treatment. There is undisputed evidence that this is a common characteristic of such machines. It had been in constant use for about two years and no other patient had suffered a burn from it either before or after this occurrence. Other patients had been treated that same day.

There is undisputed evidence that there is no way of determining in advance of a treatment the degree of tolerance of patients to this heat or whether they are hypersensitive to diathermy heat. There is also uncontradicted evidence that generally patients can tolerate diathermy heat from 3,000 up to 4,000 milliamperes for twenty minutes and that some can take up to 4,500 milliamperes for that time without any bad results.

Defendant introduced evidence from physicians using diathermy treatments in Riverside, showing the treatment given was proper for a sprained ankle and was properly administered in accordance with the best practice of the medical profession prevailing in the neighborhood of Riverside; that there was no departure from this standard of good practice in the treatment given plaintiff. This evidence stands uncontradicted.

[1] There was no special contract between plaintiff and defendant concerning the treatment to be given and the degree of success to be achieved from it. Therefore, plaintiff must rely on the contract which the law implies when a patient presents herself for treatment and the physician accepts the patient. It is thoroughly settled in California that under such an implied contract the physician does not guarantee the success of the treatment but only represents that he possesses the ordinary training and skill possessed by physicians and surgeons of good standing practicing in the same or similar communities and that he will employ such training, care and skill in the treatment of the patient. Patterson v. Marcus, 203 Cal. 550, 265 P. 222; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Houghton v. Dickson, 29

Cal.App. 321, 155 P. 128; Priestley v. Stafford, 30 Cal.App. 523, 158 P. 776; McLennan v. Holder, 1 Cal.App.2d 305, 36 P.2d 448; McNamara v. Emmons, 36 Cal. App.2d 199, 97 P.2d 503.

[2] As a general rule, it is thoroughly settled in California that, as both the standards of good practice by physicians and surgeons in a given community and the degree of skill employed by a physician or surgeon practicing in such community, as applied to and used in a given case, are solely within the knowledge of physicians and surgeons, the testimony of experts is indispensable to establish such standards of good practice and any departure therefrom by a physician or surgeon accused of malpractice. See Callahan v. Hahnemann Hospital, 1 Cal.2d 447, 35 P.2d 536; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Patterson v. Marcus, supra; Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695; Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023; Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350; Rasmussen v. Shickle, 4 Cal.App.2d 426, 41 P.2d 184; Bickford v. Lawson, 27 Cal.App.2d 416, 81 P.2d 216; McNamara v. Emmons, supra; Adams v. Boyce, 37 Cal. App.2d 541, 99 P.2d 1044.

There is a certain well recognized exception to this rule. The exception upon which plaintiff relies is illustrated by those cases in which recovery was permitted because of hot water bottle or hot compress burns suffered during post operative care. See, Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; Timbrell v. Suburban Hospital Inc., 4 Cal.2d 68, 47 P.2d 737; McBride v. Clara Barton Hospital, 75 Cal. App. 161, 241 P. 941.

In these cases the burns were on healthy portions of the patients' bodies and were not in the diseased areas involved in medical or surgical treatment.

Other cases where the same exception to the general rule has been applied, under varying circumstances, are Brown v. Shortlidge, 98 Cal.App. 352, 277 P. 134, where a healthy tooth was knocked from the patient's jaw by the physician in preparing for a tonsillectomy, and Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136, where the patient's healthy uvula and soft palate were cut and damaged by a surgeon while performing a tonsillectomy. In Barham v. Widing, 210 Cal. 206, 291 P. 173, a dentist was held liable for an infection caused by the use of an unsterilized needle in giving an injection of novocain.

These cases, and the hot water bottle and hot compress cases, are distinguished from the instant case for easily understandable reasons. This distinction, where healthy portions of the body are injured, as distinguished from the diseased portions that furnish the field of operation or treatment, is clearly made in Brown v. Shortlidge, supra, quoting from Evans v. Roberts, 172 Iowa 653, 154 N.W. 923, as follows: "'It is the appellant's contention that there is no evidence in the record to support a finding that he was negligent. With this we are unable to agree. Assuming, for the purposes of this case, the soundness of the argument that, in performing an operation, a surgeon is not held to guarantee results, and that, if he possesses the measure of skill which the law requires, a mere failure of judgment in his choice of methods and means is not actionable negligence, such concession is insufficient for the disposition of the issue of negligence in this case as a matter of law. This is not the ordinary case where a practitioner is sought to be charged with liability for alleged improper treatment of some bodily ailment or infirmity. He was employed to remove the adenoids from the plaintiff's throat, and there is neither claim nor proof that he did not successfully remove them. His negligence, if any, was in failing to take due care to avoid injury to the undiseased parts in the vicinity of which the operation was performed; and while it may be true that, had the operation upon the adenoids been unsuccessful and disappointing, no inference of negligence or want of skill would arise therefrom, it does not follow that this rule applies with the same force to an injury done by him to sound and undiseased parts of the plaintiff's person, which he was not called upon to treat and did not pretend to treat. If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or if he undertakes to stitch a wound on the patient's cheek and by an awkward move thrusts his needle into the patient's eye, or if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions, which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful, are not here available. "It is a matter of common knowledge and observation that such things do not ordinarily attend the services of one possessing ordinary skill and experience in the delicate work of surgery. It does not need scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not to be anticipated, if reasonable care be exercised by the operator."'" [98 Cal.App. 352, 277 P 135.] The reasoning in the Brown case was followed and relied upon in Thomsen v. Burgeson, supra.

The rule involving the exception was somewhat differently stated in Barham v. Widing, supra, as follows: "It is equally true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert." [210 Cal. 206, 291 P. 176.]

[3] In the instant case the facts present an entirely different situation that brings the case without the exception to the general rule. The treatment was by means of an electric modality, knowledge of the use and effect of which lies entirely outside of the field of the knowledge and experience of the layman. Expert medical evidence was required to show the reasonableness and propriety of the treatment, what occurred and how and why it occurred, as well as the standard of care and skill in the use of such modality in Riverside or similar communities. Knowledge of these things lies exclusively within the knowledge of experts whose testimony was necessary to make out a case for plaintiff. Also, the burn occurred in the injured area which was being treated and was not in healthy tissue separated from it, which further distinguishes the case from those involving burns from hot water bottles and hot compresses or injury to healthy portions of the body.

Plaintiff also urges that she was entitled to rely upon the doctrine of res ipsa loquitur which would require the cause to be submitted to the jury and would make erroneous the action of the trial court in instructing the jury to return a verdict for defendant.

[4] The rule governing the trial court in giving an instructed verdict is thus stated in Engstrom v. Auburn Auto. Sales Corp. 11 Cal.2d 64, 77 P.2d 1059, 1061: "It is settled that a directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff, if such a verdict were given. Estate of Lances, 216 Cal. 397, 400, 14 P. 2d 768."

In support of her argument that the doctrine of res ipsa loquitur is applicable here, plaintiff relies on the cases of Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107, and Moore v. Steen, 102 Cal.App. 723, 283 P. 833, 835. In those cases it was held that where the physician or dentist negligently used an X-ray machine in the process of diagnosis, the injured patient might recover. That the rule that the doctrine of res ipsa loquitur may be applied in cases where the X-ray is used for the purpose of diagnosis but not where it is used for the purpose of treatment of disease is stated in Moore v. Steen, supra, as follows:

"As to the general application of the doctrine of res ipsa loquitur to the use of the X-ray, it seems to be a matter of agreement between both parties that the weight of authority in recent decisions in other jurisdictions is against it, and it is conceded that ordinarily this doctrine cannot be applied in cases of alleged malpractice of physicians and surgeons in the treatment of disease.

"The doctrine as laid down by Judge Taft in Ewing v. Goode, C.C., 78 F. 442, 443, in the following language, is undisputed:

"'Before the plaintiff can recover, she must show by affirmative evidence—first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. * * * A physician is not a warrantor of cures. If the maxim, "Res ipsa loquitur," were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the "ills that flesh is heir to."'

"It may be noted, however, that this is not a case claiming damages for malpractice in the treatment of disease, but for negligence in the process of a diagnosis to ascertain the cause of plaintiff's ill health. This distinction in the application of the rule under consideration seems to be recognized in the decisions."

As diathermy was used for the treatment of an injury and not for the purpose of diagnosis, the Ragin and Moore cases cannot be considered as authority for holding that the doctrine of res ipsa loquitur is applicable here.

Plaintiff cites the case of Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283, 287, as authority for our holding that the doctrine of res ipsa loquitur may be applied here. Bessie Ware was burned by electric pads while an inmate in a hospital owned and operated by defendant Culp who was the sole defendant in the case. The pads were applied by a special nurse under the direction of the doctor employed by plaintiff. Neither the special nurse nor the doctor in charge were agents or employees of Culp. For that reason the judgment for plaintiff against Culp was reversed, the court remarking that, "The doctrine of res ipsa loquitur cannot aid the plaintiff under the circumstances of this case." Clearly, plaintiff here can find no aid in that decision.

The question of the applicability of the doctrine of res ipsa loquitur in malpractice cases was carefully considered in Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409. The court there concluded that where the act complained of involved the knowledge of treatment of disease or of surgery the doctrine cannot be applied, but where such acts are within the experience of or may be measured by the ordinary senses of the nonexpert the doctrine is applicable. Nicholas v. Jacobson, 113 Cal.App. 382, 298 P. 505, and Barham v. Widing, supra, are to the same effect.

[5-7] The same question was considered in Engelking v. Carlson, supra, where it was said [13 Cal.2d 216, 88 P.2d 697]:

"The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Whether he has done so in a particular case is a question for experts and can be established only by their testimony. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Patterson v. Marcus, 203 Cal. 550, 265 P. 222. And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive. Wm. Simpson C. Co. v. Industrial Acc. Com., 74 Cal.App. 239, 240 P. 58; Johnson v. Clarke, 98 Cal.App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698.

"It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. * * * In each of these situations the rule was applied because common knowledge and experience teaches that the result was one which would not have occurred if due care had been exercised." The concluding remarks of the court are applicable to the instant case. "But the present case shows an entirely different situation. Here what was done lies outside the realm of the layman's experience. Medical evidence is required to show not only what occurred but how and why it occurred."

[8] As the necessity for and the method of the use of the diathermy machine in the treatment of a sprain is something that lies entirely outside of the experience of the layman we must conclude that plaintiff may not invoke the doctrine of res ipsa loquitur to aid her here.

The only case to which we have been cited which in any way conflicts with the conclusions we have reached, is McCullough v. Langer, 23 Cal.App.2d 510, 73 P.2d 649. In that case the plaintiff patient recovered judgment against the defendant physician for damages caused by third degree burns which were the result of too long exposure of plaintiff's leg to the rays of an infra-red lamp which generated 140 degrees of heat in one hour. There was expert evidence introduced to the effect that under the standards of good practice prevailing in the neighborhood, the plaintiff's leg should not have been exposed to heat in excess of 110 degrees Fahrenheit; that the burn was caused by too long exposure to too great heat; that the treatment was not in accordance with the established standards of practice prevailing in the neighborhood. With this evidence before it, based on the testimony of medical experts, the judgment for plaintiff was very properly affirmed.

However, the court there proceeded to consider the doctrine of res ipsa loquitur and held it applicable to the facts of that case. Having reached the conclusion that the evidence of the experts sustained the charge of negligence against defendant, and such evidence having disclosed the exact cause of the burn, there seems little reason for plaintiff to have relied on the doctrine of res ipsa loquitur. The discussion of the applicability of that rule does not seem to be entirely necessary to a proper decision of the case. If the trial court erroneously gave an instruction on that subject it could hardly seem to be seriously prejudicial as all the elements necessary to a recovery had been clearly established by competent expert evidence. We cannot consider the arguments and the authorities cited (all of the cases cited by the court were cases of burns from hot water bottles or hot compresses, except Moore v. Steen, supra, which we have already considered) as of sufficient weight to require us to disregard the numerous cases to the contrary which we have already considered.

As plaintiff in the instant case was required to introduce evidence of experts showing negligence of defendant in his treatment of her, which she failed to do, and as the doctrine of res ipsa loquitur was not available to her, there is no substantial evidence in the record to support a judgment in her favor.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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56 Cal.App.2d 693

WAGNER v. SARIOTTI et al.

Civ. 12219.

District Court of Appeal, First District,
Division 1, California.
Jan. 19, 1943.

1. Attorney and client 🔑148(2)

Contract to pay attorney one-third of money or property recovered and assignment to attorney of one-third interest in any money or property that might be recovered did not create a "power coupled with an interest".

See Words and Phrases, Permanent Edition, for all other definitions of "Power Coupled with Interest".

2. Attorney and client 🔑176

An attorney's equitable lien on property recovered for client could exist under contract for contingent fee and assignment of interest in property to be recovered without being coupled with a power.

3. Attorney and client 🔑176

Retaining or charging lien for attorney's compensation on judgment secured by his services may be secured only by contract for a lien.

4. Attorney and client 🔑176

Attorney's "equitable lien" for compensation on judgment secured by his services may be created by contract, without using the word lien therein, that attorney is to look to any judgment he may secure as security for his fee.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Lien".

5. Attorney and client 🔑176

Contract for equitable lien for compensation on judgment secured by attorney's services may be entered into before judgment is secured and before legal services are performed. Civ.Code, §§ 2883, 2884.

6. Attorney and client 🔑171

Attorney's "equitable lien" for compensation on judgment secured by his services is an equitable assignment for security and is fundamentally different from a "power coupled with an interest".

7. Equity 🔑20

Equity looks with favor on equitable liens.

8. Attorney and client ⚷176

Contract to pay attorney one-third of money or property recovered by his services and assignment as security therefor of one-third interest in any such recovery created an "equitable lien" in favor of attorney. Civ.Code, §§ 2883, 2884.

9. Attorney and client ⚷187

Where judgment debtors knowing of contract for attorney's equitable lien for compensation on judgments to be secured against them, by fraud and undue influence and without consideration, procured transfer to them of interest in realty to be acquired by judgment creditor at execution sale and dismissal of another action pending against judgment debtors, judgment debtors were not "purchasers for value in good faith", and transfer was subject to attorney's equitable lien for contingent fees in both actions and advancements to finance actions. Civ.Code, §§ 1106, 2883, 2884.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchaser for Value in Good Faith".

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Richard Wagner against Mary Sariotti and others to enforce an equitable lien and constructive trust upon certain realty owned by defendants. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

Joseph A. Garry, of San Francisco, for appellants.

George Moncharsh, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendants prosecute this appeal from a judgment for plaintiff rendered in an action to enforce an equitable lien and constructive trust upon certain real property owned by defendants. The appeal is taken on a bill of exceptions. The only exceptions noted are to the orders overruling the defendants' general demurrer to the first amended complaint, and denying defendants' motion for judgment on the pleadings. The sole issue presented, therefore, is whether the first amended complaint states a cause of action.

From the first amended complaint it appears that defendants had taken a transfer of property from Francesco Calicchio, and, in return, had promised to support him. Defendants broke this contract. Calicchio employed plaintiff, an attorney at law, to represent him in any action he might have against defendant Mary Sariotti. As evidence of this employment on August 19, 1938, the following letter was signed by Calicchio and delivered to plaintiff:

"Dear Sir:

"I hereby retain you as my attorney with reference to any actions or proceedings which you may take against Mary Sariotti, either to recover money or property which I previously deeded to said Mary Sariotti.

"For your services I agree to pay a sum equivalent to one-third of any recovery that you may obtain for me. In the event that you do not recover any money or property for me, then I will owe you nothing for your services.

"This letter has been read to me and I understand its contents and agree to the same."

On the next day Calicchio executed the following assignment: "For value received I hereby set over, assign and transfer unto Richard Wagner a one-third (⅓) interest in any and all moneys and/or property which he may recover for me from Mary Sariotti."

It is alleged that at all times concerned Calicchio was without funds and had no money with which to commence and pursue any litigation, and that this fact was known to defendants; that on April 1, 1939, plaintiff, as attorney for Calicchio, instituted suit against defendants; that in that action damages were sought for breach of defendants' contract to support Calicchio for the two-year period immediately preceding April 1, 1939; that on August 1, 1939, judgment was rendered against defendants and in favor of Calicchio for $960 and costs; that on September 30, 1939, plaintiff filed an identical suit to recover for the breach of contract to support from March 31, 1939, to September 30, 1939; that the complaint in the second action prayed for judgment against appellants for $350 and costs; that a writ of execution was issued on October 13, 1939; that on that day the sheriff was instructed to levy upon all of the interest of the defendants in certain described real property; that this property, free of incumbrances, was reasonably worth $5,500; that on October 24, 1939, the sheriff levied upon that real property; that on December 4, 1939, the sheriff sold the right, title and interest of Mary Sariotti to Calicchio, the judgment creditor; that during this period defendants knew that Calicchio had retained plaintiff as his attorney; that they knew that he had assigned to plaintiff a one-third interest in any money and/or property which plaintiff might recover; that they knew that judgment had gone against them in Calicchio's favor; that they knew that the second suit had been started on September 30, 1939; and that they knew that the aforementioned execution proceedings had been held.

The complaint then alleges that shortly prior to December 4, 1939 (the date of the execution sale), defendants, for the purpose of depriving Calicchio of any claims which he might have, and to deprive plaintiff of his right to receive compensation and reimbursement for moneys advanced by him to Calicchio, removed Calicchio, who was seventy years of age, partially blind, suffering from diabetes, and having already suffered the amputation of one leg, from the Laguna Honda Home in San Francisco to their home and induced him, without the advice of counsel, and without plaintiff's knowledge, to execute papers purporting to retransfer to them any of the realty which he might acquire on the execution sale, and to cause a termination of the municipal court action started September 30, 1939. It is alleged that Calicchio was completely incapable of understanding the nature of what he was doing, and that he received no consideration from defendants in exchange; that defendants have paid nothing on the August 1st judgment; that defendants assert that any interest in the realty which was acquired by Calicchio was transferred to them by virtue of the documents which they caused Calicchio to execute. It is also alleged that, after securing the documents above mentioned, defendants returned Calicchio to the Laguna Honda Home where he died without any estate whatever.

The prayer of the complaint is that plaintiff have judgment against defendants for $602.37. This sum is made up of one-third of the original judgment, plus interest, one-third of the $350 prayed for in the second action which Calicchio was induced by defendants to terminate, and certain advances made by plaintiff in financing the actions. The complaint also prays that defendants be declared constructive trustees of the real property involved for the benefit of plaintiff to the extent of $602.37, plus interest; that the real property be charged with a lien in plaintiff's favor in that amount, and that the sheriff be ordered to sell it, or such of it as might be necessary to satisfy plaintiff's claim and interest thereon. Judgment was granted substantially in accordance with the prayer of the complaint.

[1, 2] Defendants argue that plaintiff has no cause of action against them for the reason that the contingent fee agreement and the assignment did not create in plaintiff a power coupled with an interest. There can be no doubt that the contract and assignment did not create a power coupled with an interest. Wright v. Security-First Nat. Bank, 13 Cal.2d 139, 88 P.2d 125; Cassetta v. Del Frate, 116 Cal.App. 255, 2 P.2d 533. Defendants argue that, because of this fact, there can be no equitable lien. That is a non sequitur. The question as to whether plaintiff, as against Calicchio, possessed a power coupled with an interest, is entirely distinct from the question as to whether plaintiff possessed an interest in the nature of an equitable lien. The equitable lien could exist without being coupled with a power. Under the facts alleged, we are of the opinion that plaintiff possessed an equitable lien, and that the purported transfer by Calicchio to defendants was subject to that lien.

[3-6] In this state an attorney has neither a retaining nor charging lien for compensation on a judgment secured by his services in the absence of a contract containing an agreement for a lien. Ex parte Kyle, 1 Cal. 331. But the attorney may secure such a lien by contract. Tracy v. Ringole, 87 Cal.App. 549, 262 P. 73; Haupt v. Charlie's Kosher Market, 17 Cal.2d 843, 112 P.2d 627; City of Los Angeles v. Knapp, 7 Cal.2d 168, 60 P.2d 127. In order to create such a lien the parties are not required to use the word "lien" in their contract. The real question in each case is, whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for his fee. If so, an equitable lien is created. (See annotation in 93 A.L.R. 667, at page 681 et seq., where many cases are collected and discussed; see, also, 7 C.J.S., Attorney and Client, p. 1146, § 211, subsec. b; 29 Cal. L.Rev. 628.) The contract for such lien may be made lawfully before judgment is secured. § 2883, Civ.Code. The contract may be entered into before the performance of the legal services. § 2884, Civ.Code; McGown v. Dalzell, 72 Cal.App. 197, 236 P. 941. Such a lien is, in reality, an equitable assignment for security, and is funda-

mentally different from a power coupled with an interest.

[7] The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results. Carter v. Holt, 28 Cal.App. 796, 154 P. 37; Hurley v. Atchison, Topeka & Santa Fe R. Co., 213 U.S. 126, 29 S.Ct. 466, 53 L.Ed. 729; Red Bud Realty Co. v. South, 96 Ark. 281, 131 S.W. 340; Pacific Ready Cut Homes v. Title I. & T. Co., 216 Cal. 447, 14 P.2d 510; City of Los Angeles v. Knapp, supra.

[8, 9] Tested by these standards, there is no doubt that in this case it should be held that an equitable lien was created. The parties clearly contracted that the attorney must look to the property recovered for his payment. Moreover, the allegations of the complaint demonstrate that defendants have committed an aggravated fraud on Calicchio and plaintiff. All the equities are in favor of plaintiff. Defendants have no compensating equities in their favor. Under such circumstances it seems quite clear to us that plaintiff has alleged facts demonstrating that he possesses an equitable lien, and that such lien has priority over any claim of defendants.

Of course, prior to December 4, 1939, Calicchio had but a judgment and execution lien on the property. He had no title. Before he secured title, as a result of the fraud and undue influence of defendants, he purported to "retransfer" to defendants whatever rights he might get in the property at the execution sale on December 4th, and to dismiss the existing action. On December 4, 1939, he secured title at the execution sale. The after-acquired title thus secured immediately passed to defendants by virtue of the instruments of "retransfer." § 1106, Civ.Code. In other words, on December 4th defendants received whatever interest Calicchio got at the execution sale. But the title secured by Calicchio at the execution sale was subject to the equitable lien of plaintiff. According to the allegations of the complaint (and also according to the findings which are not challenged), defendants knew of the rights of plaintiff, and one of the purposes of securing the transfer agreement was to deprive plaintiff of his right to compensation and reimbursement. Defendants secured the agreement by fraud and undue influence. They gave Calicchio no consideration therefor. Defendants are not purchasers for value, in good faith. They not only paid nothing for the "retransfer," and had actual notice of plaintiff's lien, but they secured the "retransfer" for the very purpose of defeating the plaintiff's lien. The after-acquired title of Calicchio was subject to the lien of plaintiff. It follows, that as against plaintiff, defendants must be held to have received the after-acquired title subject to plaintiff's rights.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

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56 Cal.App.2d 780

BARNES et al. v. CAHILL.

Civ. 13691.

District Court of Appeal, Second District, Division 3, California.

Jan. 25, 1943.

1. Trade-marks and trade-names and unfair competition ⟹68(1)

A tradesman, using any artifice or contrivance for purpose of representing his goods or business as goods or business of rival tradesman, thereby deceiving people by causing them to trade with him when they intended to trade with rival, commits a "fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. Trade-marks and trade-names and unfair competition ⟹70(4)

Entire identity in wording of tradesman's packages, wrappers, labels, or titles with those of rival tradesman is unnecessary to establish first tradesman's "fraud" in representing his goods or business as those of rival.

3. Trade-marks and trade-names and unfair competition ⟹84

A tradesman's abandonment of intention to use business name similar to that of rival tradesman after issuance of temporary injunction against use of such name should not save him from permanent injunction against such use.

4. Appeal and error ⚷1056(1)

In suit by sellers of newspaper matrices to enjoin competitor's use of trade-name "Hollywood Now" as similar to plaintiffs' trade-name "Hollywood Today", exclusion of plaintiffs' evidence of defendant's declaration of intention to use name complained of after issuance of temporary injunction and his acts of preparation to use it just before commencement of suit was error and prejudicial to plaintiffs, where trial court found that defendant did not intend to use such name.

5. Injunction ⚷56

A creditor's familiarity with names and addresses of debtor's customers as result of being permitted to keep debtor's books, manage his office, and collect sums due him constituted "confidential business information" against creditor's use of which in soliciting such customers' business for himself debtor's successors were entitled to injunction.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Business Information"

6. Injunction ⚷56

It is employee's wrongful use of employer's business secrets which constitutes injury to employer and entitles him to injunction against such use.

7. Trade-marks and trade-names and unfair competition ⚷77

A written agreement for sale of business at price payable by buyer to seller's creditor, who agreed to accept it in full satisfaction of his claims did not authorize him to engage in unfair competition with seller and buyer or to use information obtained while managing seller's business in conducting competitive business.

◆

Appeal from Superior Court, Los Angeles County; Stanley Moffatt, Judge pro tem.

Action by John Barnes and another against Gerald W. Cahill for an injunction against engaging in the same business as plaintiffs under a similar name. From part of the judgment rendered, plaintiffs appeal.

Reversed and remanded.

William E. Empey, of North Hollywood, for appellants.

William Hicks, of Hollywood, for respondent.

SHAW, Justice pro tem.

The plaintiffs have appealed from a part of the judgment in an action brought by them to obtain an injunction.

The respondent has filed no brief and made no argument. That being so, we are not required to engage in legal research or critical examination of the record to find an answer to appellants' arguments. We have, however, considered the record, in connection with the points made, and conclude that a reversal must be ordered.

In the amended complaint on which the case was tried plaintiffs set up two causes of action. The first alleged that plaintiffs were engaged in the business of making weekly newspaper matrices containing "current news and information concerning Hollywood, the motion pictures, events and personalities," under the title "Hollywood Today" and of selling these matrices to various newspapers and theaters. The business was conceived and developed by plaintiff Barnes, who had, before the action was brought, sold it to plaintiff Tobin, retaining a thirty percent interest in its profits. Plaintiffs were doing business under the names "Hollywood Features Syndicate" and "Hollywood Today." Defendant Cahill, having become familiar with this business and plaintiffs' mode of conducting it, undertook to engage in the same business, and was preparing to do so under the names "Hollywood Features Syndicate" and "Hollywood Now" and to issue matrices under the names "Hollywood Now" or "This Week in Hollywood," or other name tending to mislead the public. He was preparing to make and issue weekly matrices of the same general appearance, style and arrangement as those of plaintiffs and containing substantially the same subject matter, which would deceive and mislead the public and plaintiffs' customers, thus appropriating much of plaintiffs' business. The second cause of action, in addition to the foregoing allegations, stated that defendant Cahill had been employed and acted as manager of plaintiffs' business and while so employed had become familiar with plaintiffs' list of customers, which was a confidential trade secret, and was engaged in soliciting their patronage for his enterprise. We do not state the allegations of the complaint in detail, but each count appears to be sufficient to state a cause of action. The defendant in his answer admitted that he intended to engage in a business similar to that of plaintiffs, under the name "This Week in Hollywood," but denied the other allegations of the complaint.

The trial court made findings confirming the plaintiffs' allegations regarding their business, and stating that defendant was intending to engage and was engaged in business under the names "Hollywood Features Syndicate" and "This Week in Hollywood" but was not, since July 15, 1941, intending to use the name "Hollywood Now." Other findings will be mentioned later. Judgment was ordered enjoining the use by defendant of the name "Hollywood Features Syndicate" and denying plaintiffs any other relief. The judgment entered contained this injunction and also dissolved a preliminary injunction against the use by defendant of the name "Hollywood Now." The appeal is from the whole of the judgment except that part containing the injunction.

[1, 2] The first cause of action is brought under the rule declared in Weinstock, Lubin & Co. v. Marks, 1895, 109 Cal. 529, 540, 42 P. 142, 145, 30 L.R.A. 182, 50 Am.St.Rep. 57, and the many cases following it, that "when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive." At the trial there were put in evidence a mat produced by plaintiff and another prepared by defendant for use in his business. Examination of copies of them in the record indicates such a similarity as would make it easy for an intending customer to mistake one for the other. Defendant's mat was entitled "This Week in Hollywood" while that of plaintiffs bore the title "Hollywood Today," but undoubtedly the word "Hollywood" is the important part of each. An entire identity in the wording of a defendant's packages, wrappers, labels or titles with those of a plaintiff is not necessary to bring this rule of law into play. See Modesto Creamery v. Stanislaus, etc., Co., 1914, 168 Cal. 289, 294, 142 P. 845. The trial court found, in the case at bar, that the use by defendant of the title "This Week in Hollywood" would not tend to deceive or mislead plaintiffs' customers. Plaintiffs contend that this finding is not supported by the evidence. We need not so hold because a reversal is necessary for other reasons. At least, a finding the other way would have been well supported.

[3, 4] The trial court found that the defendant did not intend to use the name "Hollywood Now." There was in evidence an affidavit made by him in opposition to the application for a temporary injunction, in which he admitted his intention to use that name. He denied such intention in his answer. There appears to be no evidence in support of the denial. The finding lacks support. Abandonment of such intention after the issuance of a temporary injunction against it should not save him from a permanent injunction. Plaintiffs offered evidence of later declarations by defendant of his intention to use the name "Hollywood Now," and evidence of acts of preparation to use that name made just before suit was brought, but the trial court excluded them. This was error, and in view of the finding it was obviously prejudicial.

[5, 6] The trial court found, in regard to the second cause of action, that defendant was engaged in soliciting plaintiffs' customers, but that he had never been manager of plaintiffs' business, and that it was not true that plaintiffs entrusted him with trade secrets and confidential information. There is no express finding on the allegation that defendant learned the names and addresses of plaintiffs' customers and the amount of business done with each, the prices and their credit rating. The evidence shows that defendant's first connection with plaintiffs' business was as a supplier of mats used therein. These mats were sold to plaintiff Barnes, who was then the owner of the business, on credit and he was unable to pay for part of them. He and defendant then agreed, in July, 1940, that defendant would continue to furnish mats on credit on condition that defendant be permitted to keep said plaintiffs' books, and handle the office management and the collection of all receipts. This arrangement was carried out and continued for several months. The plaintiff spent considerable time, effort and money in promoting the enterprise and secured some customers. Obviously, defendant must have become familiar with their names and addresses and the nature of the business done with them.

It is equally obvious that this was confidential business information of plaintiff Barnes, and that the plaintiffs, as his successors, were entitled to protection against its use by defendant in soliciting business for himself, since defendant obtained it in confidence. Pasadena Ice Co. v. Reeder, 1929, 206 Cal. 697, 703, 275 P. 944, 276 P. 995; Langendorf United Bakeries v. Phillips, 1936, 5 Cal.2d 150, 153, 53 P.2d 363. It may be that the evidence does not show that defendant was plaintiffs' general manager, as alleged, but he was at least engaged to act in plaintiffs' business in such capacity that while so acting he acquired the knowledge of plaintiffs' customers which he now seeks to use for his own advantage. The principle of the cases just cited is applicable to him whether he be a manager or employed in some other capacity. "It is the wrongful use by the employee of the business secrets of the employer which the courts have held constitutes the injury to the employer." Pasadena Ice Co. v. Reeder, supra [206 Cal. 697, 275 P. 947]. Indeed, the same principle applies, where there is a misuse of business information confidentially acquired, even though the relation of the parties is not that of employer and employee at all. Hollywood M. P. Equipment Co. v. Furer, 1940, 16 Cal.2d 184, 188, 105 P.2d 299. The fact that defendant was a creditor of plaintiff Barnes does not avert the application of the rule to him.

[7] In July, 1941, plaintiff Barnes sold the business to plaintiff Tobin, retaining an interest in the profits. This was done by a written agreement dated July 14, 1941, to which defendant was also a party, and the trial court seems to have regarded this agreement as some sort of a settlement with defendant by plaintiffs, which prevented them from complaining of anything done by defendant before it was made or proving any such acts in support of their complaint, and to have based its rulings excluding evidence on this theory. But the agreement, as far as it affected defendant, merely provided that the purchase price for which Barnes sold the business to Tobin, $2,000, should be paid by the latter to defendant, that defendant would accept it as full satisfaction of all his claims against Barnes, and that defendant warranted to Tobin that all bills in reference to the business had been paid, reciting also that defendant had acted as agent and manager for Barnes from July 15, 1940, to May 26, 1941. There is nothing in this agreement authorizing defendant to engage in unfair competition with plaintiffs, or to use the information he had obtained while managing the business, and it does not constitute a settlement of any claims plaintiffs had against him for such matters, or bar this action in any way.

The part of the judgment appealed from is reversed and the cause is remanded for a new trial of all issues relating thereto.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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56 Cal.App.2d 885

PEOPLE v. ROBIN et al.

Civ. 13564.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1943.

1. **Nuisance 🔑82**

Civil action to abate public nuisance existing in a city may be brought by city attorney in name of people of the state. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

2. **Nuisance 🔑79**

A court of equity has no authority to abate a public nuisance except in specific cases where authority has been granted by Legislature. Code Civ.Proc. § 731.

3. **Nuisance 🔑85**

A judgment in a civil action to abate a public nuisance should contain restrictions within issues, and judgment, prohibiting defendant from doing that which neither past acts nor present intent indicates he is likely to do unless prevented by a court of equity, is an erroneous exercise of equitable jurisdiction. Code Civ. Proc. § 731.

4. **Injunction 🔑11**

An injunction should not forbid the doing of acts which there is no evidence to show were committed or threatened to be committed.

5. Intoxicating liquors 🔑260

Unlawful sale of intoxicating liquor, of itself, without further facts, does not constitute a "nuisance" which may be abated by city attorney. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

6. Judgment 🔑256(1)

Where there were no findings that defendants sold or threatened to sell intoxicating liquor illegally, provisions of judgment enjoining them from selling intoxicating liquor illegally was without support in findings and void. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

7. Nuisance 🔑85

Provisions of judgment enjoining operators of cafes from permitting any breach of peace on premises then or thereafter under their control, or on street immediately adjacent thereto, were too broad and too indefinite to be valid provisions. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

8. Nuisance 🔑85

Provisions of judgment enjoining cafe operators from using, causing, or permitting use of their premises or premises thereafter under their control, or public streets immediately adjacent thereto, so as to affect health, safety, or morals, or comfortable enjoyment of life and property by persons in community or neighborhood were too indefinite to be valid. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

9. Nuisance 🔑85

Provisions of judgment enjoining cafe operators from permitting practice of prostitution or soliciting on their premises of acts of prostitution were valid. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

10. Nuisance 🔑85

Provisions of judgment enjoining cafe owners from permitting the loitering and congregating of persons of immoral character on the premises or on any premises thereafter under their control were valid. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

11. Nuisance 🔑85

Provisions of judgment enjoining cafe operators from permitting or acquiescing in fighting, disorderly or tumultuous conduct, shouting, cursing, swearing, or the use of vile or opprobrious language in a loud tone of voice, boisterous conversation, or playing of loud, blaring music on premises, were valid. Civ.Code, §§ 3479, 3480; Code Civ.Proc. § 731.

12. Trial 🔑396(4)

Unsworn statement by counsel, not intended to be and not amounting to stipulations of fact, do not constitute "evidence" in harmony with which a trial court is bound to make a finding.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

◆

Appeals from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Civil action by the People of the State of California against Aubert E. Robin, etc., and others to abate public nuisances in the operation of cafes. From a judgment enjoining defendants from a variety of activities, and from order denying motion for new trial, defendants appeal.

Judgment modified, and appeals from order denying motion for new trial dismissed.

J. Howard Sullivan, Ray C. Eberhard, Claire V. Eberhard, and Alfred J. Luke, all of Los Angeles, and Aubert E. Robin, in pro. per., for appellants.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland and Wm. U. Handy, Deputy City Attys., all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1] A civil action to abate one or more of the public nuisances defined by sections 3479 and 3480, Civil Code, existing in a city, may be brought by the city attorney in the name of the people of the State of California. Code Civ.Proc. § 731. Sections 3479 and 3480 do not embrace all public nuisances known to the law; they read: Sec. 3479. "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance." Sec. 3480. "A

public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." This action was brought under section 731 by the Los Angeles City Attorney to put an end to public nuisances allegedly existing in the city as a result of the conditions which the defendants permitted to arise in connection with the operation of their respective cafes. A judgment was entered, enjoining the defendants from a variety of activities, and the defendants Aubert E. Robin, Jack Lunsford and Luther J. Smith have appealed. We find our principal problem to be to determine which of the prohibitory provisions of the judgment find support in the law and the findings.

[2] It is not every public nuisance known to the common law that may be the subject matter of an action of this type. When the judgment appealed from was entered this proposition was debatable, but it is no longer an open question in this state since the decisions in People v. Lim, 1941, 18 Cal.2d 872, 118 P.2d 472, and Kreling v. Superior Court, 1941, 18 Cal.2d 884, 118 P.2d 470. It is now settled that a court of equity has no authority to abate a public nuisance except in those specific cases where authority has been granted by the legislature. Insofar, therefore, as the judgment in the present action covers matters which do not fall within the purview of section 731, Code of Civil Procedure, it is without validity.

[3, 4] There is another limitation upon the provisions which may properly be given place in a judgment such as that under review; it is that the restrictions of the decree should be within the issues of the case. Of actions not threatened it cannot be said that unless enjoined they will occur. A judgment prohibiting a defendant from doing that which neither past acts nor present intent indicates he is likely to do unless prevented by a court of equity is an erroneous exercise of equitable jurisdiction. Pezold v. Amalgamated Meat Cutters, 1942, 54 Cal.App.2d 120, 128 P.2d 611, 615, and cases cited. The rule is stated in 32 C.J. 379, in these words: "Nor should the injunction forbid the doing of acts which there is no evidence to show had been committed or threatened to be committed."

The judgment entered in this case quite obviously violates both principles we have noted; it attempts to enjoin acts which the legislature has not authorized the court to prohibit in such an action as this, and it endeavors to cover situations not within the field of this action. In division I of the judgment it is decreed that defendant Robin and his agents are perpetually enjoined and restrained:

"(a) From unlawfully selling, serving, or giving away intoxicating liquor, or permitting, suffering, consenting to or acquiescing in the unlawful selling, serving, or giving away of intoxicating liquor in or upon the premises [described] or upon any premises now or hereafter under the control of said defendant;

"(b) From permitting, suffering, consenting to or acquiescing in the practice of prostitution or the soliciting or offering of acts of prostitution on said premises or upon any premises now or hereafter under the control of said defendant, or from permitting, suffering, consenting to or acquiescing in the use of said premises as a rendezvous for prostitutes or persons of immoral character;

"(c) From permitting, suffering, consenting to or acquiescing in the congregating, visiting, or loitering of persons of immoral character in or upon the said premises or in or upon any premises now or hereafter under the control of said defendant;

"(d) From permitting, suffering, consenting to or acquiescing in fighting, disorderly or tumultuous conduct, shouting, cursing, swearing, or using vile or opprobrious language in a loud tone of voice, boisterous conversation, or the playing of loud, blaring music in or upon the said premises or upon any premises now or hereafter under the control of said defendant or on the streets immediately adjacent thereto;

"(e) From permitting, suffering, consenting to or acquiescing in any breach of the peace in or upon the said premises or upon any premises now or hereafter under the control of said defendant, or on the streets immediately adjacent thereto; and

"(f) From using, causing, permitting, suffering, consenting to or acquiescing in the use of said premises or of any premises now or hereafter under the control or management of said defendant, or any part thereof, or any building, structure or appurtenance thereon, or the public streets immediately adjacent thereto, in any manner injuriously affecting the health, safety, or morals of or the comfortable enjoyment of life and property by persons residing in the community or neighborhood about and adjacent to any of said premises."

Division II of the judgment contains provisions identical with those just quoted (except for a different description of the premises involved) in perpetual restraint of defendant Lunsford, and division IV in identical terms (again the premises differ) restrains defendant Smith.

[5, 6] Subdivisions (a) of these decrees run afoul of both the principles by which we are testing the judgment. Places where liquor is unlawfully sold have been declared by the legislature to be nuisances (Stats.1915, p. 236, Deering's General Laws 1937, Act 3778), and district attorneys in the name of the people and individuals in their own names are given authority to bring actions to abate such nuisances. We are of the opinion that it cannot be validly claimed, and no claim has been made, that the present action finds authority in the statute just referred to. The source of the authority for the action before us is, as set forth in the complaint, section 731, Code of Civil Procedure. As the unlawful sale of liquor, of itself, without further facts, does not constitute a nuisance within the terms of section 3479, Civil Code, it follows that the provisions in the judgment in this action enjoining the defendants from making unlawful sales are without legislative authority and therefore erroneously included. But the only findings on the subject of the alleged unlawful sale, et cetera, of intoxicating liquors, were in the negative; and while they were negatives pregnant ("it is not true that * * * said defendants and each of them have sold or served liquor"), there are no findings that any of the defendants had sold or threatened to sell liquor out of hours, to minors, or otherwise illegally. The decrees that they be prohibited from doing so were therefore without support in the findings.

[7, 8] Subdivisions (e) and (f) of the judgment are too broad and too indefinite to be valid provisions of a decree in equity. At the time of oral argument counsel for the plaintiff agreed that this was true, at least as to subdivision (f), and the matter merits no argument. The reference to "any premises now or hereafter under the control of said defendant" found in several of the prohibitory provisions also gives those provisions an invalid scope. So far as appears no one of the appellants has or threatens to operate a cafe, or to do any of the acts enjoined at any other place than at the premises involved in this action. But if he did, it might well be at an isolated location where any nuisance he maintained would not affect any part of a neighborhood or any considerable number of people and so would not be a public nuisance. That which we have before us is a decree in equity, not the terms under which the defendants are granted probation. The object of the decree is to protect the public from nuisances, not to reform the defendants.

[9-11] The doubts which first assailed us about the sufficiency of the findings to support subdivisions (b), (c) and (d) of the judgment cannot stand in the face of the conclusion reached in People v. Lim, 1941, supra, 18 Cal.2d 872, 882, 118 P.2d 472, 477, that the following allegations stated a sufficient cause of action under section 731, Code of Civil Procedure: "[the gambling house] draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property," and in the light of this comment: "Crowds of disorderly people who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property and give rise to the hazards designated in the statute." If the allegations quoted are sufficient to state a cause of action under the section, findings to the same effect are of course sufficient to support a judgment for the relief authorized by the section, and we have such findings relative to the matters covered by subdivisions (b), (c) and (d).

There has been considerable argument about the responsibility of one defendant for a condition constituting a nuisance which is not caused by his operations alone, but by the joint operations of himself and others. The trial court did find that the acts of the several defendants united to constitute a nuisance, but it also found that the acts of each separately were nuisances (to be more exact, that they drew together in the same neighborhood large numbers of disorderly persons, etc.). Each appellant, therefore, appears responsible for the acts the judgment enjoins him from continuing, and there is no occasion to determine the terms a judgment should contain which abates a nuisance that is the result only of joint action. See Willson v. Edwards, 1927, 82 Cal.App. 564, 569–572, 256 P. 239, 241.

We have not considered it necessary to search the 1,300 pages of the reporter's transcript to ascertain whether each one of the many findings was supported by the evidence, because of the position of the appellants on the subject, which is virtually this: There is no credible evidence to support the essential findings. Note, for example, this statement from their opening brief (of 21 pages): "Stephen K. Newhall, called by the plaintiff recited a long statement of purported facts that, if true, would make this neighborhood worse than the Barbary Coast of San Francisco ever was; yet he testified he never saw an arrest there even though he stated he called the police one hundred fifty times. His statements are so fantastic they are incapable of belief when compared with those of Officer Jasper W. Smith * * *." We have examined the record enough to find many substantial "scintillas" of evidence, and we accept the judgment of the trial court that the witnesses, who testified to the conditions which constituted public nuisances, were to be believed.

[12] Appellant Robin argues that he should not have been enjoined, as were his codefendants, because before the time of the trial he had ceased to be the proprietor of the cafe that bore his name. By the pleadings, Robin's status as the proprietor of the Robin cafe was admitted, and there was no evidence that he had ceased to be in a position to continue to operate it if he chose to do so. His testimony that he had operated the cafe for "close to three years" "* * * terminating when?" "In February of this year," falls short of proof that he had lost his lease or had no legal right or intention to continue as its proprietor. From the opening statements of counsel we gather that it was their understanding that Robin had had his lease forfeited, but unsworn statements by counsel, not intended to be and not amounting to stipulations of fact, do not constitute evidence in harmony with which a trial court is bound to make a finding.

The judgment is accordingly modified: (1) By striking subdivisions lettered (a), (e) and (f) from divisions numbered I, II and IV; (2) by striking the words "or (in or) upon any premises now or hereafter under the control of said defendant" from subdivisions lettered (b), (c) and (d) of divisions numbered I, II and IV; as so modified the judgment is affirmed; each party shall bear his own costs of appeal.

The appeals from the order denying appellants' motion for a new trial is dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

FEWEL v. FEWEL.

Civ. 13664.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1943.

Hearing Granted March 18, 1943.

1. Constitutional law 🔑75

An action or proceeding, such as divorce suit, involving change of minor children's custody from one parent to the other, is a "judicial proceeding", in which decision must be rendered by judge himself on competent evidence. Const. art. 6, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Proceeding".

2. Infants 🔑19

In cases involving minor children's custody, paramount consideration is children's welfare and best interests.

3. Infants 🔑19

When a court has decreed custody of minor child, such custody may not be changed, unless adequate cause therefor arises from changed conditions.

4. Constitutional law 🔑75

Citizens and litigants have constitutional right to have laws governing them declared, applied and expounded by duly qualified judges, instead of commissioners, investigators, or other administrative officials authorized by Legislature to assist judges. Const. art. 6, § 1.

5. Courts 🔑55

Court investigators are not authorized to recommend decisions to courts, as they are not clothed with any judicial attributes, though called court assistants.

6. Courts 🔑55

The position of "court investigators" is that of hearsay witnesses, and they should be made available for complete cross examination on any matters concerning which they have made reports at judge's request.

See Words and Phrases, Permanent Edition, for all other definitions of "Court Investigator".

7. Divorce 🔑303(3)

A superior court judge's decision, based solely on court investigator's report and recommendations, as to custody of divorced parents' minor children, was improper as not in accord with law or litigants' vested rights. Const. art. 6, § 1.

8. Courts 🔑55

A court investigator's report is not "prima facie evidence".

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

9. Divorce 🔑303(3)

In proceeding for modification of order concerning divorced parents' minor children's custody, an investigator, designated by court to ascertain facts occurring since entry of order and report to court, had no authority to make recommendations as to order which should be entered, and court was not authorized to receive investigator's report as final determination of issues presented.

10. Appeal and error 🔑181, 882(1)

Reversal of order appealed from may not be urged because of erroneous rulings or procedure, invited or not challenged by appellant, in trial court.

11. Divorce 🔑303(3)

Where divorced wife's counsel demurred and said he did not think there was any necessity for reference to court investigator of matter of changing custody of divorced parents' minor children when trial judge first intimated intention to make such reference and noted exceptions to order of reference, proposed fact findings, conclusions of law and formal order predicated on investigator's recommendations, such erroneous procedure was not invited or acquiesced in by wife, who was not "estopped" from challenging it on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeals from Superior Court, Los Angeles County; William S. Baird, Judge.

Action for divorce by Helen Mary Fewel against Richard William Fewel. Decree for plaintiff and from orders modifying an order which modified provisions of the decree as to the custody of the parties' minor children, plaintiff appeals.

Reversed and remanded with directions.

Stewart, Shaw & Murphey and William L. Murphey, all of Los Angeles, for appellant.

Reynolds & Painter and Howard Painter, all of Los Angeles, for respondent.

WHITE, Justice.

On April 13, 1934, plaintiff mother obtained an interlocutory decree of divorce from defendant father on the ground of extreme cruelty. By such interlocutory decree plaintiff mother was awarded the care, custody and control of the two minor children of the parties; one, a girl then five years of age, and a boy at that time aged three years, with right of visitation with the children conferred upon defendant father. When the final decree of divorce was entered on April 17, 1935, there was incorporated therein the foregoing provisions of the interlocutory decree.

On September 24, 1937, upon application of the defendant father and pursuant to stipulation of both parents, the court entered an order modifying the provisions of the final decree with reference to the times when each parent should have actual custody of the children in lieu of the prior existing provisions as to time of visitations by the defendant father.

Thereafter, on September 18, 1941, defendant father filed with the court an application supported by his affidavit for an order to show cause directed to plaintiff mother in re modification of the order of September 24, 1937, with reference to the custody of said minor children. As grounds for the issuance of such order to show cause against plaintiff mother, the defendant alleged (1) that plaintiff did not provide the proper care or training for said children in that they are deprived of the companionship of other children; (2) that plaintiff failed to provide the children with proper and adequate schooling; (3) that plaintiff had consistently, wilfully and without reason refused to comply with any and all orders of the court concerning the right of defendant father to see and visit with the children; (4) that plaintiff mother persisted in sending the children out of the State of California to boarding schools so that the father would be denied visitations with them; and (5) that changed circumstances made it necessary for the best interests of the children that they spend more time with their father.

Following the issuance of an order to show cause as prayed, the same came on for hearing October 1, 1941, and thereupon the following proceedings were had:

"Mr. Painter: (counsel for defendant father) I don't know whether we are permitted to butt into the proceedings of the court here this morning. I am engaged in trial over in Department 47.

"Mr. Murphey: (counsel for plaintiff mother) Mr. Painter told me that he could continue that for the purpose of this hearing.

"Mr. Painter: I told Mr. Murphey no such thing. I told him I would hope we got through before Wednesday.

"The Court: I tell you what I can do: if you wish I will give you the first out. It won't take but a minute.

"Mr. Painter: It will take more than a minute.

"The Court: It won't take over ten minutes.

"Mr. Painter: It will not take a minute under two days.

"The Court: No, it won't.

"Mr. Murphey: There is no moral issue involved in the custody matter.

"The Court: If there is no moral issue there will be no hearing of two days.

"Mr. Painter: If Your Honor please, I happen to know that it will take two days.

"The Court: I happen to know it will not take two days. I will put an investigator on it if it is necessary.

"Mr. Painter: I suggested that to Your Honor the other day. I am perfectly willing that Your Honor put an investigator on.

"Mr. Murphey: I don't think there is any necessity for that. There is no issue tendered as to moral fitness of my client.

"Mr. Painter: There is as to the welfare of the children.

"The Court: What do you mean by 'welfare?'

"Mr. Painter: The manner in which they are being educated; the manner in which they are being taken care of by the mother at the present time.

"The Court: I will put an investigator on on your say so, if you think it is necessary.

"Mr. Painter: I think it is necessary."

The court thereupon entered its minute order reading in part as follows: "Said matter is continued to November 7, 1941, at 10 a. m. Matter re custody is referred to Margaret Harpstrite, court investigator."

When on November 7, 1941, the matter was again called, the record reflects that proceedings were had as follows:

"The Court: We are going to adopt the recommendation of the investigator, gentlemen, I will say to you.

"Mr. Murphey: May I file a return on the matter, Your Honor?

"The Court: What return?

"Mr. Murphey: The return of the plaintiff in response to the order to show cause.

"The Court: A return?

"Mr. Murphey: In the form of affidavits?

"The Court: What do you mean? What are you talking about?

"Mr. Murphey: Nothing more than we were served with the order to show cause why the custody of the children should not be changed; and in response to that order to show cause we have prepared a return."

At this juncture in the proceedings plaintiff's counsel presented to the court a document entitled "Return on and Affidavit in Opposition to Order to Show Cause in re Modification of Order for Custody of Minor Children and in re Contempt, Also Application for Modification of Order Allowing Visitation." Contained in this document were affidavits by plaintiff and five other persons challenging the averments contained in the affidavit presented by defendant father when he obtained issuance of the order to show cause. Upon being handed the just mentioned document containing the affidavit, the court remarked "You are a little late on that. We will file it, however. Everything has been done that can be done, or that should be done." Following which statement, according to the engrossed bill of exceptions now before us, the court, without reading the said return and affidavits, ordered the said return and affidavits filed, and filed the same with the clerk of the court.

Thereupon the trial judge made his ruling modifying as follows the order by which plaintiff mother theretofore had custody of both children: "The order of the court is that the father shall have the custody, care and control of John, and that the mother shall have the care, custody and control of Mary Margaret. John is to spend every other week end with his mother, and that Mary Margaret is to spend every alternate week end with her father; that the children will spend Christmas eve with the mother and Christmas day with the father; that there shall be alternate visitations at all holidays; that John shall spend one-half of the summer vacation with his mother, and Mary Margaret shall spend one-half of the summer vacation with her father; that neither parent shall say anything derogatory of the other parent in the presence of the children; that these children shall not be taken out of Southern California without the written consent of both parties."

Plaintiff's counsel thereupon noted in the record an exception to each of the court's statements, rulings and orders. On the same day, November 7, 1941, the court caused to be entered by the clerk a minute order as follows: "Order to show cause re modification of certain court order and for temporary restraining order and in re contempt comes on for hearing; plaintiff present with her attorney, W. L. Murphey, and defendant with Reynolds & Painter. Recommendation of Margaret Harpstrite, court investigator, is approved, filed and made the order of court. Plaintiff orally excepts to order and rulings of the court in open court."

At the conclusion of the November 7th hearing the court filed with the clerk a document entitled "Recommendation by Margaret C. Harpstrite, Court Assistant, and Order." It should be here noted that this document contained verbatim as recommendations what the court adopted as its ruling on November 7th as heretofore set out, and upon this document the court endorsed "Approved and so ordered. Wm. S. Baird, Judge of the Superior Court."

On November 17, 1941, plaintiff mother filed her notice of appeal from said order of November 7th and from the whole thereof.

On December 27, 1941, defendant father made application ex parte and without notice to plaintiff for an order nunc pro tunc as of November 7, 1941, directing the clerk to file a supplemental affidavit of defendant Richard Wm. Fewel and that said affidavit be included in the clerk's transcript on appeal. On the same day the court made its order granting such application. The affidavit in question was in reply and answer to the affidavits theretofore filed by plaintiff on November 7, 1941, and hereinbefore referred to as "Return on and Affidavit in Opposition to Order to Show Cause, etc."

On January 7, 1942, defendant served upon plaintiff and filed with the clerk proposed "findings of fact and conclusions." On the day following plaintiff served upon defendant and filed with the clerk "Objections to findings of fact and conclusions and order proposed by defendant." However, on January 13, 1942, the court signed and filed the proposed findings of fact and conclusions.

On January 5, 1942, the court signed and filed with the clerk an "order in re custody, care and control of Minor Children" which order conformed to the ruling theretofore made by the court at the conclusion of the hearing on November 7, 1941. On February 16, 1942, plaintiff filed her notice of appeal from such order of January 5, 1942, and from the whole thereof.

We shall first give consideration to the initial appeal taken from the order of November 7, 1941, wherein it is contended by plaintiff that the trial court erred and acted without its jurisdiction "in refusing to hear any evidence or read or consider the return and affidavits offered by plaintiff at the hearing; in referring the entire matter of the care, custody and control to a court investigator; in receiving a confidential report, entitled "Resume," and "Recommendations" from the investigator, ex parte, without service of a copy upon counsel or affording counsel an opportunity to object thereto, and in basing each of its orders, changing the care, custody and control, entirely upon the said confidential report and recommendations of the said court investigator (made after interview-ing witnesses, ex parte, not under oath, and excluding counsel from such interviews)."

[1-4] That an action or proceeding such as the one now before us involving the change of custody of minor children from one parent to another is a judicial proceeding and that the decision therein must be rendered by a judge himself based upon competent evidence, admits of no denial. Const. of Calif., art. VI, § 1; Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96; McGuire v. Superior Court, 137 Cal.App. 272, 30 P.2d 61. It is equally well established that in custody cases the paramount consideration is the welfare and best interests of the child, and there is another rule, not in conflict with the one just announced, which prescribes that when a court has decreed custody of the child there shall not be a change made as to such custody unless adequate cause for a change arises from changed conditions. Furthermore, it is the constitutional right of every citizen and litigant to have the laws governing them declared, applied and expounded by duly qualified judges and not by commissioners, investigators or other administrative officials authorized by the Legislature to assist a judge. As was tersely stated in a well reasoned and carefully considered opinion authored by Mr. Justice pro tem Hanson in Washburn v. Washburn, supra [49 Cal.App. 2d 581, 122 P.2d 101], "Such help as may be accorded a judge to assist him in the exercise of his judicial functions may never be permitted to reach the point where some one else decides the case or an issue before him"; and further in the same case it is said with reference to court assistants and investigators, "They may act as messengers of and acquire information for the judge, but in no event may their influence upon the chancellor guide or control the decision of a cause." Notwithstanding these wholesome rules, we are here confronted with a case wherein the trial judge in fixing a time for hearing of the order to show cause in re custody of minor children instructed the parties to "give my investigator, Mrs. Margaret Harpstrite, all the data you have now" and in ordering the parties to return on the date set for the hearing the judge admonished them "You will return—without witnesses because the report of the investigator will be final."

[5-8] When the matter was called for hearing the judge announced "We are going to adopt the recommendations of the investigator, gentlemen, I will say to you." And that is exactly what the court did—adopted the recommendations of the investigator as the order of the court in re custody of the children. It might well be here noted that such court investigators are not authorized to recommend a decision to the court. Though they may be called "court assistants" they are not clothed with any judicial attributes. They are not in the same category as special masters, commissioners or referees, appointed by the court. They do not possess the power to administer an oath to those appearing before them; they cannot compel anyone to appear or testify before them, nor can they take any evidence. However high-sounding or impressive may be their official designation they are but investigators and nothing more. Their position is that of a hearsay witness, and they should be made available for complete cross examination on any matters concerning which they have made a report at the request of the judge. Issues presented to our courts must be tried and decisions thereon rendered by the judge alone upon sufficient and competent evidence. To again quote from Washburn v. Washburn, supra, "There is no back door to the courts for witnesses, investigators, litigants or others." One has but to read the transcript on this appeal to realize the force and influence of the investigator's report upon the judge because the record discloses that the decision was based solely and alone upon the report and recommendations of such court investigator. This is not in accord with the law nor in consonance with the vested rights of litigants. Whatever halo has become attached to reports rendered by court investigators through custom, practice and a growing misapprehension by some courts as to their relation to certain of their attaches, we deem it both wholesome and timely to point out that the belief that the report of a court investigator is prima facie evidence is without legal sanction.

[9] Respondent contends, however, that the court had before it his affidavit which afforded grounds for the order made, but the answer to this contention is contained in the statement of the trial judge himself "that the report of the investigator will be final" and again "we are going to adopt the recommendations of the investigator." While we concede the right of the trial court to designate an investigator in a proceeding concerning modification of an order concerning custody of minor children to seek and delve into facts occurring subse-

quent to the previous order in re custody, but within certain definite limitations, and bearing directly on the issues involved in the order to show cause, and to report thereon to the court, we do not concede under the law the authority of such investigator to make recommendations to the court as to the order that should be entered nor do we find in the law any authority for the court to receive such a report as a "final" determination of the issues presented. That is exactly what occurred in the case at bar and the orders made herein must therefore be reversed.

[10-12] Respondent contends nevertheless that appellant is estopped from challenging for the first time on appeal the procedure followed in the trial court when, as asserted by respondent, the appellant participated and acquiesced therein at the hearing in the court below. We are not unmindful of the rule that upon appeal a reversal may not be urged by reason of errors occurring in the trial court when a party has invited or failed to challenge erroneous rulings or procedure therein. The trial court is entitled to protection against thus being led into an erroneous ruling or procedure, and the adverse party in the action is entitled to have timely objection made in the trial court so that he may have an opportunity to meet the same and chart his course in that forum. Lyle v. Lyle, 53 Cal. App.2d 552, 127 P.2d 1006; 2 Cal.Jur. 241; Cummings v. Cummings, 97 Cal.App. 144, 275 P. 245. However, in the case at bar we cannot perceive wherein appellant either invited or acquiesced in the erroneous procedure followed by the trial judge. When the court first intimated an intention upon his part to refer the matter to an investigator, appellant's counsel demurred and said "I don't think there is any necessity for that." Again appellant's counsel, according to the authenticated record before us, noted an exception to the order of reference and also filed exceptions to the proposed findings of fact, conclusions of law and the formal order, in all of which appellant emphasized her objections to the procedure followed in referring the matter to an investigator and in predicating the order affecting custody upon such investigator's recommendations. We must, therefore, conclude that appellant's objections to the procedure followed were timely and that both respondent and the court acted with knowledge thereof.

We do not deem it necessary to discuss or decide the question as to whether respondent was entitled to file a supplemental affidavit on December 27, 1941, because it is at once apparent that the ruling and order of the court made November 7, 1941, could not have been influenced thereby, and in any event, as heretofore pointed out the trial judge according to his own declaration predicated his orders primarily and exclusively upon the report and recommendations of the investigator which he unequivocally stated "would be final."

The foregoing conclusions at which we have arrived render it unnecessary to consider other points raised.

For the reasons herein stated the orders and each of them from which these appeals were taken are reversed and the cause remanded with directions to the court below to proceed with a hearing or hearings on the order to show cause in accordance with the views herein expressed.

YORK, P. J., and DORAN, J., concurred.

HILL v. HILL.

Civ. 2921.

District Court of Appeal, Fourth District, California.

Jan. 26, 1943.

Hearing Granted March 25, 1943.

1. Husband and wife 🔑281

Evidence justified finding that property settlement agreement between spouses was conditioned on the procuring of a divorce and hence was void as contrary to "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Husband and wife 🔑278(1)

Fact that wife who signed property settlement agreement which was conditioned upon divorce was represented by her attorney throughout the negotiations for the agreement and was not present during any of the negotiations, did not relieve wife from responsibility for the agreement.

3. Husband and wife ⚷278(2)

A property settlement agreement between husband and wife, conditioned upon and made in contemplation of one of the parties securing a divorce, is against "public policy" and void.

4. Divorce ⚷255

Generally, when a property settlement is valid and the execution of the settlement is free from fraud and not against public policy, the settlement may not be attacked after it is presented to the court and approved in a divorce action.

5. Divorce ⚷255

That contract settling property rights between spouses was approved in the divorce action did not make the judgment "res judicata" so as to prevent it from being attacked as void and contrary to public policy because conditioned on the procuring of a divorce when the wife sued to recover a balance allegedly due under the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Judgment ⚷576(3)

The doctrine of "res judicata" may not be applied where the judgment is based on collusion and fraud.

7. Husband and wife ⚷278(2)

A contract settling property rights between spouses which was void as contrary to public policy because conditioned on the procuring of a divorce would not "estop" the husband when sued to recover a balance due on the contract from denying the validity thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by Zola V. Hill against Jack C. Hill to recover a balance alleged to have been due under a property settlement executed while plaintiff and defendant were husband and wife. Judgment for defendant, and plaintiff appeals.

Affirmed.

Haas & Home, of Los Angeles, for appellant.

Sarau & Thompson and Roy W. Colegate, all of Riverside, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of defendant in an action brought to recover a balance alleged to have been due under a property settlement executed while plaintiff and defendant were still husband and wife.

The trial court found that:

"It is true and the court expressly finds that the execution and delivery of that said agreement made and entered into on the 14th day of August, 1928, was at that time and date conditioned upon and in contemplation of, and for the purpose of promoting an immediate and forthwith dissolution of the marriage existing between the plaintiff, Zola V. Hill, and the defendant, Jack C. Hill."

Following the foregoing finding the trial court drew the conclusion that the contract was against public policy and void and entered judgment for defendant.

But two questions raised by plaintiff need consideration here. They are: (1) That the evidence fails to support the foregoing finding, and, (2) That as the contract was approved in the divorce action that judgment became res judicata and consequently the contract cannot be attacked here.

A casual reading of plaintiff's opening brief where the evidence is summarized leads to the conclusion that the finding has ample evidentiary support. Statements in substance like the following are repeated:

"The respondent stated to Mr. Haas that he was willing to pay a monthly sum to Mrs. Hill on condition that she get a divorce immediately or permit him to get one but that he would not pay $250.00 a month that was being asked by Mrs. Hill. Finally the respondent stated he would pay Mrs. Hill $200 per month for ten years on condition that the divorce was had and Mr. Haas suggested that the respondent agree to the payment of $50.00 per month after the 10-year period. After further discussion, the respondent agreed that he would pay the additional amount, but only on condition that Mrs. Hill either proceed to get a divorce, or that he be permitted to get one."

An examination of the record shows that these statements were fully justified.

After negotiations between defendant and his attorney, who does not appear here, and Mr. Haas was was representing plaintiff, the then attorney for defendant prepared a property settlement agreement which was mailed to Mr. Haas. It contained the following:

"Now, Therefore, by way of property settlement, it is hereby agreed between both parties hereto that in the event the party of the second part does obtain an interlocutory decree of divorce, and thereafter obtains a final decree of divorce, that the following agreement is made as a full and complete property settlement between said two parties, and full and complete settlement for the support and maintenance of the said party of the second part and the said two minor children."

Mr. Haas objected to this provision appearing in the contract and had it rewritten with the paragraph omitted. When the attorney for the defendant received the amended contract he had a telephone conversation with Mr. Haas which is summarized in the record as follows:

"I told him that the agreement was in accordance with my understanding and the conversation we had had that the agreement was not to be effective unless the decree of divorce was obtained by one or the other of the parties and that I would not send the property settlement agreement back, signed by Dr. Hill, unless it was specifically understood it was not to be used and that the $100.00 which Mr. Haas was asking for attorneys fees was not to be paid except and until and upon condition that the divorce be obtained by one of the parties. He (Mr. Haas) said 'Well he did not want it in the contract, but that was the understanding.'"

The contract was signed by defendant and sent to Mr. Haas with a letter in which the following appears:

"I am sending you these contracts, together with the checks in question, the same to be held by you and not delivered or used except in the event of an action being filed by Mrs. Hill for divorce against Dr. Hill and the obtaining of the decree of divorce by one or the other of the parties.

"On the basis of this understanding and in line with our telephone conversation of today, I will appreciate your getting the complaint prepared, signed, filed and served as soon as possible, and I will then put in an appearance and advise you."

The divorce action was filed by plaintiff on August 17, 1928. The complaint alleged that there was no community property and set forth the settlement of the property rights of the parties by an agreement dated August 14, 1928. It prayed that the court approve the property settlement.

The answer of defendant admitted the allegations of the complaint and prayed that defendant's obligation for support of Mrs. Hill and the two children of the parties be limited to the terms of the agreement.

The divorce case was heard by stipulation on September 7, 1928, and an interlocutory decree was rendered on that day. The following appears in the decree:

"And it appearing that a full and complete property settlement had been entered into by and between plaintiff and defendant and that said property settlement is satisfactory to the plaintiff herein the said property settlement is hereby approved."

The final decree of divorce was rendered on September 17, 1929. The property settlement agreement was delivered to the attorney for defendant on September 7, 1928.

[1] It is trite to observe that the challenged finding is amply supported by the evidence. No other finding on that subject could have been made.

While the reasoning of plaintiff on this question is somewhat obscure we believe the thought back of the argument that the finding is contrary to the evidence, is the fact that plaintiff was represented by an attorney, was dealing at arm's length with her husband and actually was not present during any of the negotiations.

[2] This may be all true but it does not relieve her from responsibility. Mr. Haas was her attorney, selected by her to represent her in the matter of the property settlement as well as the divorce. He was acting as her agent within the scope of his employment and she is charged with his knowledge and is bound by his acts. She accepted the benefits of the fraud and was paid $17,200 under the contract.

[3] It has long been the rule that a property settlement agreement between husband and wife, conditioned upon and made in contemplation of one of the parties securing a dissolution of the marriage by divorce, is against public policy and void. Brown v. Brown, 8 Cal.App.2d 364, 47 P.2d 352; Beard v. Beard, 65 Cal. 354, 4 P.2d 229; Senter v. Senter, 70 Cal. 619, 11 P. 782; Loveren v. Loveren, 106 Cal. 509, 39 P. 801; Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S.,

880, 134 Am.St.Rep. 107; Lanktree v. Lanktree, 42 Cal.App. 648, 183 P. 954; Whiting v. Whiting, 62 Cal.App. 157, 216 P. 92.

[4] It is a general rule that when a property settlement is valid and its execution is free from fraud and not against public policy it may not be thereafter attacked if it is presented to the court and approved in a divorce action. Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536.

[5, 6] It is also true that the doctrine of res judicata may not be applied where the judgment is based on collusion and fraud. The rule is thus stated in 30 Am. Jur. 941: "In stating the doctrine of res judicata, the courts frequently refer to the fact that the judgment sought to be used as a basis for the application of the doctrine was rendered without fraud or collusion, since it is generally held that the principles of res judicata may not be invoked to sustain fraud, and that a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata."

[7] See Milekovich v. Quinn, 40 Cal. App. 537, 181 P. 256; Boullester v. Superior Court, 137 Cal.App. 193, 30 P.2d 59. Nor can a party be estopped by such a contract. Ryder v. Ryder, 2 Cal.App. 2d 426, 37 P.2d 1069.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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56 Cal.App.2d 681

GOULD et al. v. ESCONDIDO VALLEY POULTRY ASS'N.

Civ. 2860.

District Court of Appeal, Fourth District, California.

Jan. 15, 1943.

1. Evidence 🔑542

In action to rescind realty purchase contract for fraud, objection that witness, who testified that topsoil was from one to two feet deep with hardpan underneath, was young and without experience in soils except in high school agriculture course, went to weight and not to admissibility where witness showed some knowledge of types of soil including hardpan.

2. Appeal and error 🔑1012(1)

It is province of trial court to pass on weight to be given evidence.

3. Vendor and purchaser 🔑44

In purchaser's action to rescind land contract for fraud, evidence supported findings that vendor knew falsity of representation as to depth of top soil and that plaintiffs had no knowledge thereof until shortly before giving notice of rescission.

4. Vendor and purchaser 🔑119, 120

Where purchaser, after learning of falsity of representation as to soil in land sold, unsuccessfully negotiated with vendor until the next year, when she delivered notice of rescission containing unreasonable demands, but vendor did not object to form of the notice, and it appeared that vendor would not have accepted notice to rescind except on terms unduly favorable to vendor, purchaser was not guilty of "laches" in giving notice of rescission, and further notice of rescission was excused.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

5. Vendor and purchaser 🔑37(4)

Statements by agent of vendor of land concerning depth of topsoil were not mere expressions of "opinion" and "puffing talk" which would furnish no basis for rescission and action for fraud, but constituted "representations of a material fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Opinion", and "Puffing Talk" and "Representation of a Material Fact".

6. Appeal and error 🔑901

There is a strong presumption in favor of regularity of proceedings of a court of record, which must prevail until overcome.

7. Appeal and error 🔑935(2)

In absence of contrary showing, reviewing court must presume that order vacating default judgment was regularly and lawfully made.

8. Appeal and error 🔑935(2)

Where record did not force conclusion that motion to vacate default judgment was made and granted under statute requiring such motion to be made within six months, reviewing court would not reverse on ground that motion was not made within such period. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Mae Gould and others against the Escondido Valley Poultry Association to rescind real estate purchase contract and for other relief, wherein defendant filed cross-complaint to quiet title to the property. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Von Seggern & Hawkes, of Escondido, for appellant.

Vincent Whelan, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment for plaintiffs against the Escondido Valley Poultry Association rescinding a contract of purchase of real property because of fraud, for the return of money paid by them, together with the enhanced value of the property by reason of improvements placed on it before discovery of the fraud, and also from an order vacating a judgment for defendant Escondido Valley Poultry Association rendered on its cross-complaint to quiet title to the property. Defendant James Badgley was not served with summons and made no appearance in the action. We will refer to the Escondido Valley Poultry Association as the defendant.

Plaintiffs entered into negotiations for the purchase of the property in 1936 which terminated in a conditional sales contract dated April 1, 1936, whereby they agreed to purchase the property for $1,880. They paid $500 on the purchase price, $126.52 in progress payments on the principal and $125.38 on the interest accruing. They also expended about $1,500 in making permanent improvements in the buildings and other improvements which the trial court found had enhanced the value of the property in the sum of $500. They occupied the property for twenty-two months. The reasonable value of this occupancy was found to be $250. The judgment rescinded the contract and awarded plaintiffs $1,001.90.

The fraudulent representations upon which plaintiffs rely were made by James Badgley, who acted as agent for defendant in making the sale.

Mrs. Gould was engaged in the business of raising chickens and turkeys. As Ray Gould, her husband, was working for contractors and away from home for considerable periods of time, the negotiations for the purchase were conducted and the contract of purchase was signed by Mrs. Gould.

Mrs. Gould advertised in an Escondido paper for a small tract of land having a good water supply which would be suitable for raising poultry. She was first shown this property by a real estate agent who had his place of business in Escondido. A few days later she met Badgley on the property and he showed her the boundaries of the five acres and made the representations, according to Mrs. Gould, upon which she relied in making the purchase.

The evidence concerning these representations is sharply conflicting. As the trial court found in accordance with the testimony of Mrs. Gould we need not concern ourselves with contrary evidence produced by defendant as conflicts in the evidence and the credibility of witnesses generally are questions addressed to the trial court and settled there and not on appeal.

Mrs. Gould detailed her conversation with Badgley in part as follows: "I said, 'Well, Mr. Badgley,' I said, 'I am convinced that you have a good well here,' but I says, 'The condition of these buildings I would consider them as firewood.' 'Yes,' he said, 'That is right. The buildings are very old,' he said, 'And they are just in a tumbledown state; the roof is all caving in; it looks as though the walls are all caving in.' He says: 'It is an old building,' but he says, 'You get a very fine five acre tract here.' * * * I said, 'What else have you got to show for value?' He said, 'Let us skip the buildings completely; you have got five acres of land here, if you try to buy good land like this anywhere around Escondido, it will run you at least four hundred dollars an acre.' I said, 'You consider now that this is good soil?' 'Yes,' he says, 'This is good deep fine soil.' I said, 'In case we could not make a go of the poultry business, the market is very weak at present, what could we raise on these five acres to make a living, we are trying to make our living with poultry?' He said, 'You can raise anything on this land except citrus.' He said, 'It is a little too cold in here for citrus.' He says, 'This is good, deep soil, and it is rich soil, it has been used for a poultry ranch for many years,' and he said, 'the soil is very good.' I said, 'For instance, if we do not make a go of poultry, would this soil be suitable for growing walnuts or good vineyards?' 'Yes,' he said, 'there have been some very fine vineyards grown here,' and he says, 'As far as walnuts, you can grow excellent walnuts here'; he says, 'it is good deep soil; lots of water.' * * * Well, just that I went over that soil with Mr. Badgley. He picked up some of the soil, showed me what nice fine, sandy soil it was there. He said it was excellent rich soil, and deep, he said we could go down there four feet, that deep, the roots of any trees would spread and then the lower place had lots of water. * * * He said, 'Yes, this is excellent deep soil. You can grow fine walnuts.' And he said, 'Mrs. Young, what about these walnuts over on Gutchell's?' She said, 'They are very fine.' He took me across this five acre land to Getchell's place on the line and he said, 'I will show you the kind of walnuts that you can grow on this land.' Well, I went with him, and my son and I walked across the alfalfa patch. Mrs. Young did not go with us. She went in the house. We looked at the walnuts and cracked some of them. They were very fine large walnuts, with thin shells. He said, 'You can plow this land up and plant it to walnuts if you don't make a go with the turkeys, because you have a wonderful water supply,' which was correct. So I bought the property with the understanding that it was good deep soil and that I could plow it up."

The walnut trees on the Gutchell place were about 100 feet north of the north line of the property involved here.

Plaintiffs moved onto the property in April, 1936, and commenced improving the buildings on it. Mr. Gould dug a pit for a septic tank. At that point the top soil was about 18 inches deep. Underneath was a hard layer which one witness described as hardpan and others a hard packed clay. Mr. Gould had to blast this layer with dynamite to get through it to a depth of four and one-half feet. Mrs. Gould testified that this pit was near a road and that she and her husband did not suspect that the shallow top soil with the hard layer underneath extended over the rest of the place because of the existence of the road.

Mrs. Gould broke a bone in one of her legs in the summer or early fall of 1937. She was disabled for several months and could not tend to her poultry business. With her consent defendant took over her poultry on a chattel mortgage which had been given for feed. She advertised the place for sale and a man from Long Beach came to Escondido to inspect it with the object of buying it. He, accompanied by plaintiffs' son, tested the soil in various places. The son testified that the top soil was from one to two feet deep; that underneath was a layer of hardpan.

[1, 2] Defendant urges that the testimony of this youth should have been excluded and should be given no credence because of his years and lack of experience. This witness was young and his sole experience in soils was in an agricultural course in the high school, where various soils, including hardpan, had been studied and samples inspected. This objection goes to the weight to be given the evidence and not to its admissibility as the witness showed some knowledge of types of soil including hardpan. It is the province of the trial court to pass on the weight to be given evidence.

[3] Previous to the sale to plaintiffs, defendant had attempted to sell the property to the Mrs. Young mentioned in the foregoing testimony. Her purchase was dependent upon getting a loan from a bank. Badgley testified that when he and Mrs. Gould first went on the property Mrs. Young handed him a letter from the bank in which the loan was refused because the top soil was shallow and was underlaid with a stratum of hardpan. He testified that he read the letter and handed it to Mrs. Gould who also read it. She denied seeing the letter until 1938. Thus the finding that defendant knew that the representation that the top soil was deep, at least four feet deep, was false and was known to be false by defendant through its agent, has evidentiary support as does the finding that plaintiffs had no knowledge of the falsity of that representation until the fall of 1937.

There is evidence that walnuts cannot be grown successfully on land with a shallow top soil with hard clay or hardpan underneath.

[4] Defendant urges that plaintiffs should not be permitted to recover because of their delay in attempting to rescind the contract. Mrs. Gould first learned of the

character of the soil in the fall of 1937, when she was still unable to walk without the aid of crutches. She unsuccessfully communicated with officers of defendant in an effort to adjust the wrong she believed had been done her. When she was able to walk she renewed her demands in personal interviews with officers of defendant. Finally in 1938, after her efforts to compromise the claim had been rebuffed, she attended a meeting of the board of directors and delivered a notice of rescission. The trial court found that the notice of rescission contained unreasonable demands on the part of plaintiffs but that no objection to the form of the notice of rescission was made by defendant. Further, if Mrs. Gould's testimony be given full weight, no notice to rescind would have been accepted by defendant unless it had been upon terms permitting it to cancel the contract, retain the property and the value of the improvements made by plaintiffs as well as the money paid by them. Under these circumstances the finding against laches, and that further notice of rescission was excused, finds evidentiary support.

[5] Defendant urges that the statements of Badgley concerning the depth of the soil and its suitability for walnut culture were mere expressions of opinion and "puffing talk" on the part of an agent that furnish no basis for rescission and an action for fraud. Perhaps this may be true as to the representations concerning the suitability of the soil for walnut culture, but it is not true concerning the representations concerning the depth of the soil.

The case of McMahon v. Grimes, 206 Cal. 526, 275 P. 440, 443, is factually similar to the instant case as far as the representations concerning the depth of the soil are concerned. There the Supreme Court quoted from Powell v. Oak Ridge Orchards Co., 84 Cal.App. 714, 258 P. 636, as follows: "The statements as to the character of the soil and as to the water supply were clearly misrepresentations of fact."

In the same case it was said: "That representations regarding the character and nature of the soil of land sold are statements of a fact, and when fraudulently made will justify a rescission of the sale, is supported by an unbroken line of authorities in this state. Particularly is this so when the trial court, as it has in the present action, found that such representations were statements of fact, and not the expression of an opinion. Groppengiesser v. Lake, 103 Cal. 37, 36 P. 1036; French v. Freeman, 191 Cal. 579, 217 P. 515; Delta Land, etc., Co. v. Perry, 57 Cal.App. 314, 207 P. 393; Stone v. McCarty, 64 Cal.App. 158, 220 P. 690; Dickey v. Dunn, 80 Cal. App. 724, 252 P. 770." See, also, Neff v. Engler, 205 Cal. 484, 271 P. 744; Gammon v. Ealey & Thompson, 97 Cal.App. 452, 275 P. 1005.

Defendant seeks to distinguish the instant case from those cited, and others, by arguing that in those cases the injured parties were inexperienced, while here, Mrs. Gould had previously owned land and had some knowledge of walnut culture. This argument is based on a fragile foundation. Mr. and Mrs. Gould had owned land in San Diego County on which a few walnut trees were growing. During her youth she had lived on a farm in Canada. She had read some government publications on walnut culture. There is nothing to indicate that either of plaintiffs had any knowledge of the character of the land around Escondido or in the locality of the land they were buying. The representation as to the character and depth of the soil was a representation of a material fact, was a positive representation and was false. It was relied upon by plaintiffs to their injury. In Neff v. Engler, supra, it was said [205 Cal. 484, 271 P. 746]: "In Bishop on Noncontract Law, sec. 330, it is said: That plaintiff is too credulous is not generally a defense. 'The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind or one weak and too relying.' (See, also, Bigelow on Frauds, 524.) 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' Mead v. Bunn, 32 N.Y. 275."

Defendant filed a cross-complaint with its answer. No answer to this pleading was filed and plaintiffs' default was entered and judgment on the cross-complaint was taken against them. More than a year after the entry of this judgment plaintiffs moved to vacate the judgment, set aside the default and permit them to answer. The judgment was vacated but they were not permitted to file an answer.

[6-8] Defendant urges this was error, maintaining that such a motion must be made within six months under the provisions of section 473 of the Code of Civil Procedure. If the motion were made and granted under the provisions of that section the argument might deserve serious consideration. However, there is nothing in the record to force such a conclusion. There is no bill of exceptions of the proceedings taken at that time and no part of the reporter's transcript is devoted to that subject. We are furnished, in a supplemental clerk's transcript, with a copy of the minutes of the trial court vacating that judgment. There is nothing there to indicate that the order was made under the provisions of the code section. There are grounds on which a judgment may be vacated independent of the section, and after the expiration of six months, such as extrinsic fraud. There is a strong presumption in favor of the regularity of the proceedings of a court of record which must prevail until overcome. In the absence of any showing to the contrary we must presume that the order vacating the judgment was regularly and lawfully made.

The judgment is affirmed.

BARNARD, P. J., concurred.

GRIFFIN, J., being disqualified, does not participate herein.

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56 Cal.App.2d 715

In re MORRIS' ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. RILEY.

Civ. 13868.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1943.

Hearing Denied March 18, 1943.

1. Adoption 🔑5

California law authorizes only adoption of minor children and it is legally impossible to adopt an adult.

2. Adoption 🔑25

Whether a child has acquired status of an adopted child, so as to be entitled to inherit property, in a state other than that of his adoption, will be determined by law creating the adoption, though dissimilar to that of situs of property.

3. Adoption 🔑25

In fixing inheritance tax to be imposed on death in California of an adult adopted under laws of Rhode Island and survived by adoptive parent, fact that adoption of adults was not recognized in California and that recognition of adoption of adults in other states might open avenue for evasion of inheritance taxes did not preclude recognition by California of the Rhode Island statute. Civ.Code §§ 221–230.

4. Adoption 🔑25

A Rhode Island decree in adoption proceedings creating status of adopted child and adoptive parent between an adult and her uncle and the status thereby created were entitled to "full faith and credit" in California, notwithstanding that adoption of an adult was contrary to California policy. Civ.Code § 221–230; U.S.C.A.Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

5. Constitutional law 🔑14
Contracts 🔑147(1)
Statutes 🔑181(1), 184

In construing a written instrument, whether a constitution, statute or contract, court's duty is to discover true meaning of instrument and to glean therefrom purposes and objects thereof.

6. Taxation 🔑886½

An adoptive father was a "lineal ancestor" within Inheritance Tax Act provision granting preference in matter of rates to lineal ancestors and others, in view of other statutory provisions indicating that adoptive parents and adopted child should have rights and be subject to duties ordinarily recognized in case of relation of parent and child. Gen.Laws 1937, Act 8495, § 4(1); Civ.Code § 228; Probate Code § 257; Code Civ.Proc. § 1858.

See Words and Phrases, Permanent Edition, for all other definitions of "Lineal Ancestor".

7. Statutes 🔑245

Tax statutes are to be strictly construed in favor of the individual and against the state.

8. Taxation ⚿204(2)

Exemptions from taxation are to be construed liberally in favor of state and strictly as to those claiming benefit of exemption.

9. Taxation ⚿860, 872, 886½

The provision of Inheritance Tax Act giving preference in matter of rates to persons specified therein was not an exemption provision, and the state was not entitled to have such provision liberally construed in favor of state as is customary in case of exemption provisions. Gen.Laws 1937, Act 8495, § 4(1).

◆

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge pro tem.

Proceeding in the matter of the estate of Winifred R. Morris, deceased, wherein the Security-First National Bank of Los Angeles and others objected to the amount of inheritance tax which Harry B. Riley, as state comptroller, etc., claimed was owing to the state by the estate of the deceased. From an order of the Superior Court fixing the inheritance tax, Security-First National Bank of Los Angeles and others appeal.

Order reversed and cause remanded with directions.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for appellants.

James W. Hickey, Inheritance Tax Atty., of Sacramento, Walter H. Miller, Asst. Inheritance Tax Atty., of Los Angeles, and T. H. Christiansen, of Sacramento, and Donald R. Peck, of Los Angeles, Deputies Inheritance Tax Atty., for respondent.

WHITE, Justice.

This appeal is prosecuted by the administrator with the will annexed of the above entitled estate and by the administrator with the will annexed of the sole legatee and beneficiary of such estate, from an order of the Superior Court of Los Angeles County determining and fixing the amount of the inheritance tax in said estate.

The facts are stipulated and without dispute. Epitomized, they are that by decree of the probate court of the city of Providence, State of Rhode Island, on the 23rd day of March, 1934, John F. Morris, an unmarried man then of the age of 92 years, duly and legally adopted as his child, Winifred R. Morris, the above named decedent, who was his niece, then of the age of 61 years, and both of whom were then domiciled in that state. The adoptive father and the adopted child thereafter made mutual wills exclusively in favor of each other. The adopted child, decedent herein, died domiciled in Los Angeles on the 7th day of October, 1940, predeceasing her adoptive father who was the sole legatee under the terms of her will, which was thereafter duly admitted to probate; her entire estate consisted of personal property. The adoptive father died on the 18th day of November, 1940. The inheritance tax appraiser appointed herein correctly reported that the clear market value of the taxable property in the above entitled estate was $502,659.36.

The California inheritance tax appraiser found, determined and reported to the court that the inheritance tax to be charged against John F. Morris, the sole legatee herein, would be based upon the collateral relationship of uncle of the decedent adopted daughter, Winifred R. Morris, resulting in a tax of $64,118.90, and not upon the direct relationship of "lineal ancestor," which would result in a tax of only $37,415.94.

Objections having been duly filed on behalf of the administrators hereinbefore referred to, the matter proceeded to hearing before the court, resulting in an order of said court overruling the objections filed, approving the report of the inheritance tax appraiser and directing that the amount of the inheritance tax to be paid on the estate be fixed in the sum of $64,118.90. It is from such order that this appeal is taken.

For the first ground of appeal it is urged by appellants that the court's finding, "That the Rhode Island adoption of Winifred R. Morris by John F. Morris when Winifred R. Morris was sixty-one years of age did not have the effect of creating a relationship of parent and child between said parties which can be recognized under the law of this state, for the reason that the adoption of adults is against the public policy of this state," is without support in the uncontradicted evidence and is unsupported by law. It is agreed herein that the adoption proceedings were regularly and duly had in accordance with the laws of the State of Rhode Island, and that the adoption of an adult, younger in age than the adoptive parent, is legal and authorized by the laws of that state. It is also stipulated that, under the laws of Rhode Island, one adopted as was the decedent herein shall be deemed for the purpose of inheritance and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if such adopted child had been born to the adoptive parents in lawful wedlock, excepting that such adopted child shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from a lineal or collateral kindred of such parents by right of representation. Manifestly, under the laws of the State of Rhode Island the full and complete relationship of parent and child ensued in that state from adoption proceedings. Bearing in mind that the decedent died while domiciled in California and that the estate consists in its entirety of personalty, it seems pertinent to here set forth section 228 of the Civil Code of California, which provides: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." Section 257 of our Probate Code reads: "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adopted child."

From the foregoing it follows that if the adoption proceedings had in the State of Rhode Island are to be recognized in California, then the relation of parent and child existed between John F. Morris and the decedent herein, and if such be the case then under the laws of this state (§ 257, Prob.Code), in accordance with and by which the property herein is to be distributed, the adoptive father inherits from his adopted child just as a natural parent would inherit from his natural child.

[1-3] Respondent, however, contends that a person who has legally become, as in the instant case, the adoptive parent of an adult under Rhode Island laws, which permit the adoption of adults, is not recognized as an adoptive parent for any purpose under the laws of the State of California. In support of this claim we are cited by respondent to section 221 of the Civil Code and the sections following, from section 222 to section 230 of the same code. It must be conceded that the law of California authorizes only the adoption of minor children and that it is legally impossible to adopt an adult under the laws of this state. In re Estate of Taggart, 190 Cal. 493, 213 P. 504, 27 A.L.R. 1360. Relying upon the rule that the laws of a state can have no extraterritorial force and effect except through the doctrine of comity, we are urged by respondent to hold that if the law of Rhode Island permitting the adoption of an adult is given force and effect in this state, such action would be violative of the laws of California and its public policy; for which reason it is asserted we should not give effect, by way of comity, to the laws of a sister state when such laws substantially conflict with our own statutes and an announced public policy that has endured in California for more than seventy years. That the policy of permitting adoption of adults is not generally regarded as offensive to public morals and is not unusual is attested by the fact that in some twenty-two states, as well as in the District of Columbia, adoption of adults is permitted and authorized by express statute or by judicial interpretation. There is also creditable authority for stating the rule to be that the question whether the child has acquired the status of an adopted child, so as to allow him to inherit property in a state other than that of his adoption, will be determined by the law creating the adoption, though that law, in respect to form and procedure of adoption be dissimilar to that of the situs of the property. In other words, if the child had been legally adopted in accordance with the laws of one state, the status created by such adoption, with the right to inheritance, and other incidental rights flowing therefrom, will follow him to and be respected as well as recognized in the state where the property is, to the extent that the law of the latter state allows a child there adopted to inherit. (1 Am.Jur. 668.) It does not seem to us that because there is a variance between the laws of two sovereignties that the courts of one state should refuse to recognize the status of a person created by the laws of another unless to extend such recognition would be contrary to pure morals or abstract justice and harmful to its own people. The heretofore noted widespread recognition by the states of the union of the adoption of adults it seems to us militates against any conclusion that to recog-

nize such adoptions would infringe upon or outrage public morals and justice. Respondent further urges upon us that "to recognize adoptions of adults in other states and countries might prove a serious threat to the revenue from inheritance taxes, since it would open up an avenue for the evasion or minimizing of taxes through the simple device of adoption of an adult in another state which allowed such procedure, who would otherwise have been taxable as a stranger or as one otherwise falling in higher taxing brackets." This contention does not appear alarming to us when we contemplate the rarity of questions such as the present litigation presents. Diligent search by counsel on both sides of the instant case has failed to reveal a single case disposing of the problems involved in the one at bar, while our own research has gone similarly unrewarded.

A much more serious question however is presented when we contemplate the full faith and credit clause of the federal Constitution, which in section 1 of article IV provides in part as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. * * *"

That the status or relationship of parent and child was established between John F. Morris and the decedent herein by judicial proceedings in the State of Rhode Island cannot be successfully challenged. Is not the State of California and its courts bound by the United States Constitution to give full faith and credit in this state to the status thus created between the aforesaid persons by a valid and legal decree of the Rhode Island courts? The recent pronouncement of the United States Supreme Court in the case of Williams v. State of North Carolina, 63 S.Ct. 207, 87 L.Ed. 279, decided December 21, 1942, we regard as decisive of the question presented to us concerning the duty and obligation of the courts of California under the full faith and credit clause of the federal Constitution to give complete recognition to the status of adopted daughter and adoptive father as established by decree of the Rhode Island court. In the cited case the facts were that both petitioners were married to other spouses in the State of North Carolina, where they resided with such spouses over a period of years. In 1940 both petitioners went to the State of Nevada and instituted divorce proceedings against their respective spouses, the latter of whom never resided in Nevada but were served with summons by publication. A decree of divorce was granted each petitioner by the Nevada court, which found among other things that each petitioner "has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law." After obtaining their respective Nevada decrees the petitioners were married to each other in the State of Nevada and thereupon returned to the State of North Carolina where they lived together until they were indicted, tried and convicted of bigamous cohabitation under section 4342 of the North Carolina Code. Following the affirmance of such conviction by the Supreme Court of North Carolina, 220 N.C. 445, 17 S.E.2d 769, the case went to the United States Supreme Court upon certiorari. 315 U.S. 795, 62 S.Ct. 918, 86 L.Ed. 1196. At the trial of petitioners in the North Carolina court the prosecution contended and the court instructed the jury that since neither of the defendants in the Nevada divorce actions was served in Nevada nor entered an appearance there, the Nevada decrees of divorce could not be recognized as valid in North Carolina. The State of North Carolina further contended that petitioners went to the State of Nevada not to establish a bona fide residence but solely for the purpose of taking advantage of the laws of that state to obtain a divorce through fraud upon that court. The North Carolina Supreme Court in affirming the judgment of conviction held that North Carolina was not required to recognize the Nevada decrees under the full faith and credit clause of the United States Constitution. In reversing the judgment of conviction against petitioners the United States Supreme Court said [63 S.Ct. 210, 87 L.Ed. 279]: "Article IV, § 1 of the Constitution not only directs that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State' but also provides that 'Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.' Congress has exercised that power. By the Act of May 26, 1790, c. 11, 28 U.S.C. § 687, 28 U.S.C.A. § 687, Congress has provided that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' Chief Justice Marshall stated in Hampton v. McConnell, 3 Wheat. 234, 235, 4 L.Ed. 378, that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.' That view has survived substantially intact. Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039. This Court only recently stated that Art. IV, § 1 and the Act of May 26, 1790 require that 'not some, but full' faith and credit be given judgments of a state court. Davis v. Davis, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26, 118 A.L.R. 1518. Thus even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit. See Christmas v. Russell, 5 Wall. 290, 18 L.Ed. 475; Fauntleroy v. Lum, supra; Kenney v. Supreme Lodge, 252 U. S. 411, 40 S.Ct. 371, 64 L.Ed. 638, 10 A. L.R. 716; Titus v. Wallick, 306 U.S. 282, 291, 59 S.Ct. 557, 562, 83 L.Ed. 653. * * * Cheever v. Wilson [9 Wall. 108, 19 L.Ed. 604], held that a decree of divorce granted by a state in which one spouse was domiciled and which had personal jurisdiction over the other was as conclusive in other states as it was in the state where it was obtained. Atherton v. Atherton [181 U.S. 155, 21 S.Ct. 544, 45 L.Ed. 794], held that full faith and credit must be given a decree of divorce granted by the state of the matrimonial domicil on constructive service against the other spouse who was a non-resident of that state."

Again the Court says: "It is objected, however, that if such divorce decrees must be given full faith and credit, a substantial dilution of the sovereignty of other states will be effected. For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state. But such an objection goes to the application of the full faith and credit clause to many situations. It is an objection in varying degrees of intensity to the enforcement of a judgment of a sister state based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overridden in Fauntleroy v. Lum, supra, when a Missouri judgment based on such a Mississippi contract was enforced by this Court. Such is part of the price of our federal system."

Finally the court concludes by saying: "So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter."

[4] We therefore hold that when the State of Rhode Island, acting in accord with its laws, established through valid adoption proceedings the status of adopted child and adoptive parent between decedent herein and her uncle, full faith and credit must be given to such decree and the status thereby created must be recognized by the State of California, notwithstanding a claimed conflict with the announced policy of the latter state.

The next finding of fact made by the court and now under attack by appellants on this appeal reads as follows: "That at the time of her death John F. Morris was not the lineal ancestor of Winifred R. Morris, within the meaning of that term as used in Section 4, subdivision (1) of the Inheritance Tax Act of the State of California then in effect."

The pertinent portion of subdivision 1, section 4, of the Inheritance Tax Act of 1935 (Deering's Gen.Laws, 1937, Act 8495) of the State of California, and upon which the foregoing finding was predicated, provides: "(1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal ancestor, lineal issue of the decedent or any child adopted as such in conformity with the laws of this State, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent (provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter), or any lineal issue of such adopted or mutually acknowledged child, at the rate * * *."

It is at once apparent that before John F. Morris may be taxed at the rates mentioned in subdivision 1, section 4, of the just quoted act and be entitled to the preferment incident thereto it must be determined that he is a lineal ancestor of the deceased adopted daughter, Winifred R. Morris, which respondent contends he is not and with which contention the trial court agreed. Respondent maintains that "lineal" means descent from an ancestor, hence, family, race, stock; that "lineal" is that which subsists only between persons of whom one is descended in a direct line from the other, as between a son, father, grandfather, great grandfather, and so upward in the direct ascending line, or between son, grandson, great grandson, and so downward in the direct descending line. In other words, that lineal consanguinity means blood relationship. Respondent's claim in this regard might be summarized by saying that when the word "lineal" was used by the Legislature in subdivision 1, section 4, of the Inheritance Tax Act it was used in the sense of consanguinity or relationship by blood, which can come about only by natural means and not by artificial means, such as "statute made" relationships in the form of adoptions; that when, therefore, the Legislature speaks in the aforesaid act of "lineal ancestor" it means one who is in the direct line of ascent from the deceased; that is, a natural father or mother, natural grandfather or grandmother, and so on up in the direct ascending line. We are asked to hold that notwithstanding section 228 of the Civil Code of California, which provides that after adoption the adoptive parent and the adopted child shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation; and section 257 of the Probate Code, which declares that the person adopting succeeds to the estate of an adopted child the same as a natural parent, that it was intended notwithstanding to restrict the favored class only to ancestors by blood in the direct ascending line. While undoubtedly it is true that the Legislature lacks the power to infuse into the parties to an adoption the element of blood relationship, the lawmakers certainly do have the power to confer upon parties to an adoption all rights, privileges and obligations enjoyed by or reposing in natural parents and children. In fact, the above mentioned section of the Inheritance Tax Act specifically provides in relation to "lineal issue of the decedent" that children by adoption, children by acknowledgment and the issue of such children shall enjoy the same preferment in the matter of tax as shall issue of the blood. While conceding this, and apparently not challenging the legality or validity of such legislative action, respondent argues that it was intended to exclude ancestors by adoption, since there was not added to the words "lineal ancestor" any reference to ancestors by adoption. Having expressly included adopted children, acknowledged children and their heirs in the preferred class, respondent argues that by failing to provide specifically that adoptive ancestors shall be so preferred, the maxim expressio unius est exclusio alterius applies and requires a holding by us that a lineal ancestor, as the term is used in subdivision 1, section 4, above mentioned, is restricted to one by blood in the direct ascending line and not one who became an ancestor by adoption.

[5] The most important duty devolving upon a court in the construction of a written instrument, whether the same be a constitution, statute or a contract, is to discover the true meaning of the instrument and to glean therefrom the purposes and objects of the same (Perry v. Gross, 172 Cal. 468, 156 P. 1031; Fairman v. Mors, 55 Cal.App.2d 216, 130 P.2d 448. By the mandate of section 1858 of the Code of Civil Procedure there is enjoined upon courts in the construction of statutes the duty to ascertain and give effect to the legislative intent. We are therein admonished to refrain from any unwarranted invasion of the functions of the lawmaking body; that if for any reason amendment or abrogation of a statute is desired, resort must be had to the Legislature, which alone has power to modify or abolish statutory rules, and not to the courts, whose duty is simply to declare the law. The last cited section reads: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if pos-

sible, to be adopted as will give effect to all."

[6] With these rules in mind we proceed to a consideration of the legislative intent and objectives as manifested by the terminology of subdivision 1, section 4, of the Inheritance Tax Act of 1935. The difficulty with respondent's contention in reference to the statute now under consideration is that if we adopt the interpretation urged by respondent we must hold that the Legislature intended by the language used to confer upon adopted children certain rights and privileges denied to adoptive parents; and this in the face of the reciprocal rights, privileges and obligations granted and imposed upon both the adopted children and the adoptive parents. We are persuaded that when the Legislature exercised the diligence it did in stating expressly, specifically and in detail, provisions regarding adopted children but refrained from such reference to adoptive parents, it was intended that the latter be regarded as being in the legal category of "lineal ancestors," as that phrase is used in the Inheritance Tax Act. Otherwise, the child adopted and the adoptive parent would not sustain toward each other "the legal relation of parent and child" and "have all the rights and be subject to all the duties of that relation" (§ 228, Civ.Code; § 257, Prob.Code). In view of the language of the last cited code sections we are constrained to hold that the right of the adoptive parent to succeed to the estate of a deceased adopted child must be included. It must be assumed that when the Legislature provided in the Inheritance Tax Act that the preferred class should include "lineal ancestors" the lawmakers were cognizant of these code sections; and that while adoption does not make the person adopted one of the blood or of the issue of the adoptive parent, it does make such parent capable of inheriting the same as if he was an ancestor by blood. Our view in this regard is strengthened by reference to judicial interpretation of related statutes. A situation somewhat similar to the one at bar was presented in the case of In re Estate of Winchester, 140 Cal. 468, 74 P. 10, which involved the question of whether or not legacies for the benefit of the children of an adopted daughter, as made by the will of the adoptive parent (an adoptive grandparent) were subject to the collateral inheritance tax of 1893, and wherein the court held that the children of an adopted daughter were not collateral but were lineal descendants of the adopting parent. The reasoning and conclusion arrived at in that case were considered and approved in Re Estate of Hebert, 42 Cal. App.2d 664, 665, 666, 109 P.2d 729. It is therefore our conclusion that by the well-settled current of authority and when the provisions of the Inheritance Tax Act are construed in pari materia with the hereinabove quoted applicable sections of the Civil and Probate Codes, it was intended by the Legislature in adopting the tax act that an adoptive father was to be classified as a "lineal ancestor" within the meaning and purview of subdivision 1, section 4, thereof.

[7-9] Finally respondent contends that subdivision 1, section 4, of the Inheritance Tax Act giving preferences in the matter of rates to those included therein should be liberally construed in favor of the state in the same manner as in the case of an exemption. It is firmly established in our law that statutes imposing taxes "are to be strictly construed in favor of the individual and against the state," while exemptions from taxation are to "be construed liberally in favor of the state and strictly as to those claiming the benefit of such exemptions." In re Estate of Steehler, 195 Cal. 386, 389, 396, 233 P. 972, 974. Appellants, while not denying the rule of strict interpretation of statutory exemptions in favor of the state and strictly as to claimants for such exemptions, and not opposing the authorities urged in its support, insist that the rule is not to be given application to the portion of the Inheritance Tax Act with which we are here concerned. We find ourselves in accord with this claim, because, as appellants point out, and we think correctly, in construing subdivision 1, section 4, of the Inheritance Tax Act, we are not dealing with exemption clauses in the act, but are confronted with the question as to whether the section in fact imposes the greater rather than the less or preferred tax upon a lineal ancestor of the decedent. In other words, subdivision 1, section 4, imposes and fixes the rate of taxation and its provisions cannot be viewed in the light of establishing exemptions. It is section 6 of the Inheritance Tax Act that deals with and provides for the allowance of exemptions. In re Estate of Steehler, supra.

The order appealed from is reversed and the cause remanded with directions to the court below to enter its order sustaining the objections filed by the administrators and directing that the total amount of inheritance tax due to the State of California out of this estate is $37,415.94.

YORK, P. J., and DORAN, J., concurred.

Hearing denied; TRAYNOR, J., dissenting.

PEOPLE v. LANIGAN et al.

Cr. 3595.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1943.

Hearing Granted Feb. 18, 1943.

1. Criminal law 🔑641(1)

The sixth amendment to the federal constitution applies only to criminal trials in federal courts. U.S.C.A.Const. Amend. 6.

2. Criminal law 🔑641(1)

Where at first trial accused were represented by separate counsel and accused released his counsel from further duties as such after a mistrial, and although the trial court instructed accused to be prepared to go to trial some 30 days later with counsel, accused was without counsel and his co-accused appeared with the same counsel who represented him at the previous trial, and trial court appointed such counsel to represent accused over his and counsel's objection, accused were deprived of their constitutional "right to counsel" where the question of guilt was close and counsel had no opportunity to consult with accused to arrange his defense. Const.Cal. art. 1, § 13, as amended in 1934.

See Words and Phrases, Permanent Edition, for all other definitions of "Right to Counsel".

3. Criminal law 🔑576(5)

Where accused, after being informed that they were entitled to go to trial within 60 days from date of filing of robbery indictment, consented to trial court's setting prosecution for trial on a specified date more than 60 days after indictment was filed, accused were not entitled to release on ground that they were deprived of constitutional right to a "speedy trial". Pen. Code, § 1382.

See Words and Phrases, Permanent Edition, for all other definitions of "Speedy Trial".

4. Criminal law 🔑576(2)

What constitutes "good cause", within statute requiring a prosecution to be dismissed unless the action is brought to trial within 60 days after the filing of the indictment unless good cause to the contrary be shown, rests largely within discretion of trial court. Pen.Code, § 1382.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause".

5. Criminal law 🔑576(2)

The crowded condition of the trial court's calendar furnished "good cause" within statute justifying setting robbery trial for a date more than 60 days after the indictment was filed. Pen.Code, § 1382.

6. Criminal law 🔑1166(7)

Where robbery indictment with consent of accused was set for trial on a specified date more than 60 days after indictment was filed and prior to that date because of crowded condition of trial court's calendar indictment was set for trial for some six weeks later and an accused was granted a five-day continuance on ground that his counsel was engaged in another trial and that his depositions had not been filed with the court, co-accused was not prejudiced by such continuance. Pen.Code, § 1382.

7. Jury 🔑32(1)

The statute providing for substitution of an alternate juror after final submission of the case does not violate the constitutional rights of a defendant in a criminal action. Pen.Code, § 1089.

8. Criminal law 🔑172

Where accused after being informed that a juror was ill stipulated that trial court could talk to the juror in place of calling a doctor to determine whether juror's physical condition warranted juror's proceeding further as such, and trial court ordered substitution of alternate juror because juror was not able to continue as such, accused were not placed in "jeopardy" so as to preclude another prosecution for the same offense. Pen.Code § 1089.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

James Lanigan and another were convicted of robbery, and they appeal.

Reversed, and new trial ordered.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan and Marcus R. Brandler, Deputy Dist. Attys., all of Los Angeles, for respondent.

W. J. WOOD, Justice.

Defendants were charged in an indictment with the crime of robbery, in that on June 18, 1941, in the city of Los Angeles they forcibly took the sum of $4,170.56, from Ruth Lewis, who had the money in her possession as an employee of Prudential Life Insurance Company. There have been two trials. The jury disagreed at the first trial and at the second trial the jury brought in verdicts of guilty of robbery in the first degree. Defendants have appealed from the judgments of conviction and from an order denying their motions for a new trial.

Ruth Lewis was employed on the date mentioned in the indictment at the offices of Prudential Life Insurance Company at 5544 North Figueroa Street, the offices being located on the second floor of the building. Shortly before 3:00 o'clock she was directed to deposit funds of the company in a bank and, accompanied by K. E. Powers, the assistant superintendent for the insurance company, she started down the steps to the first floor. Two robbers, one of whom was armed with a gun, took the money from her. It is charged by the prosecution that defendants, who were later arrested in the State of Illinois, were these two robbers. At the trial the prosecution relied mainly upon the positive identification of the two defendants by Mr. Powers. Neither of the defendants took the witness stand in his own behalf but each sought to establish an alibi as a defense. A number of witnesses gave testimony in support of the contention that defendant Giardano was in the State of Missouri on June 18, 1941, and a number of other witnesses gave testimony in support of the contention that defendant Lanigan was in the State of Nevada on that date.

Defendants contend that they were deprived of their constitutional rights by the action of the court in appointing the attorney who had been employed by defendant Giardano to act as attorney for defendant Lanigan. At the first trial, which began January 14, 1942, Giardano was represented by Morris Lavine and Lanigan was represented by separate counsel. The jury having disagreed, a mistrial was declared on January 28, 1942, at which time Mr. Cantillon, counsel for Lanigan, informed the court that he was soon to be engaged in a trial which would consume about two months and, with the consent of Lanigan, he was released from further duties as Lanigan's counsel. The court reset the case for trial for March 9, 1942, and instructed Lanigan to be prepared to go to trial on that date with counsel. When the case was called for trial on March 9, 1942, Giardano appeared with his counsel, Mr. Lavine, but Lanigan was without counsel and moved the court for a continuance. This motion was denied. The judge stated that he had heard all the testimony at the previous trial and that there was no conflict in the interests of the two defendants and suggested that Mr. Lavine be appointed to represent Lanigan. Mr. Lavine replied that he felt that there might be a conflict in interests and both defendants objected to the appointment. The record discloses some further discussion, then the following: "The Court: In order to keep the record clear in this matter the motion for continuance made in propria persona by the defendant Lanigan having been denied the court at this time asks the defendant Lanigan to elect between representing himself or having Mr. Lavine represent him.

"Defendant Lanigan: Well, can I consult Mr. Lavine?

"Mr. Lavine: Mr. Lavine objects to being consulted on that motion.

"The Court: All right, let the record show that Mr. Lavine objects to being consulted on the question of the court. It is up to you, Mr. Lanigan.

"Mr. Lavine: On the ground that there will be a conflict in the interests and the two interests are separate and apart.

"The Court: I will request you to make the election at this time, Mr. Lanigan, either represent yourself in the matter or be represented by Mr. Lavine as an officer of the Court.

"Defendant Lanigan: If the court please, if Mr. Lavine represents me it is with my objection. I cannot represent myself.

"The Court: I understand that you are objecting to the order of the court requiring you to elect and whichever course you adopt will be over your objection.

"Defendant Lanigan: Yes.

"The Court: At the order of the court.

"Defendant Lanigan: I am in the position where I have to have an attorney. In other words, I am between the devil and the deep blue sea.

"The Court: Having had some 30 days notice, however, of the fact that the case was going to trial on this date and that you would be required to have counsel at this time.

"Mr. Lanigan: As I stated before I did believe I had counsel and I am not ready to go to trial.

"The Court: That question has been disposed of. I am now asking you to elect as to whether you want to represent yourself or have Mr. Lavine represent you as an officer of the court.

"Defendant Lanigan: I should like an opportunity to consult some counsel as to that.

"The Court: I am afraid we can't give you that opportunity. You have had 30 days in which to prepare for this and I will have to ask you to declare your choice at this time.

"Defendant Lanigan: I am in an awful spot. I don't know what to do. I can't defend myself.

"The Court: You don't feel capable of defending yourself?

"Mr. Lanigan: No. It has always been taught to me that every person in this country has a right to counsel.

"The Court: You are correct about that.

"Defendant Lanigan: This is an important matter in my life. Fortunately we have a higher court.

"The Court: Yes, that is right. That is why I want to keep the record straight in this matter so that if it goes to a higher court the higher court will know just what the proceedings were.

"Defendant Lanigan: I realize that. I am not qualified to answer your question. I can't defend myself and I don't care to have Mr. Lavine defend me.

"The Court: You don't want to represent yourself?

"Defendant Lanigan: No.

"The Court: In that circumstance the court will appoint Mr. Lavine as an officer of the court and the record will show it is over your protest and over the protest of Mr. Lavine."

A case bearing striking similarity to the case now before us was decided by the Supreme Court of the United States on January 19, 1942, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 467, 86 L.Ed. 680. In the Glasser case several defendants, among them Glasser and Kretske, were charged with conspiracy to defraud the United States. Kretske appeared for trial without counsel and the court appointed William Stewart, who previously had been retained as counsel by Glasser, to act also as counsel for Kretske. No objection was made to this action by Kretske but Glasser objected to the appointment. In reversing the conviction as to Glasser because of the violation of his rights guaranteed by the Sixth Amendment to the Constitution of the United States, the Supreme Court pointed out that Mr. Stewart had failed to object on behalf of Glasser to certain testimony which was admissible as to Kretske but inadmissible as to Glasser. The court then made these important statements: "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Citing cases.] Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. * * *" The application of these sound principles to the present case requires the reversal of the judgments.

[1] The trial in the Glasser case was conducted in a federal court, where the proceedings were governed by the Sixth Amendment to the Constitution of the United States, which provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The Sixth Amendment to the national Constitution applies only to trials in federal courts. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. But we find in article 1, section 13, of the Constitution of California a provision which safeguards the right to the assistance of counsel in a criminal case in language as potent as the language of the Sixth Amendment, for it is there provided: "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel."

In the Glasser case the co-defendant Kretske consented to the appointment but the record in the present case shows that both defendants vigorously objected to the appointment of Mr. Lavine to act for defendant Lanigan. Moreover, Mr. Lanigan during the proceedings stated that he would like to consult Mr. Lavine on the matter of the appointment but Mr. Lavine objected to being consulted. A little later when the court asked Mr. Lanigan to decide whether he wished to represent himself or be represented by Mr. Lavine, Lanigan stated he wished an opportunity "to consult some counsel as to that" but he was denied this request.

[2] It must be conceded that the question of the guilt of defendants in the present case is a close one, for at the first trial the jury disagreed and at the second trial, when Mr. Lavine represented both defendants, a verdict was not reached until the jurors had deliberated for more than two days. Respondent argues that the record fails to show that either defendant was prejudiced by the action of the court. But as pointed out in the Glasser case, it is unnecessary to determine the precise degree of prejudice sustained. Defendant Giardano was deprived of the "undivided assistance of counsel" and defendant Lanigan was represented under order of the court by an attorney with whom he had had no opportunity to confer. When the time came for defendants to present their defense counsel had to decide whether to advise each of them to testify in his own behalf. This was an important decision to make, for under the provisions of the Constitution of California, art. 1, § 13, as amended in 1934, the failure of a defendant to explain or deny by his testimony any evidence in the case may be considered by the jury. It frequently occurs in criminal cases that circumstances which make it advisable for one defendant to take the witness stand are not present when consideration is given to the question of offering the testimony of other defendants. One of the defendants might be vulnerable to impeaching questions but the other defendant entirely free from this difficulty. In such a situation it would probably be advisable for the defendant not vulnerable to impeachment to take the witness stand, but if he should do so and his co-defendant should fail to testify, this circumstance doubtless would weigh heavily against the co-defendant with the jury. Each of the defendants was entitled to have questions of this nature decided independently of the interests of the other defendant. The trial court erred in forcing defendant Giardano to share the attention and efforts of his attorney with his co-defendant. The court also erred in causing defendant Lanigan to be represented by an attorney who did not wish to represent him, who did not have opportunity to consult with him and arrange for his defense, and whom he did not wish to have appointed.

Defendants contend that the action should be dismissed without another trial, claiming that, not having been brought to trial within the time prescribed by section 1382 of the Penal Code, they were deprived of their constitutional right to a speedy trial; and that, because of the substitution of an alternate juror during the deliberations of the jury another trial would be in violation of their constitutional right not to be put in jeopardy twice for the same offense.

The indictment was returned on September 3, 1941, and the trial was set for the latter part of October, 1941. On October 17, 1941, defendants requested that the trial be reset for November 28, 1941.

Both defendants were informed by the court that they were entitled to go to trial within sixty days from the date of the filing of the indictment but both defendants expressly waived this right. On November 7, 1941, the case was placed upon the calendar at the request of the prosecution and defendants for the purpose of setting the case for trial for a date later than November 27, 1941. At that time the prosecutor stated to the court that defendants wished to take depositions in St. Louis, Missouri, and Reno, Nevada, and that the prosecution would bring witnesses from eastern points, some of whom were scheduled to appear as witnesses in the federal court on January 20, 1942, in a case in which defendants were charged with transporting from one state to another the guns used in the commission of the robbery charged in the instant case. When the court informed counsel that the calendar was filled for December both defendants stated that they would be ready on November 27, 1941, and objected to a continuance. The court then set the case for trial for January 9, 1942. Defendant Giardano obtained on December 27, 1941, an order for the issuance of a commission to take the depositions of witnesses residing in St. Louis, Missouri, and on January 5, 1942, obtained the issuance of a commission to take the depositions of additional witnesses residing in St. Louis. Early in January 1, 1942, defendant Lanigan obtained an order for the issuance of a commission to take the depositions of witnesses residing in Reno, Nevada. On January 9, 1942, when the case was called for trial defendant Lanigan asked that the case be continued until January 14, 1942, basing his motion upon the ground that his counsel was engaged in another trial and on the further ground that depositions which he was taking had not been filed with the court. This motion was granted.

[3-6] Section 1382 of the Penal Code provides that the prosecution must be dismissed unless the action is brought to trial within sixty days from the filing of the indictment unless good cause to the contrary be shown. As we have heretofore shown, defendants, having given their consent, were not in position to complain of the court's action in setting the case for trial for November 27, 1941. It clearly appears from the record that all parties at the time of their appearance in court on November 7, 1941, were in favor of a trial later than November 27, 1941. When, however, they discovered that the court's calendar was filled for December and that the prosecutor was meeting with certain difficulties in getting to trial, they concluded that they could be ready on November 27, 1941, and wished the trial to remain set for that date. What constitutes "good cause" for the continuance of a trial rests largely within the discretion of the trial court. We find no abuse of discretion here, for the continuance of the trial date under the circumstances shown cannot be considered unreasonable. The crowded condition of the court's calendar furnished "good cause," as required by the code section, to justify the action of the court in setting the case for January 9, 1942. Murphy v. Superior Court, 53 Cal.App. 6, 200 P. 483. The continuance of five days ordered on January 9, 1942, was requested by defendant Lanigan. This continuance did not cause prejudice to defendant Giardano.

[7, 8] At the commencement of the second trial Cliff W. Rolff was sworn as an alternate juror. On the second day after the jury commenced its deliberations the court informed counsel that it had been advised by the bailiff that one of the jurors, Mrs. Thelma Mercier, had become ill. It was then stipulated by counsel that the court could "talk to the juror in place of calling a doctor to determine whether or not her physical condition is such as to warrant her proceeding further in her deliberations as a juror." The defense, however, reserved objections to the substitution of an alternate juror. Thereafter the court found that Mrs. Mercier was not able to continue as a juror and ordered the substitution of the alternate juror, Mr. Rolff. In view of the stipulation made, defendants are not in position to argue that the court did not act properly in determining that Mrs. Mercier was not physically able to continue as a juror. Without detailing the steps taken by the court in reaching this conclusion, it is appropriate to state that the court's handling of this matter appears to have been entirely proper. Defendants contend, however, that they were deprived of their constitutional rights by the substitution of the alternate juror. This point was raised in People v. Peete, 54 Cal.App. 333, 202 P. 51, where the question was exhaustively discussed and decided adversely to the contentions now made by defendants. After the decision in the Peete case section 1089 of the Penal Code was amended to

provide that a substitution of an alternate juror may be made "after the final submission of the case to the jury." This amendment came before reviewing courts in People v. Von Badenthal, 8 Cal.App.2d 404, 48 P.2d 82, and in People v. Love, 21 Cal.App.2d 623, 70 P.2d 202, where it was held that the provision for the substitution of a juror after the final submission of the case does not violate the constitutional rights of a defendant in a criminal action. We are in accord with the views expressed in the decisions in these two cases.

The judgments and the order denying the motion for a new trial are reversed and a new trial is ordered.

McCOMB, J., concurred.

MOORE, Presiding Justice.

I dissent. The principal contention made by appellants is that their constitutional rights were violated by the court's order appointing Attorney Lavine, counsel for Giardano, to act as counsel for the latter's co-defendant Lanigan. Such order they contend violated due process of law guaranteed by the 14th Amendment to the federal Constitution as well as by article I, section 13 of the state Constitution.

Enlarging upon such assignment appellants contend that Giardano was deprived of the undivided assistance of his own counsel and that Lanigan was required to accept the assistance of an attorney with whom he had had no opportunity to confer. The prevailing opinion proceeds to illustrate the possible disadvantages to be suffered by either of the defendants by envisaging a situation where one might be advised not to take the witness stand because he was vulnerable to impeachment, and it is argued that a failure of either to do so would, if one lawyer appeared for both, militate against him who acted upon such advice. I perceive no additional gravity to be attached to the silence of one because they both had the same counsel. If Lanigan had been represented by an Erskine or a Webster, the same deduction could have been made and the same argument might with equal propriety have been urged before the jury had he posed in smug complacency behind the counsel table after his co-defendant had testified despite the fact.

The assignment of lack of due processes brings us directly to the question as to whether due process was violated in the making of the order or whether any unfairness resulted to either defendant in the subsequent proceedings. It will be borne in mind that the appellants were indicted jointly; that they were apprehended together; that they had recently been tried jointly as required by law, § 1098, Pen.Code, before the same judge who made the order complained of; and to all appearances they collaborated at all times.

We first consider the effect of the order upon the case of Lanigan only. When a mistrial was ordered on the 28th day of January, Lanigan was advised by the court that, since the counsel who had represented him in the first trial had been released from further obligation to represent him, he should procure other counsel and be prepared for trial on the ninth day of March. Inasmuch as one trial had already been completed the issues were clearly defined and the available evidence was known to the court. Such knowledge as Lanigan might have gained by the first trial was available to him and to such counsel as he might retain for the second trial. But he made no effort to obtain an attorney. He permitted more than five weeks to elapse only to appear on the day fixed and declare his need for counsel and his unwillingness to proceed to trial without a lawyer. His inaction during those five weeks prior to March 9th was tantamount to a declaration by him that he required no counsel to represent him or that he waived the right to be represented. Having gone through a trial represented by a clever lawyer, he was awake to the advantages of legal assistance. He was in a manner schooled in the business of defending against a criminal accusation. His decision not to engage counsel was therefore one consciously and knowingly reached. He was in no position to claim his inability to procure counsel. The public defender's office was in the very building which housed appellants during the five weeks' period. A simple request to that official by one accused of crime and in impecunious circumstances brings instantly efficient counsel. Moreover, had the public defender rejected the opportunity to serve Lanigan, the very judge who had made the order for him to obtain counsel, sat in the same building. A suggestion to the judge of Lanigan's predicament would promptly have brought to his side an advocate for his cause, even though he were without money and the public defender had refused to serve. Courts are not required to adjourn or mark time to accommodate prisoners who by their own choice make no attempt to be prepared for trial during a period of time long enough for such purpose. People v. Dowell, 204 Cal. 109, 113, 266 P. 807.

The refusal of a party accused of crime to obtain counsel to represent him at the trial will not avail him in his attempts to procure further delays of the trial. Therefore, by his own behavior Lanigan is entitled to no relief from his present predicament for, under the circumstances disclosed by the record, astute counsel encumbered with one of two defendants jointly accused was better than no lawyer at all.

The contention that the constitutional rights of both defendants were violated by the court's appointment of Lavine to serve Lanigan is equally without merit. It goes without saying that innumerable situations might arise where such an order would operate an injustice, but the constitutionality of the order in question must be adjudged in the light of the circumstances as they existed and as they appeared to the court at the time. It is not my view that the accused should ever be denied a constitutional right merely because the evidence in the case clearly indicates his guilt. Neither should a deaf ear be turned to his appeal based upon such denial. On the contrary, every right vouchsafed to a person accused of crime, by both the state and the federal Constitutions, should be held inviolate. But whether such rights have been disregarded must be determined by the facts in each case as it arises. No formula has been derived whereby constitutional guaranties can be vouchsafed in all cases without running the risk of defeating justice.

Giardano announced ready for trial. He had his attorney. Lanigan had none and demanded a continuance on that account Although there was no duty incumbent upon the court to delay the trial upon Lanigan's demand, rather than for Lanigan to go through the trial without the aid of any counsel, the court determined that it was better to appoint Lavine to conduct the trial on behalf of Lanigan as well. Lavine objected on behalf of Giardano on the ground that there might be a conflict of the interests of the parties. On this appeal both defendants claim to have been prejudiced by the court's action, and both demand a reversal by reason of the court's appointment of Lavine to represent Lanigan during the trial. But the situation as it existed at the time of the court's order refutes the claim that either defendant suffered any prejudice. The court knew substantially all of the case about to be presented on behalf of both the People and the defendants; it knew that the defense of each of the defendants was an alibi and that very few new questions, if any, could arise which had not already been considered and determined on the former trial. Neither had denied the corpus delicti.

The court knew that beyond a question the robbery had been committed; knew that on the former trial the witnesses on behalf of the People definitely identified defendants as the two robbers who committed the crime named in the indictment; knew that on the twenty-second day following the commission of the crime defendants were arrested in the State of Illinois driving a Chrysler automobile and that at the time Lanigan was its driver; that he had a loaded revolver under his belt which was taken from him by the police; and that on the seat beside him lay a second revolver; knew that they were accompanied by another party who was armed with a .45 caliber army pistol. The court knew that it had been established that in the same automobile were found license plates issued by the states of Nevada, Kansas and Illinois; knew that the arresting officers found cartridges and shotgun shells in the same car, and that at the time of the arrest both appellants told the officers that they had been on a visit to Los Angeles. Also the court had in mind that the defendants had each pleaded an alibi; that one undertook to prove that he was in the city of St. Louis on the day of the crime, while the other undertook to prove that he was in the State of Nevada on the same day.

If the court had foreseen that any possible conflict of interest between the two defendants might arise in the course of the trial it would clearly have been its duty to refrain from casting upon Giardano's counsel the burden of representing Lanigan. And had any showing been made on this appeal that the court committed an arbitrary act, or an error arising from a conflict of interest of the defendants, resulting in a prejudice to either defendant, we would have a situation clearly different from that which is before us.

In view of the fact that practically the whole of the testimony about to be introduced at the trial on the ninth day of March had been embalmed at the first trial, there was little of original effort that was possible of performance by any counsel appearing for Lanigan or Giardano at the second trial, and very little variation of that record, if any, was possible to be made on behalf of either. The court was justified in concluding that if the testimony of the alibi witnesses presented by the defendants should raise a reasonable doubt in the minds of the jurors as to the presence of the defendants at the scene of the crime on the 18th day of June, 1941, then the defense was simplified; and that, if, in spite of the testimony of such witnesses the jury should believe the identifying witnesses beyond a reasonable doubt, the People's case was simplified.

In this state of the record, the opportunity arose for the court to exercise its discretion as to whether it should proceed to trial with Lanigan appearing for himself, or to have the only available lawyer, who is schooled in the art of trials, to interpose appropriate objections and pleas on his behalf, and whether or not the appointment of Giardano's lawyer to the office of Lanigan's counsel would be a deprivation of the rights of both or of either of them. Where such a situation arises at the threshold of a trial, the court should not be so "straitjacketed" by such a construction of the Fourteenth Amendment (Betts v. Brady, June 1, 1942, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595) as to be shorn of all discretion and freedom of judgment as is necessary to a wise and judicious conduct of such trials.

The defendants were neither youthful nor ignorant. Not only had they recently completed a trial of the same identical charge, but by the evidence of their very acts in driving through the various states of the Union in an automobile with generous supplies of arms and ammunition in their possession showed an aggressiveness, if not a brilliance, that would serve them in summoning to their aid such proof as might serve their defenses or in making such disclosures to their attorney as would prevent a disastrous overturn of their proof.

It was not for the trial court to presume that Mr. Lavine would neglect the interest of either defendant. It must now be presumed that, had a crucial moment arrived in the progress of the trial, when Lanigan's interest conflicted with Giardano's, the attorney would have appealed to the court. These appellants are entitled to their constitutional rights, but Lanigan may not disrupt the even and orderly administration of justice by his own inertia and Giardano may not avoid a conviction merely because his lawyer felt that a conflict of his interests with those of Lanigan might arise. Clearly no conflict did arise, hence, no prejudice did, in fact occur. While we shall insist upon the vigilant watchfulness of the courts to see that the rights of accused are safeguarded, they are to bear in mind that justice is due alike to the accuser as well as to the accused. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575. They are not to be strangled with terse and pungent phrases which have been evolved from the white-heated brain of an industrious jurist following its impact with a record reeking with injustice to the accused. It is the duty of the courts to apply the principles and doctrines arising from the application of the constitutional guaranties to mete out justice to all; not to do injustice to the accuser and afford a picnic for the accused.

The Glasser case, which is relied upon in the prevailing opinion, should not be our guide in the situation presented. Before the appointment of Glasser's attorney to defend Kretske, the lawyer presented his own affidavit in which he pointed out certain inconsistencies in the two defenses. When asked by the court on that score Mr. Lavine could say only: "I feel that there may be; there may be other matters which come up," etc. Glasser personally objected to the appointment of his attorney to serve Kretske; Giardano did not. On his appeal, Glasser claimed the insufficiency of the evidence to support the verdict; no such claim is made by either of these appellants. Glasser urged that certain testimony inadmissible as to himself was received without objection so as to avoid prejudice to Kretske. No such testimony is mentioned by either of the defendants herein.

The judgment should be affirmed.

56 Cal.App.2d 747

VANDERLIP et al. v. LOS MOLINOS LAND CO. et al.
Civ. 6709.

District Court of Appeal, Third District, California.
Jan. 23, 1943.

1. Corporations 🔑202
Evidence 🔑73

In absence of fraud, the presumption is that corporate directors act for the best interest of the shareholders, and the shareholders may not sue in their individual names for alleged injuries to the corporation or for the collective rights of the shareholders.

2. Corporations 🔑316(3), 377(2), 401

Where subsidiary corporation illegally acquired stock of parent corporation in good faith without fraud or detriment to either the shareholders or the corporations, such purchases were voidable and the transferors of such stock were authorized by mutual consent subsequently to sell such stock to a director of both corporations upon his restoring to the subsidiary the full consideration therefor. Civ.Code, § 342.

3. Corporations 🔑60

The statutory term "treasury shares" has no application to shares of one corporation held in the treasury of another. Civ.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Treasury Share".

4. Corporations 🔑60

"Treasury stock" is issued and outstanding stock that has come into possession of the corporation which issued it by purchase, donation, or in liquidation of a debt.

See Words and Phrases, Permanent Edition, for all other definitions of "Treasury Stock".

5. Corporations 🔑60, 197

Where subsidiary corporation illegally acquired stock of parent corporation in good faith without fraud or detriment to either the shareholders or the corporations, such stock was not "treasury shares" of the parent corporation which could not be voted in election of the parent's directors. Civ.Code, §§ 278, 342.

6. Corporations 🔑197

A corporation may not directly or indirectly vote its stock which it owns for the election of directors, or otherwise. Civ.Code, § 278.

7. Corporations 🔑283(1)

Elections of officers of a corporation at a general or special election are not necessarily void unless it also appears that the illegal votes cast therefor were sufficient in number to have changed the result of the election. St.1939, p. 264, § 8514.

8. Corporations 🔑283(3)

Shareholders of parent corporation could not complain of voting of parent's stock illegally held by subsidiary corporation, in election of parent's directors, where plaintiffs did not show that the results of the election would have been changed if such stock had not been voted thereat, no fraud in the election was proved, acquisition of the parent's stock by the subsidiary was in good faith and for the best interest of the corporations and stockholders, and was not dominated by the officers or directors of either corporation. Civ.Code, § 342; St.1939, p. 264, § 8514.

9. Corporations 🔑283(3)

Where subsidiary corporation illegally purchased parent corporation's stock at a reasonable value and the transferors of the stock, the subsidiary and director of both corporations rescinded the sale to the subsidiary and transferred the stock to the director, shareholders of parent corporation could not complain of the transaction in absence of proof of fraud or detriment thereby suffered by them. Civ.Code, §§ 342, 366, 3406, 3407.

10. Corporations 🔑377(2)

Under statute prohibiting a corporation from purchasing stock issued by the corporation by which it is controlled except in specified exceptions, subsidiary corporation's purchase of shares of parent corporation to prevent them from falling into the hands of strangers to the corporation was void. Civ.Code, § 342.

11. Corporations 🔑316(3), 401

Where subsidiary corporation illegally purchased parent corporation's stock and the transferors of the stock, the subsidiary, and a director of both corporations rescinded the sale to the subsidiary and transferred the stock to the director upon payment by him to the subsidiary of the original purchase price, director was not required to pay to subsidiary 7 per cent interest instead of 6 per cent interest on the original purchase price. Civ.Code, § 342.

12. Corporations ⚷377(2)

Where subsidiary corporation illegally purchased parent corporation's stock, the subsidiary was authorized to rescind the stock purchase agreement with the mutual consent of the parties thereto to avoid any cloud on subsidiary's title thereto, upon restoration of all moneys which it had paid for the stock. Civ.Code, § 342; § 1689, subd. 5.

13. Quieting title ⚷7(2)

The doctrine of "rescission" applies to cancel illegal contracts and to cancel illegal deeds to real property on ground that such conveyances constitute a cloud on the true title. Civ.Code, § 1689, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Rescission".

14. Corporations ⚷316(1, 3), 377(2), 401

Where subsidiary corporation illegally but in good faith purchased parent corporation's stock and transferors of the stock, the subsidiary and a director of both corporations rescinded the sale to the subsidiary and transferred the shares to the director for the original cost to the subsidiary, part of which was paid by giving of director's note to subsidiary, the transaction did not constitute a "loan" within statute requiring loans by a corporation to its officers to be approved by stockholders. Civ.Code, §§ 342, 366; § 1689, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan".

15. Corporations ⚷316(1)

The statute requiring loans by a corporation to its directors to be approved by two-thirds of the stockholders does not apply to valid promissory notes of directors accepted by the corporation as part payment for property sold to such directors. Civ.Code, § 366.

16. Corporations ⚷316(3), 377(2), 401

Where subsidiary corporation illegally purchased parent corporation's stock, and the transferors of the stock, the subsidiary, and a director of both corporations rescinded the sale to the subsidiary and transferred the stock to the director, evidence established that the sale of the stock to the director was for the full market value thereof paid by him to the subsidiary, precluding complaint by the subsidiary's shareholders on ground of lack of "consideration". Civ.Code, § 342; § 1689, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

17. Corporations ⚷316(5), 377(2), 401

Where subsidiary corporation illegally purchased parent corporation's stock and the transferors of the stock, the subsidiary, and a director of both corporations rescinded the sale to the subsidiary and transferred the shares to the director upon payment by the director to the subsidiary of the cost of the stock to it, the sales to the subsidiary were canceled and the transferors of the stock were the only ones to complain of lack of consideration. Civ. Code, § 342; § 1689, subd. 5.

18. Corporations ⚷316(3), 377(2), 401

Where subsidiary corporation illegally purchased parent corporation's stock and the transferors of the stock, the subsidiary, and a director of both corporations rescinded the sale to the subsidiary and transferred the stock to the director upon payment by the director of the original cost of the stock to the subsidiary, the director became the owner of the stock and was entitled to have his title thereto quieted. Civ.Code, § 342; § 1689, subd. 5.

◆

Appeal from Superior Court, Tehama County; Charles A. Paulsen, Judge assigned.

Action by Kelvin Cox Vanderlip, as executor, etc., and others, against Los Molinos Land Company, a corporation, and others, to enjoin defendants from changing the amounts of named defendant's capital stock or the par values thereof, and from exercising the right to vote specified shares of named defendant's stock held by a codefendant, to declare such stock to be treasury stock of named defendant, to rescind purported sales of such stock, and to remove three members of each board of directors of defendant corporations and to fill such vacancies by election of individual plaintiffs as representatives of the estate, wherein a cross-complaint was filed. From a judgment for defendants and cross-complainants, plaintiffs appeal.

Affirmed.

Curtiss E. Wetter, of Red Bluff, and Musick & Burrell and James E. Bednar, all of Los Angeles, for appellants.

Pugh & Pugh, of Red Bluff, and James G. Scarborough, of Los Angeles, for respondents

THOMPSON, Justice.

The plaintiffs and cross-defendants have appealed from a judgment which was rendered against them in a suit to secure control of the Los Molinos Land Company and its auxiliary, Coneland Water Company, by ousting three directors from the boards of each corporation and by replacing them with individual plaintiffs as representatives of the estate of Frank A. Vanderlip, deceased, which estate owns 178 shares of the capital stock of the first mentioned company. This demand is made on the theory that the election of the directors of said corporations was controlled by voting 1917 shares of the capital stock of the Land Company, illegally purchased by the Water Company contrary to law. The plaintiffs sought to declare the elections void; to determine that said purchased shares became treasury stock and to prohibit the further voting of said shares. The court adopted findings favorable to the defendants in every respect and accordingly rendered judgment against the plaintiffs. No fraud was alleged or proved, and none is relied upon.

For convenience we shall refer to the Los Molinos Land Company as the "Land Company" and to the Coneland Water Company as the "Water Company."

The complaint alleges that prior to 1911 the Land Company was incorporated to acquire and develop land in Tehama County, with 5000 shares of capital stock of the par value of $100 per share; that all of said shares were originally purchased by Frank A. Vanderlip, W. H. Kiernan, Jay Lawyer, and other associates for the aggregate sum of $700,000; that on June 29, 1937, Mr. Vanderlip owned 178 shares of said stock; that since its organization, Jay Lawyer has been and now is the president and general manager of said corporation, acting through a board of directors; that the Land Company acquired, improved and fully paid for 12,000 acres of land in Tehama County, all of which land was subsequently sold, with the exception of 2,000 acres; that on January 23, 1939, when the complaint was filed, the Land Company owned assets of the aggregate value of $500,000, and owed debts in the sum of only $3,000, and in the meantime successfully conducted its business, making substantial dividends to its stockholders.

It is further alleged that the Water Company was incorporated shortly after the organization of the Land Company for the purpose of acquiring water rights and serving the lands belonging to the Land Company with water for irrigation and domestic use; that said Water Company issued 200,000 shares of capital stock of the par value of $1 per share; that ever since January 11, 1921, C. D. Conway has been and now is the President of the Water Company; that he, with the aid of a board of directors, manages and directs the operation of its affairs; that at the time of the filing of the complaint in this suit the Water Company was successfully conducted and then possessed assets of the value of $250,000, and was then indebted in the sum of only $1,500, together with its notes payable to the Land Company in the additional sum of $52,000.

The complaint alleges that Frank A. Vanderlip died testate on June 29, 1937, possessed of considerable property, including 178 shares of the capital stock of the Land Company, and upon proceedings duly had in the Surrogate's Court of New York, the plaintiffs were appointed and qualified as executors of his estate; that by means of a previous declaration of trust executed by said deceased person the plaintiff, The National City Bank of New York, was appointed trustee of 1440 shares of the stock of said Land Company, of which trust the individual plaintiffs were beneficiaries.

The gist of plaintiffs' charges is that the Water Company is wholly subsidiary to and controlled by the Land Company which owns its entire capital stock, and that the corporations operate by means of interlocked boards of directors; that on December 18, 1934, Walter M. Murphy owned 1642 shares of the capital stock of the Land Company which were thereafter illegally purchased by the Water Company, contrary to the provisions of section 342 of the Civil Code, for the sum of $34,482; that said stock was purchased from the surplus earnings of the last-mentioned company, except for the sum of $24,000 which it borrowed from the surplus funds of the Land Company; that on November 11, 1935 the Water Company illegally purchased from J. P. Kiernan 250 shares of the Land Company stock for the sum of $5,500, with the surplus funds of the Water Company; that on May 12, 1938, the Water Company illegally purchased from Rose O'Neal 25 shares of the Land Company stock for the sum of $300, which were paid for from the funds of the Water Company; that on the last-mentioned date Jay Lawyer, president of the Land Company and a director of both companies, borrowed from the Water Company on his promissory note the sum of $20,000, with which he paid in part for the previously-mentioned shares of stock; that the individual plaintiffs own ten per cent of the capital stock of the Land Company, and are entitled to representation on the boards of directors of both companies.

It is finally asserted the officers and directors of both companies violated their trust by illegally purchasing capital stock as above related, contrary to section 342 of the Civil Code, and by other acts detrimental to the stockholders of said corporations; that the officers and directors of the Land Company threaten to reduce its capital stock from $500,000 to $250,000, and to change the par value of said stock from $100 to $50 per share, unless restrained from so doing, contrary to the welfare of the corporation and against the interest of the stockholders of both companies.

The complaint contains three separate causes of action based on similar allegations, except that the second count further charges that the officers and directors of the Water Company unlawfully authorized the loan of $20,000 to Jay Lawyer previously mentioned and did fail to give legal notice of the annual meeting of said corporation. The third count further charges that the officers and directors of the Land Company threaten to unlawfully reduce the capital stock and the par value thereof to one-half the original amounts thereof to the detriment of the corporation and its stockholders.

The complaint prays that the defendants be enjoined from changing the amounts of the capital stock or the par value thereof of the Land Company, and from exercising the right to vote 1917 shares of said stock held by the Water Company; that said stock which was illegally acquired by the Water Company be declared to be treasury stock of the Land Company; that the rescission of the purported sales of said shares of stock to the Water Company, and the purported subsequent sales thereof to Jay Lawyer be declared to be void, and that three members of each board of directors be removed from office and that the vacancies created thereby be filled by the election of the individual plaintiffs as representatives of the estate of Frank A. Vanderlip, deceased.

The answer of the defendants admits the illegal purchase of said 1917 shares of the Land Company's stock from Murphy, Kiernan and O'Neal, but alleges that said stock was purchased in good faith for the best interest of the corporations and their stockholders and that the purported sales were subsequently rescinded by mutual consent of all interested parties and that everything of value paid therefor by the Water Company, together with interest thereon and costs were restored to the Water Company; that the Water Company lost nothing by virtue of said void purchases. It is further alleged the former owners were unable to restore said sums of money and that by mutual written consent of all interested parties said shares were thereupon sold and conveyed to Jay Lawyer who paid to the Water Company the full purchase price thereof together with interest and costs; that the former owners and the Water Company waived all claims to said shares. The answer further alleges that the capital stock of the Land Company and the par value thereof were by resolution duly adopted, reduced to one-half the original amounts thereof, and that a regular meeting of the stockholders was called pursuant to law, for the purpose of ratifying said changes, but that no action thereon was taken on account of the temporary restraining order which was issued in this action. The answer recites the reasons for making said changes, and asserts that said action is for the best interest of the corporation and the shareholders thereof; that none of the alleged acts of the officers or members of the boards of either company were subversive or detrimental to the welfare of either of the companies or their stockholders; that Jay Lawyer became and is the bona fide owner of said purchased stock; that both of said corporations have prospered financially; that the said Frank A. Vanderlip, deceased, never took any active part or interest in the management of said corporations, but relied solely on the judgment and ability of the officers and directors of the respective companies, to the time of his death. The answer prays that the relief sought by the plaintiffs be denied and that the defendant, Jay Lawyer, be adjudged to be the owner of said purchased stocks together with the legal rights incident thereto, free from all claims of the plaintiffs.

The individual directors of both corporations filed a cross-complaint making similar admissions and allegations to those which are included in the answer.

The court adopted findings favorable to the defendants and cross-complainants in every essential respect. Judgment was rendered in favor of the defendants and cross-complainants to the effect that the plaintiffs take nothing by their action and that Jay Lawyer is the owner of and entitled to the absolute use and control of said purchased shares of the capital stock of said Land Company, together with all rights incident thereto. From that judgment the plaintiffs have appealed.

We are of the opinion the findings and judgment are adequately supported by the evidence.

It will be observed this is not a stockholders' suit for alleged detriment to either of the corporations which are involved in this litigation. It is an action by and on behalf of individual stockholders, in their personal capacity, to secure a judgment declaring that certain shares of the capital stock of the Land Company be deemed to be treasury stock, and to enjoin the voting of those shares pending the trial of this case, and to oust those directors from the board of each corporation.

[1] In the absence of allegations and proof of fraud, the presumption is that the directors of a corporation act for the best interest of the stockholders, and the stockholders may not sue in their individual names for alleged injuries or detriment to the corporation or for the collective rights of the stockholders. In 4 Thompson on Corporations, 2nd Ed., p. 1015, sec. 4550, it is said: "The general rule is that neither a stockholder nor any number of stockholders have the right to sue in their own names or to use the corporate name for the prosecution of an action at law on account of any right of action which may exist in favor of the corporation. And subject to exceptions hereafter to be considered the rule is the same in equity. In other words a stockholder cannot sue individually for injuries affecting the corporate or collective rights. This duty the law devolves on the directors as the trustees and agents of the corporation, and, in the absence of a charge of fraud or collusion it will generally be presumed that the directors are acting for the best interest of the corporation."

[2] The court found that the shares of stock formerly belonging to Murphy, Kiernan and O'Neal were acquired by the Water Company in good faith, free from fraud and without detriment to either the stockholders or to the corporations, but technically in violation of section 342 of the Civil Code, and that said shares "did not become and *were not thereafter treasury shares* of either of the defendant corporations." We may assume that if said shares were illegally acquired by the Water Company in violation of section 342 of the Civil Code, even though they were secured in good faith, the proposed purchases were voidable and the owners had a right by mutual consent to subsequently sell and convey them to Jay Lawyer upon restoring to the Water Company the full consideration therefor. The appellants concede that said shares were illegally acquired by the Water Company. On page 26 of their opening brief they say in that regard: "The trial court found in this case that Murphy, Kiernan and O'Neal shares were acquired in violation of C.C. 342, and *appellants do not intend to attack this finding,* although the evidence was conflicting."

We are convinced the shares of the Land Company which were purchased by the Water Company from Murphy, Kiernan and O'Neal did not, by virtue of the invalidity of those purchases or otherwise, become treasury shares of either corporation. In their closing brief the appellants concede that these shares of stock were not treasury shares of the Water Company. Nor do we believe they became treasury shares of the Land Company. They were neither acquired nor held by the company which issued them. They were shares of the Land Company acquired and held by the subsidiary Water Company. We are cited to no authority holding that shares of a parent corporation automatically become its treasury shares by the mere acquiring or holding of such shares by its subsidiary corporation. The definition of "treasury shares" which is found in section 278 of the Civil Code indicates that the term applies only to the stock of the corporation which issues the shares, and not to an auxiliary or subsidiary company. That definition reads:

" 'Treasury shares' means shares issued and thereafter acquired by *the* corporation, but not retired or restored to the status of unissued shares." (Italics added.)

[3] In 6a California Jurisprudence, page 407, section 229, it is said: "The statutory term has obviously no application to shares of one corporation held in the treasury of another, and no such application of it should be made."

[4] In 4 Thompson on Corporations, 2nd Ed., p. 51, sec. 3436, it is said in that regard:

"A modern writer already quoted has given a very accurate and complete definition of treasury stock as follows:

" 'Treasury stock is issued and outstanding stock *that has come into possession of the corporation which issued it* by purchase, donation, or in liquidation of a debt. * * *' " (Italics added.)

[5] We conclude that the said capital stock of the Land Company which was acquired by the subsidiary Water Company as above related, and which was not in possession of the corporation which issued it, may not be deemed to have become its treasury stock, under the circumstances of this case.

[6, 7] Assuming that a corporation may not directly or indirectly vote stock which it owns for the election of directors, or otherwise (Lawrence v. I. N. Parlier Estate Co., 15 Cal.2d 220, 231, 100 P.2d 765), and that the rule applies to the stock of a parent corporation held by its subsidiary company, which we do not concede, the appellants may not complain of that fact in the present case because neither the corporations nor the stockholders were injured thereby. It has been held that the elections of officers at a general or special election is not necessarily void unless it also appears that the illegal votes cast therefor were sufficient in number to have changed the result of the election. § 8514, Elections Code, St.1939, p. 264, formerly § 1114, Code Civ. Proc.; 20 C.J. 255, § 353, 29 C.J.S., Elections, § 290.

[8] We are cited to no evidence in this case that the election of directors would have been changed if the illegally acquired shares had not been voted thereat. The complaint alleges that the Land Company issued 5000 shares of capital stock, all of which were purchased by various stockholders; that Vanderlip owned only 178 shares, and that the total number of shares which were purchased from Murphy, Kiernan and O'Neal were 1917 shares. The appellants failed to object to the voting of the last-mentioned shares at the election of directors. We assume the same directors would have been duly elected if those shares had not been voted. No fraud in the election of directors was alleged or proved. The court specifically found that all of the challenged acts of the defendants were performed in good faith, and were for the best interest of the corporations and stockholders; that none of said acts were dominated or controlled by the defendant Jay Lawyer, or by any of the other officers or directors of either of the corporations, and that the appellants were not injured or damaged thereby. There is substantial evidence to support those findings. We therefore conclude that the voting of the illegally-acquired shares, under the circumstances of the present case, was harmless. None of those shares were voted by the Water Company after the commencement of this action.

The appellants contend that the rescission or cancellation of the sales to the Water Company of the Murphy, Kiernan and O'Neal shares of stock, and the subsequent transfer of those shares to Jay Lawyer were void for the reason that the first-mentioned sales were fully consummated, and rescission of the transactions would not lie under sections 3406 and 3407 of the Civil Code, because the consideration therefor was not completely restored to the Water Company. The appellants further claim that the subsequent purchase of those shares by Jay Lawyer was void because they were paid for in part by a loan of $20,000 which he procured from the Water Company contrary to the inhibitions of section 366 of the Civil Code, which provides in part: "No corporation nor any of its subsidiary corporations shall make any loan of money or property to or guarantee the obligation of (a) any director or officer of any such corporations * * *."

[9] We are of the opinion the appellants may not complain of that transaction in the absence of proof of fraud or detriment suffered by them on that account. The court found that the transaction was consummated in good faith, and that neither the corporations involved nor the stockholders were injured or damaged thereby. There is substantial evidence to support those findings. The shares in question were purchased by the Water Company from individuals who were financially embarrassed and anxious to sell them. They

were purchased by the Water Company at a reasonable value thereof to prevent them from falling into the hands of strangers to the corporation, but contrary to the provisions of section 342 of the Civil Code, which provides in part that: "A corporation may not purchase directly or indirectly any shares issued by it or by any corporation by which it is controlled, except as follows: * * *."

[10] That section specifies various exceptions to the foregoing general rule. None of those exceptions include the circumstances, or conditions under which the stock was purchased in the present case. The sales were therefore void. The Water Company was so advised. The court so determined. There is evidence to support that finding.

For the reason that a serious question existed regarding the Water Company's title to the shares on account of the illegal purchase and to save the possibility of future litigation and trouble, the Water Company, Jay Lawyer, and the former owners of the shares entered into a written agreement rescinding and cancelling the purported sales of said shares to that company upon restoration to it of everything of value which was paid therefor. The former owners were unable to restore the purchase moneys, and it was mutually agreed between the parties that said stock would be resold and conveyed to Jay Lawyer for the same amounts paid therefor by the Water Company, plus six per cent interest on said sums during the time the company held possession of said stock. The entire purchase price of the Murphy stock was $34,482, plus six per cent interest, which was paid in cash to the Water Company, except the sum of $20,000, which portion of the purchase price was paid by the execution and delivery to the company of Jay Lawyer's promissory note for that amount. That note was accepted by the corporation as part payment for said stock, and the shares were regularly transferred to Lawyer by the mutual consent of all interested parties.

[11] Regarding the market value of said purchased stock, there may be some conflicting evidence, but there is substantial proof that Lawyer paid the Water Company the full market value of the stock. At least the company was repaid all that it invested in the stock. The appellants do claim that the company should have been paid seven per cent interest on the original purchase price instead of six per cent. We think there is no substantial merit in that contention.

The appellants also claim that Lawyer's delivery to the Water Company of his note of $20,000 in part payment for the stock amounted to a loan of that sum of money by said corporation, contrary to the provisions of section 366 of the Civil Code. We think not.

[12] We are of the opinion the Water Company was authorized to rescind and cancel the agreement to purchase the stock in question, by mutual consent of the parties thereto, under the provisions of section 1689 of the Civil Code, to avoid any cloud or question regarding the validity of its title thereto.

The last-mentioned section provides that: "A party to a contract may rescind the same in the following cases only: * * *

"5. By consent of all the other parties * * *."

[13] It has been frequently held that the doctrine of rescission applies to cancel illegal contracts. It applies to cancel illegal deeds to real property on the ground that such conveyances "constitute a cloud on the true title." 12 C.J.S., Cancellation of Instruments, p. 970, § 22.

The Water Company which acquired the said shares of stock contrary to the provisions of section 342 of the Civil Code certainly was authorized to rescind that purported sale by mutual consent of all interested parties upon restoration to it of all moneys which it paid on that account. We assume that transaction could be legally rescinded by mutual consent, even though the corporation acquired some title to the stock, for the purpose of saving the corporation and its stockholders vexatious suits and expensive litigation in the attempt to remove the cloud from its title to the stock.

We therefore hold that the Water Company was authorized to and that it did rescind the purported sales of stock, with the mutual consent of all interested parties, and that everything of value which it paid on that account was restored to that company. The court so determined.

That stock was subsequently sold and transferred to Jay Lawyer by the mutual consent of all parties, for the same aggregate sum paid for it by the Water Company which was the reasonable market value thereof, plus six per cent interest and costs. It is immaterial whether Lawyer derived his title from the Water Company or from the original owners of the stock, since the sales were made with the mutual consent of all parties. No injury resulted to the corporation, its stockholders or the plaintiffs.

[14, 15] Section 366 of the Civil Code was not violated by the giving of Lawyer's promissory note to the Water Company for $20,000 in part payment of the purchase price of the Murphy stock. We assume that was a good and valid note. There is no evidence to the contrary. It was accepted by the company as part payment for the stock. We think it may not reasonably be said that transaction constituted a loan from the company. It was a bona fide payment, which was duly accepted by the corporation as such. There is no contention that transaction was fraudulent or that it was not consummated in good faith. The findings of the court in that regard were favorable to the respondents. Since we assume the giving of that note did not constitute a loan from the Water Company, it was not necessary that the acceptance of the note as part payment for the stock should be approved by two-thirds of the stockholders pursuant to section 366 of the Civil Code, since it applies only to loans which are made by the corporation to its officers or directors and not to valid promissory notes accepted as part payments for property sold to purchasers thereof.

[16, 17] There is adequate evidence to support the findings that the sales of the Land Company stock to Jay Lawyer were for a fair and reasonable consideration, not disproportionate to the full market value thereof. There is conflicting evidence regarding the market value of said stock, but several witnesses testified that it was then actually worth only from $12 to $21 per share. The appellants offered no affirmative proof in rebuttal of that evidence. If the purported sales of stock to the Water Company were actually rescinded on the ground that the purchases were illegal, it is immaterial whether the subsequent sales to Jay Lawyer were for full market value or not. If the rescission by mutual consent of the respective parties was lawfully made and everything of value which was paid by the Water Company was actually restored to it, the sales were thereby cancelled and the former owners of the stock were the only ones entitled to complain of a lack of consideration. But assuming the Water Company had some title which might justify stockholders acting in their individual capacity to complain of that transaction on account of a lack of consideration, still there is adequate evidence to support the finding that the stock was sold for its full market value. The evidence is uncontradicted that the capital stock of said corporation had no fixed market value and that it was not listed on the stock exchange. Mr. C. D. Conway, the secretary of the Land Company, testified that the stock of the Los Molinos Land Company was not listed on the stock market, and that it had no fixed value. He testified that several blocks of that stock were sold in 1937 for $12 per share. Other witnesses testified that the shares of that company were worth from $12 to $21 per share. Mr. J. C. Thomson, a certified public accountant who had audited the books of the Land Company since 1932, testified from his own knowledge of the income, assets and liabilities of that company, that the stock was then worth about $21 per share. The plaintiffs introduced no evidence to the contrary. That showing sufficiently supports the finding that said stock was not sold to Jay Lawyer for less than its actual value. He paid $34,482 for 1642 shares of the Murphy stock, which was $21 per share. He paid $5,500 for 250 shares of Kiernan's stock, which was $22 per share. He bought only 25 shares of Rose O'Neal's stock for the sum of $300, which was $12 per share. These were the exact sums paid by the Water Company for those identical shares of stock. The company therefore lost nothing by that transaction. We may not hold those shares of stock were purchased by Jay Lawyer for sums disproportionate to their actual value.

We are satisfied from a careful examination of the record that the findings of the court are adequately supported by the evidence to the effect that the rescission of the purported sales of stock to the Water Company was accomplished in good faith for the welfare of the corporations and their stockholders, and not for any ulterior purpose or private gain on the part of any of the officers of said companies, that everything of value which was paid by the Water Company therefor was restored to it, and that neither the companies nor their stockholders lost anything thereby. It will unduly extend the length of this opinion and accomplish no useful purpose to quote at length or attempt to analyze the large quantity of evidence which was adduced on that subject. We shall therefore not attempt to do so.

[18] From the foregoing conclusions we are satisfied it necessarily follows that Jay Lawyer had a right to, and that he did lawfully purchase said stock formerly belonging to Murphy, Kiernan and O'Neal in good faith for a fair and reasonable value thereof, that said transaction was not in conflict with the trust which he or any of the other defendants owe to said corporations or their stockholders, and that he thereby became the owner and entitled to the possession of said stock, together with all rights incident thereto. The court therefore properly quieted title to said shares of stock in Jay Lawyer.

We are unable to perceive under the facts of this case how the court could have determined in this suit by minority stockholders in their individual capacity, in the absence of allegations or proof of fraud, that the directors of the Water Company were not authorized to sell and convey shares of stock which were acquired and held by that company contrary to the provisions of law, for a fair and reasonable consideration which resulted in restoring to the company the entire sum of money which it had expended on that account. Nor do we see how the court, under such circumstances, would be authorized to oust from office any of the duly elected directors of the companies, or to replace them with the individual plaintiffs in this action. We are satisfied the court properly denied that relief and determined that the plaintiffs take nothing by this suit.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.

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56 Cal.App.2d 667

SCHUBKEGEL v. GORDINO.

Civ. 12152.

District Court of Appeal, First District, Division 1, California.

Jan. 15, 1943.

Rehearing Denied Feb. 13, 1943.

Hearing Denied March 15, 1943.

1. Appeal and error 🔑930(1)

On appeal from judgment for plaintiff, evidence was viewed most favorably to plaintiff.

2. Malicious prosecution 🔑64(2)

Evidence that defendant landlord had ordered plaintiff tenant to vacate an apartment and had indicated that he was keeping plaintiff's trunk and suitcase as security for unpaid rent and waived his lien on plaintiff's other articles in the apartment and that defendant signed subsequently dismissed complaint charging plaintiff with defrauding an innkeeper for the sole purpose of collecting a private debt, established lack of "probable cause" and "malice" in signing the complaint, entitling plaintiff to recover for malicious prosecution. Pen.Code, § 537; Civ.Code, § 1861a.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice" and "Probable Cause".

3. Malicious prosecution 🔑56

"Public policy" favors apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him burden of proving the basic elements of malicious prosecution.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Malicious prosecution 🔑38, 47

Where the difficult burden of proof resting on plaintiff in a malicious prosecution action is met, recovery is allowed and the established rights of plaintiff may not be defeated by inventing new limitations on the substantive right, or by adopting stricter requirements of pleading than warranted by general rules.

5. Malicious prosecution 🔑56

The "public policy" in favor of apprehension and punishment of criminals which limits plaintiff in malicious prosecution actions by placing on him burden of proving basic elements of the tort, has properly served over many years to crystallize limitations on the tort and the defenses available to defendant, and having served that purpose, should not be pressed further to extreme of practical nullification of the right of action for malicious prosecution.

6. Malicious prosecution 🔑56

Although good faith reliance by defendant on advice of counsel in signing subsequently dismissed complaint against plaintiff is a defense to an action for malicious prosecution inasmuch as such defense shows "probable cause", to establish the defense, defendant must show that the advice relied upon was given after a full and fair disclosure of all the facts within his knowledge on the criminal charge.

7. Malicious prosecution 🔑71(2)

Evidence failed to raise defense to malicious prosecution action that defendant in good faith acted on advice of counsel in signing the complaint. Pen.Code, § 537; Civ.Code, § 1861a.

8. Evidence 🔑151(1)

Where malice, intent, or motive of a party is a material fact to be established, testimony of the party himself directly to the point is competent to prove it.

9. Evidence 🔑471(9)

In action for malicious prosecution based on dismissal of complaint signed by defendant charging plaintiff with defrauding an innkeeper, defendant's testimony that he was not actuated by malice when he had the warrant issued was not incompetent as a "conclusion". Pen.Code, § 537.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

10. Malicious prosecution 🔑26, 56, 59(1), 60(1)

In malicious prosecution actions, malice in fact is the foundation of the action and it must be proven as a fact, and defendant has an unquestioned right to introduce any competent evidence to show that he had probable cause for instituting the criminal prosecution, or that even if he did not have such cause, he was not actuated by malice in doing so.

11. Evidence 🔑471(9)

In action for malicious prosecution based on dismissal of complaint signed by defendant charging plaintiff with defrauding an innkeeper, where defendant was examined as plaintiff's witness, question by defendant's counsel whether defendant was actuated by any malice when he had the warrant issued was not objectionable as calling for a "conclusion." Pen.Code, § 537, Code Civ.Proc. § 2055.

12. Appeal and error 🔑878(4)

Contention that question was not proper redirect examination might be urged in support of trial court's ruling striking question and answer, although such objection was not urged below.

13. Witnesses 🔑275(8)

Where defendant was called as plaintiff's witness and examined in detail concerning the circumstances under which the warrant was secured for purpose of raising inference of malice, question on examination of defendant by his counsel whether defendant was actuated by malice when he had the warrant issued was proper, notwithstanding that plaintiff's counsel had not examined defendant directly as to his state of mind. Pen.Code, § 537; Code Civ.Proc. § 2055.

14. Appeal and error 🔑1047(3)

In action for malicious prosecution based on dismissal of complaint signed by defendant charging plaintiff with defrauding an innkeeper, defendant's testimony of the reason why he secured the warrant, that he believed that plaintiff had left the state, did not cure erroneous striking of defendant's testimony that he was not actuated by malice when he had the warrant issued. Pen.Code, § 537.

15. Appeal and error 🔑1056(1)

In action for malicious prosecution based on dismissal of complaint signed by defendant charging plaintiff with defrauding an innkeeper where malice was the essence of the action and the case was close on the evidence, exclusion of defendant's testimony that he was not actuated by malice when he had the warrant issued was prejudicial. Pen.Code, § 537.

16. Evidence 🔑148

In action for malicious prosecution based on dismissal of complaint signed by defendant charging plaintiff with defrauding an innkeeper where proffered evidence of identification was not sufficient, testimony of defendant's daughter concerning a portion of a telephone conversation alleged to have been overheard by her was properly excluded. Pen.Code, § 537.

WARD, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Paul Schubkegel against John Gordino for malicious prosecution. Judgment for plaintiff, and defendant appeals.

Reversed.

C. D. Dorn and Anthony S. Devoto, both of San Francisco, for appellant.

Frank J. Perry and George Olshausen, both of San Francisco, for respondent.

PETERS, Presiding Justice.

This action is one for malicious prosecution growing out of the dismissal, because of insufficiency of the evidence, of a complaint signed by defendant charging the plaintiff with defrauding an innkeeper as defined in section 537 of the Penal Code. The jury brought in a verdict of $5,000 upon which judgment was entered. Defendant appeals from that judgment, contending that there is no evidence of lack of probable cause and malice sufficient to sustain the judgment, that certain evidence was prejudicially excluded by the trial court, that certain instructions given were prejudicially erroneous, and that the verdict is excessive as a matter of law.

The facts surrounding the institution of the present action are as follows:

Defendant is the owner of a furnished apartment house in San Francisco. In August of 1940, he acted as his own manager. In that month plaintiff and his wife came to San Francisco from Denver, Colorado, and immediately went to visit Bertha Schubkegel, aunt of plaintiff, who was then living in defendant's apartment house and who is now acting as manager thereof. Plaintiff was without immediate prospects of work, had very little money, and had no place to live. Bertha Schubkegel discussed the matter with defendant, and the latter suggested that plaintiff and his wife occupy one of the then vacant apartments in the building rent free until plaintiff could get work, the understanding being that plaintiff would start paying rent from and after the time he got a job. Plaintiff was unable to secure a job for two or three weeks, and during that period remained in the apartment, rent free. On August 22 he secured a temporary job with a service station which lasted one month and which paid him $117. In October he paid defendant $50 on account of rent, it being agreed that the rental of the apartment was $25 a month. Thereafter, plaintiff and his wife moved to another apartment in the same building, the agreed rental being $30 per month.

After the termination of the service station job plaintiff was out of work until December 16, when he secured a temporary job at the Emporium as stock clerk at $22 per week, and where he worked through December 24. During this period he paid $5 on his back rental. By January he admittedly owed defendant $112.72 for back rent. On January 13, 1941, between 5 and 6 a. m., plaintiff and his wife removed their linens and personal belongings from the apartment, leaving, however, a small trunk and suitcase in the storeroom of the apartment. They did not tell defendant they intended to move that morning. Upon discovering the fact that plaintiff and his wife had moved, defendant went to see his attorney, and, upon telling him certain of the facts, was advised to go to the bond and warrant clerk's office, recount the facts to the deputy district attorney there stationed, and to request a warrant for plaintiff's arrest under section 537 of the Penal Code. That section provides that any person "who, after obtaining credit, food, accommodations, at an hotel, inn, restaurant, boarding-house, lodging-house, furnished apartment house, furnished bungalow court, or furnished auto camp, absconds, or surreptitiously, or by force, menace, or threats, removes any part of his baggage therefrom, without paying for his food or accommodations is guilty of misdemeanor." Section 1861a of the Civil Code gives the keeper of a furnished apartment a lien on the baggage or other property of a guest in an apartment for the charges due from the guest for the accommodations supplied the guest.

The defendant followed his attorney's advice, signed a complaint and a warrant was issued for plaintiff's arrest. He was arrested on January 20, 1941, while on a new job at the Emporium where he had secured employment just a few hours before his arrest. He was fingerprinted, placed in a cell with drunks and vagrants and kept in custody for four or five hours, when he was released. Subsequently, at his trial on the criminal charge, he was acquitted and the charges dismissed on the ground of insufficiency of the evidence. The present complaint for malicious prosecution was filed a short time after the criminal charge was dismissed.

On the issues of probable cause and malice, the evidence, and the reasonable inferences therefrom, are in conflict. Plaintiff testified that early in December defendant demanded some security for the rent; that he tried to secure such security but was unable to do so because he was unknown and unemployed; that on the evening of January 9, 1941, defendant told him that he was not running a charitable institution and ordered him to leave the apartment by January 22; that he, the plaintiff, agreed to be out of the apartment before that date; that on January 11 he asked the defendant if he could have his small trunk and suitcase then in the storeroom to pack; that defendant told him, "You can't have them, I am going to keep them for security on the rental"; that defendant also told him that he intended to keep the trunk and suitcase "until I could pay the rent"; that he moved between 5 and 6 a. m. on January 13 because he had to take their belongings to Oakland and his wife had to be at work at a coffee shop by not later than 7:30 a. m. There was also evidence that defendant had requested plaintiff to give him his automobile as security, but that plaintiff had such a small equity that it was not adequate. Admittedly, on January 10, 1941, defendant telegraphed to plaintiff's father in Missouri asking him to go security on the back rent in order "to avoid serious complications." A considerable portion of plaintiff's testimony was corroborated by plaintiff's wife and other witnesses. Mrs. Schubkegel particularly corroborated the conversation of January 9. Moreover, Marc Chlemens testified to a telephone conversation had with defendant on January 12 that directly corroborates plaintiff's testimony concerning the January 9 conversation.

The defendant unequivocally denied the conversation of January 9, and denied that then or at any other time he had ordered plaintiff to vacate the premises. He contended he was not present in the apartment on that evening until after 11 p. m., and was corroborated in this respect by his daughter, his son-in-law and a friend. This presented a direct conflict between plaintiff and his wife, and defendant and his witnesses. The jury has resolved that conflict in favor of plaintiff.

The defendant conceded that he did not tell his lawyer or the bond and warrant clerk of the conversation of January 9.

[1, 2] Under this evidence we think the court and jury were justified in finding lack of probable cause and malice. The evidence most favorable to plaintiff, and the reasonable inferences therefrom, is capable of the interpretation that defendant had ordered the plaintiff to vacate, and that, by his conversation concerning the trunk and suitcase, had indicated that he was keeping those articles as security and that he waived his lien on the other articles in the apartment. Under such circumstances, the evidence is capable of the interpretation that defendant knew that plaintiff was not guilty of the offense defined in section 537 of the Penal Code. The jury was reasonably entitled to infer that the complaint was signed for the sole purpose of collecting a private debt. This is sufficient to support the implied findings of lack of probable cause and malice. Franzen v. Shenk, 192 Cal. 572, 221 P. 932; Burke v. Watts, 188 Cal. 118, 204 P. 578.

[3-5] Defendant relies strongly on the statement appearing in many cases that the action for malicious prosecution is not favored in the law, and contends that, tested by that standard, the evidence, as a matter of law, shows probable cause. Whatever confusion has been created by that phrase has been set at rest by the recent decision of the Supreme Court in Jaffe v. Stone, 18 Cal.2d 146, 159, 114 P.2d 335, 342, 135 A.L.R. 775, where the court stated: "It is finally urged in support of the judgment that malicious prosecution suits are not favored. The frequency with which this statement is made in these cases calls attention to the need of some explanation. Properly applied, it means that public policy is in favor of the apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him the burden of proving the basic elements of the tort. These elements, viewed on the other side, furnish full defenses to the public spirited accuser or prosecutor. But where the difficult burden of proof is met by the plaintiff, recovery is allowed. This being true, we should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority, or by adopting stricter requirements of pleading than are warranted by the general rules of pleading. In brief, the public policy involved has properly served, over many years, to crystallize the limitations on the tort, and the defenses available to the defendant. Having served that purpose, it should not be pressed further to the extreme of practical nullification of the tort and consequent defeat of the other important policy which

underlies it of protecting the individual from the damage caused by unjustifiable criminal prosecution."

[6, 7] Defendant also relies on the defense that, in good faith, he acted on the advice of counsel in signing the complaint. While it is true that reliance on such advice in good faith is a defense to an action for malicious prosecution, inasmuch as such defense shows probable cause (Griswold v. Griswold, 143 Cal. 617, 77 P. 672; Dunlap v. New Zealand F. & M. I. Co., 109 Cal. 365, 42 P. 29; Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54; see cases collected 16 Cal.Jur. p. 741, § 11), it is equally true that to establish the defense the defendant must show that the advice relied upon was given after a full and fair disclosure of all the facts within his knowledge tending to prove or disprove the criminal charge. Burke v. Watts, supra; Franzen v. Shenk, supra; Starkweather v. Eddy, 210 Cal. 483, 292 P. 467; Diggs v. Arnold Bros., Inc., 132 Cal.App. 518, 23 P.2d 71; Gooding v. McAlister, 114 Cal.App. 284, 299 P. 774; Foster v. Banks, 112 Cal. App. 622, 297 P. 106. Although the defendant is under no duty to investigate and discover all the facts (Richter v. Neilson, supra), in order to take advantage of this defense he must disclose all of the pertinent facts within his knowledge. In the instant case the defendant admittedly did not tell his attorney or the deputy district attorney that he had ordered plaintiff to vacate the premises, although he admitted that the deputy district attorney had informed him that if he had ordered the plaintiff to vacate he was not lawfully entitled to a warrant. Although defendant denied the conversation of January 9, there is ample evidence to support the implied finding that such a conversation was had. Under such circumstances, the evidence is sufficient to support the finding that there had not been a sufficiently full disclosure to raise the defense.

Although the evidence is sufficient to sustain the judgment, it is our opinion that the judgment must be reversed and a new trial had because of prejudicial error in the exclusion of evidence on the issue of malice. Defendant was called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, and exhaustively examined by plaintiff's counsel as to all the circumstances under which the warrant for plaintiff's arrest had been secured. The witness was then examined by his own counsel. After testifying that he had secured the warrant on the advice of counsel, the following occurred:

"Q. Were you actuated by any malice when you had that warrant issued? A. Not at all.

"Mr. Perry: That is objected to and I will ask that that question be stricken.

"The Court: The question is stricken. What about the answer?

"Mr. Perry: And the answer.

"The Court: And the answer may be stricken. Now the objection.

"Mr. Perry: I object on the ground that these questions are questions of fact to be determined, and any answer would be the conclusion of this witness.

"The Court: The objection is sustained.

"Mr. Devoto: We will leave that for our own—we will recall him as our own witness.

"Mr. Perry: I will make the same objection, because the objection is well taken."

[8-10] It was clearly error to have sustained the objection. It is well settled that where the malice, intent or motive of a party is a material fact to be established, the testimony of the party himself directly to the point is competent evidence to prove it. The leading case in this state is Runo v. Williams, 162 Cal. 444, 122 P. 1082. That case also involved an appeal by defendant from a judgment in a malicious prosecution action. While defendant was under examination as a witness his counsel asked him the following questions: "What was your motive and reason for instituting the criminal prosecution against Mr. Runo?"; "Whether in instituting the criminal prosecution you were actuated by malice, hatred, or ill feeling, or whether you were actuated by an honest belief that he was guilty of the offense that you charged against him?"; "When you instituted the criminal prosecution, you honestly believed in good faith that he was guilty of the offense as charged against him?" Page 450 of 162 Cal., page 1085 of 122 P. The trial court sustained objections to these questions "on the ground that they called for the opinion and conclusion of the witness and were incompetent, irrelevant, and immaterial." Page 450 of 162 Cal., page 1085 of 122 P. This was held to constitute prejudicial error. The court first pointed out that in a malicious prosecution action "malice in fact is really the foundation of the action, and is usually the pivotal point upon which the action turns" and that "it must be proven as a fact. This being true, and it being equally true that whatever the plaintiff must prove the defendant may disprove, the latter has an unquestioned right to introduce any competent evidence to show that he had probable cause for instituting the criminal prosecution, or that, even if he did not have, he was not actuated by malice in doing so." Page 450 of 162 Cal., page 1085 of 122 P. The court then discussed the precise issue here involved as follows:

"As a general proposition, the right of a defendant to present evidence on these matters as bearing on the issues of probable cause and malice may not be disputed, and the only question is must the state or condition of mind of the defendant, respecting belief, motive, and good faith be restricted to proof of acts and circumstances accompanying or surrounding the accusation, or in addition thereto, is the defendant a competent witness to testify directly respecting them. Under the uniform rule of the authorities he unquestionably is.

"The rule is well settled in this state and other jurisdictions that, where the malice, intent, or motive of the party is under the issues in the case a material fact to be established, the testimony of the party himself directly to the point is competent evidence to prove it. [Citing many cases.] The case nearest in character to the one here where the rule was applied is Fleet v. Tichenor, supra [156 Cal. 343, 104 P. 458, 34 L.R.A.,N.S., 323], an action for damages for slander where it is said: 'The trial court sustained objection to two questions asked the defendant as to whether or not she was actuated in anything she had said or done by any wish or desire or any design or purpose to injure plaintiff. The questions were proper, both to show absence of actual malice for the purpose of avoiding exemplary damages and under the defense of privileged communication, and the court erred in overruling them. The general rule is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act, when that intent is a material thing in the action. A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, but may find in the circumstances, actions and language an entirely different intent, but the testimony of the witness "is competent and relevant and not immaterial."' So in this case, as we have pointed out, the direct testimony of the defendant as to his belief, motive, and intent in making the criminal charge was competent evidence on the question of malice in fact, and pertinent also to his defense of the existence of probable cause for the prosecution.

"The general rule announced is the one obtaining in other jurisdictions and applied in numerous cases where the actions were as here, for malicious prosecution and the questions put to the defendants were practically identical with those which were asked of the defendant in this case. In the following cases the direct question put to the defendant was whether when he made the complaint he believed it to be true or believed plaintiff guilty: Spalding v. Lowe, 56 Mich. 366, 23 N.W. 46; Garrett v. Mannheimer, 24 Minn. 193; Sparling v. Conway, 75 Mo. 510; Turner v. O'Brien, 5 Neb. 542; McKown v. Hunter, 30 N.Y. 625; White v. Tucker, 16 Ohio St. 468. In the following cases the direct inquiry was made to defendant as to his motive in making the charge: Flickinger v. Wagner, 46 Md. [580], 600; Leake v. Carlisle, (City Ct.), 75 N.Y.S. 382; Schwarting v. Van Wie, etc., Co., 60 App.Div. 475, 69 N.Y.S. 978. In others the direct inquiry put to the defendant was whether in making the charge he was actuated by malice or ill will: Coleman v. Heurick [13 D.C. 189], 2 Mackey 189; Campbell v. Baltimore & O. R. Co., 97 Md. 341, 55 A. 532; McCormack v. Perry, 47 Hun, N.Y., 71; Heap v. Parrish, 104 Ind. 36, 3 N.E. 549. In the case of Vansickle v. Brown, 68 Mo. 627, the direct question asked of defendant was whether he acted in good faith in making the charge, and in Sherburne, Adm'r v. Rodman, 51 Wis. [474], 479, 8 N.W. 414, the court was considering rulings upon direct questions asked the defendant upon all of the above matters in the same manner in which they were directed to the defendant in this case.

"In all the cases cited (without quoting from them) the right to make the direct inquiry on these matters was sustained on appeal or the cases were reversed for refusing to permit answer to such direct inquiries. See, also, 3 Elliott on Evidence, § 2479." Page 451 of 162 Cal., page 1085 of 122 P.

The rule of this case has consistently been followed in this state, and there are no contrary cases. Johnston v. Benton, 73

Cal.App. 565, 239 P. 60; Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54; MacGruer v. Denivelle, 113 Cal.App. 49, 297 P. 633; Brown v. Newby, 8 Cal.App.2d 203, 47 P.2d 1076.

[11] Plaintiff urges that Runo v. Williams, supra, did not discuss the form of the question, and that the questions asked in the Williams case and the instant case were subject to the objection that they called for a conclusion. The quotation from the Williams case, supra, definitely shows that the form of the questions was considered and that the court held that such questions do not call for a conclusion but for a fact.

[12, 13] Plaintiff also contends that the question was not proper redirect examination, and, although that objection was not urged, it may now be urged in support of the ruling of the trial court. Davey v. Southern Pacific Co., 116 Cal. 325, 48 P. 117. Assuming the correctness of the rule urged, it has no application to the problem here under discussion for the reason that the question was proper redirect examination. While it is true that when plaintiff called defendant under section 2055 of the Code of Civil Procedure plaintiff's counsel did not examine defendant directly as to his state of mind, he did examine him in detail concerning the circumstances under which the warrant was secured for the very purpose of raising the inference of malice. This necessarily involved the state of mind of defendant and rendered the question proper when defendant's counsel took the witness on redirect examination.

[14] The last contention of the plaintiff on this issue is that even if error was committed it was cured because the evidence was introduced elsewhere. In this connection the only portion of the record referred to by plaintiff is a question as to the "reason" he secured the warrant, to which he was permitted to answer that he believed the plaintiff had left the state. This question dealt with an entirely different subject matter than did the excluded question. The reason for getting out a warrant is entirely different from whether he was actuated by malice in securing it. Substantially the same argument was made in Runo v. Williams and was disposed of as follows (page 453 of 162 Cal., page 1086 of 122 P.): "In their brief counsel for respondent fail to make any argument or to cite any authority sustaining the ruling of the trial court on these questions. Their position on the subject simply is that 'the appellant was permitted to present every fact and circumstance tending to show his motive.' The complete answer to this suggestion is, as we have just pointed out, that the court erroneously refused to permit him to introduce competent evidence on this very material subject. * * * The evidence was competent and material to go before the jury and defendant had the right to have the jury determine, as is their exclusive province, the credit, weight, and effect to be given to it, and not the court." See, also, Richter v. Neilson, supra, 11 Cal.App.2d at pages 515, 516, 54 P.2d 54.

[15] The error in the exclusion of this testimony was clearly prejudicial. Malice is the very essence of the action. By excluding defendant's direct evidence on that issue the trial court required the defendant to rely on inferences from the facts and circumstances. Although, as already held, the evidence is legally sufficient to sustain the judgment, it is equally true that there was competent and ample evidence to sustain a contrary judgment. The case is a close one on the evidence, and for that reason any material error in the admission of evidence takes on added significance.

[16] Defendant also complains of the exclusion of the testimony of his daughter concerning a portion of a telephone conversation alleged to have been overheard by her. The proffered evidence of identification was not sufficient and for that reason the testimony was properly excluded.

There was no prejudicial error in the instructions. In view of the fact that a new trial must be had no useful purpose would be served in discussing defendant's contention that the verdict is excessive.

The judgment appealed from is reversed.

KNIGHT, J., concurred.

WARD, Justice.

I dissent. The majority opinion holds that the evidence is sufficient to sustain the judgment. I agree with this conclusion and all others with the exception of that holding prejudicial error to have occurred in the exclusion of certain evidence which will be hereinafter considered. The only question of any moment not passed upon is the claim of excessive damages.

Ordinarily the amount of damages is left to the experience and common sense judgment of the jury, subject to appropriate instructions and, if necessary, a revision by the trial judge. Unless the award is so disproportionate to the injury suffered or harm done as to clearly show that the verdict was the result of passion, prejudice or other unlawful influence, a reviewing court will not interfere. Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603. The members of a reviewing court, simply reading the record, might conclude that an award was disproportionate to the harm sustained, but, given an opportunity to observe the witnesses, their conduct, manner, etc., they might agree that the award of the jury was correct. There is evidence that plaintiff suffered greatly from humiliation and the loss of an opportunity to obtain a civil service appointment, etc. It does not appear, however, that the jury was actuated by any motive other than a desire to do justice. In my opinion, under the circumstances the amount of the verdict should stand.

The sole cause assigned in the majority opinion for reversal is the order of the trial court, made while defendant was a witness in his own behalf, striking out the following question and answer: "Q. Were you actuated by any malice when you had that warrant issued? A. Not at all." It may be conceded that while the question calls for the conclusion of the witness, such evidence generally is admissible upon the theory that in an action similar to the present a defendant is permitted to show an absence of ill will or malice toward plaintiff. In other words, the intent of the defendant and his reason for obtaining the warrant are material to a determination of the issues involved, but the error in excluding evidence relative thereto is not necessarily prejudicial, particularly when the defendant's attorney gives notice that he will introduce the evidence later in the trial.

In the present case the above question, if answered in the affirmative, would have been tantamount of a confession of judgment, so that the only matter to determine would be the amount thereof. The allegation in the complaint—that the defendant acted maliciously—is denied in the answer. The defense was presented with the purpose of establishing its contention that the warrant was not obtained by the defendant maliciously, and the defendant was subsequently permitted to show that he had no malicious intent. He was permitted to give his reasons for obtaining the warrant; and testified he told plaintiff that if he attempted to "sneak" out a warrant would be issued for his arrest; that subsequently, when he thought plaintiff was "on his way back to Denver," the warrant was issued.

Injury is not presumed from error; the objecting party must affirmatively show that the error was prejudicial; not only that it affected the essential rights of a party, but resulted in a miscarriage of justice. Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238.

In directing a reversal herein the majority opinion relies particularly on the authority of Runo v. Williams, 162 Cal. 444, 122 P. 1082, which it states is the ruling which has been consistently followed in this state, citing Johnston v. Benton, 73 Cal.App. 565, 239 P. 60; Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54; MacGruer v. Denivelle, 113 Cal.App. 49, 297 P. 633; Brown v. Newby, 8 Cal.App.2d 203, 47 P.2d 1076.

Johnston v. Benton, supra, and Brown v. Newby, supra, are not malicious prosecution cases, and hold only that where "intention" is an issue it may be proven by direct testimony. In MacGruer v. Denivelle, supra, a malicious prosecution action, the judgment was for defendants. The court merely held that in such a case one may testify to his motive and good faith.

In Richter v. Neilson, supra, 11 Cal.App.2d page 516, 54 P.2d page 60, Runo v. Williams, supra, is approved to the effect that "a defendant is entitled to introduce any competent evidence to show that he had reasonable cause for instituting the proceeding, or that even if he did not have such cause, he was not actuated by malice," but a reversal was based, not upon refusal to permit defendant to testify with reference to the state of mind which prompted her to institute a criminal proceeding—as to which she did so testify—but for the following reason (pages 511, 512 of 11 Cal.App.2d, page 58 of 54 P.2d): "* * * the evidence, in our opinion, is legally insufficient to establish a case of malicious prosecution, first, for the reason that the record reveals no direct evidence to prove that the defendant was actuated by any malicious motives, nor in our opinion were any circumstances proved from which an inference of malice may be reasonably inferred; and, secondly, it affirmatively appears that in causing plaintiff's arrest defendant acted under the advice of the deputy district attorney and in the honest belief that plaintiff had committed the offense with which he was charged." In the Runo case, among certain questions approved was one going to honest belief in the guilt of the party charged with a criminal offense. So far as this question is concerned, the Supreme Court in Murphy v. Davids, 181 Cal. 706, 718, 186 P. 143, 148, said: "The court sustained respondent's objection to the question propounded by the attorneys for the defendants: 'Did you honestly, in your conversations with them, state to them everything that you knew or had learned touching that matter (whether Murphy was guilty of embezzlement)?' The objection went to the word 'honestly,' as calling for a conclusion of the witness. It was for the jury to determine from the evidence whether or not defendants related their knowledge of plaintiff and his acts honestly. The objection was properly sustained. His belief on the subject of plaintiff's guilt would have been admissible (Runo v. Williams, 162 Cal. 444, 122 P. 1082), but the question, in the form in which it was propounded, was vulnerable to the particular objection leveled at it." In the Runo case, also, the court indicated that certain instructions were defective, and assumed the errors would be cured on a new trial. The judgment therein was reversed, not for one, but for two stated reasons, namely, the refusal to permit the defendant to testify on the subject of malice and the issue of probable cause. In the present case the sole ground noted in the majority opinion is the order striking from the record the question, and defendant's answer that he was not actuated by "any" malice when the warrant was issued, the only reason for the court's ruling being that the "answer would be the conclusion of this witness." Technically the ruling was correct. Murphy v. Davids, supra. If there was no evidence in the case relative to the purpose and reason for the issuance of the warrant, the conclusion reached in the majority opinion might be justifiable, but an examination of the record discloses that the defense presented evidence showing the "reason."

There is nothing in the record indicating to my mind any probability that a different verdict would have been returned had the question and answer been allowed to stand, nor am I convinced from a reading of the record, including the evidence, that even conceding the ruling to have been erroneous, it resulted in a miscarriage of justice. In my opinion the judgment should be affirmed.

Hearing denied; GIBSON, C. J., and CURTIS and CARTER, JJ., dissenting.

In re STONE'S ESTATE.
BOMASH v. STONE et al.
Civ. 13682.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1943.

Rehearing Granted Feb. 26, 1943.

1. Wills ⚿114, 121

The absence of a statement on purported will showing compliance with provision of Probate Code requiring attestation does not affect validity of instrument as a will, but absence of the fact of attestation is fatal. Probate Code, § 50.

2. Wills ⚿272

When a will is contested before probate, there are two proceedings, one being the petition for probate of the will, the other a contest thereof.

3. Wills ⚿272

A petition for probate of a will is an "ex parte proceeding in rem", in which proponent tenders issues of fact relevant to validity, and, although all persons interested are, in a sense, parties, they are not active parties litigant, the burden being on complainant to prove his allegations.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Parte Proceeding in Rem".

4. Wills ⚿272

A will contest before probate is an "adversary proceeding", the parties to which are all persons interested in testator's estate who file grounds of opposition to probate and those who have appeared and answered, and the only issues of fact involved are those which are framed by the pleadings.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Proceeding".

5. Wills ⚿288(1)

In will contest, burden of proof rests on contestant, and proponent need not submit evidence until contestants shall have produced some evidence legally sufficient to support his allegations. Probate Code, § 371.

6. Wills ⚿289

Where will was contested before probate on ground that it was not duly executed, burden was on contestant of producing evidence which tended affirmatively to prove such non-execution. Probate Code, §§ 50, 371.

7. Wills ⚿322

In proceedings for probate and contest of will, testimony of attesting witnesses as witnesses for proponent was properly taken out of hearing of jury.

8. Judgment ⚿199(3)

An order for entry of a judgment notwithstanding verdict can not be granted unless there is no evidence of sufficient substantiality to support the verdict.

9. Wills ⚿302(1)

Fact that purported will bore signatures of two attesting witnesses was evidence that will had been duly executed. Probate Code, § 50.

10. Wills ⚿302(1)

Evidence was insufficient to affirmatively prove that will which was admitted to probate was not duly executed. Probate Code, § 50.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Proceeding in the matter of the estate of Abner H. Stone, wherein Fannie Bomash filed a contest to instrument offered as decedent's will, opposed by Jerome Stone and others. From an order dismissing will contest, admitting will to probate and granting letters testamentary, the contestant appeals.

Affirmed.

Dudley Robinson, of Los Angeles, for appellant.

Jerry Giesler, of Los Angeles, and Ward Sullivan, of San Francisco, for respondents.

BISHOP, Justice pro tem.

The contest as to the facts in this will contest case narrowed down as the trial progressed until the question before the jury finally became simply this: Did the witnesses subscribe their names to the will of Abner H. Stone during his lifetime or was it after his death? To a special interrogatory which covered this question, the jury gave an answer indicating its belief that the witnesses' names had been placed on the will after Abner H. Stone's death. We have reached the conclusion, which was first reached by the trial judge, that the evidence did not warrant the jury making the answer that it gave. We are further of the opinion that the evidence did support the trial court's determination that the will was duly executed. The order and judgment dismissing the will contest, notwithstanding the jury's verdict, and admitting the will to probate, from which the appeal before us was taken, are therefore to be affirmed.

The critical issue on this appeal will emerge as free from complexity as was the ultimate question of fact at the trial. These proceedings were inaugurated by the action of Jerome Stone and Josef Widoff, named as executors in the will of Abner H. Stone, in filing a petition offering the will for probate. There is no reason to doubt that the offered document, dated February 5, 1939, was signed, at its end, by Abner H. Stone, and that the names "Joseph Loeb" and "Celia LeVee" appearing just after his signature and introduced by the words "Witnessed by," were the signatures of the persons bearing those names who, as witnesses at the trial, testified that they had signed their names as witnesses to the will.

[1] However, Fannie Bomash, a sister of Abner H. Stone, to whom $10 was devised, did doubt the due execution of the purported will and filed "Grounds of opposition to Probate of Will." Answers were filed by the two named as executors and by some seven of the legatees. Of the three grounds of opposition advanced by the contestant, the first and third grounds disappeared during the course of the contest, leaving only the contention that the will had not been duly executed in that, among other things, those who "witnessed" the will were neither requested to do so by Abner H. Stone nor did they do so in his presence. As the instrument in question was typewritten, it obviously could not be admitted as an holographic will. Probate Code, § 53. Its validity depended, therefore, on compliance with section 50, Probate Code, the last of whose requirements is: "There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence." The absence of a statement on the instrument itself showing that this provision had been complied with, does not affect its validity as a will (In re Estate of Pitcairn, 1936, 6 Cal.2d 730, 732, 59 P.

2d 90, 92), but absence of the facts is fatal. In re Estate of Krause, 1941, 18 Cal. 2d 623, 625, 117 P.2d 1, 2. The contestant, therefore, had a good ground upon which to stand if she could fortify it by competent evidence.

[2-6] A contestant's task is apt to prove a difficult one, and the appellant found it to be so in this case, for she had the burden, not merely of proceeding to meet a prima facie case made by the petitioner, but of proving at least one ground of her contest, and, as it developed, that which she had to prove was a negative. Since the four-to-three decision in Re Estate of Latour, 1903, 140 Cal. 414, 73 P. 1070, 74 P. 441, the law of this state has been as restated in Re Estate of Relph, 1923, 192 Cal. 451, 458, 221 P. 361, 364: "When a will is contested before probate there are two separate and distinct proceedings pending before the court. One is the petition for the probate of the will. The other is the contest of the probate of the will. [In re] Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; [In re] Estate of McDermott, 148 Cal. 43, 49, 82 P. 842; [In re] Estate of Cullberg, 169 Cal. 365, 146 P. 888. The petition for the probate of a will is distinctly a proceeding in rem. [In re] Estate of Baker, 170 Cal. 578, 585, 150 P. 989; [In re] Estate of Allen, 176 Cal. 632, 169 P. 364. The petitioner or proponent appears therein as plaintiff and tenders to all of the world all of the issues of fact relevant to the ultimate question of the validity of the will. While all persons interested in the estate are in a sense parties defendant thereto, there are no defendants in the sense of active parties litigant in this proceeding. It is in a sense an ex parte proceeding, in which the burden rests upon the petitioner to prove all the material allegations of his petition, whether denied or not, and the responsibility is upon the court to guard and protect the interests of all persons interested therein. The contest of a will, on the other hand, while a proceeding in rem, is at the same time an adversary proceeding, the parties to which consist, on the one hand, of those persons interested in the estate who have appeared and filed written grounds of opposition to the probate of the will (commonly referred to as the contest), and, on the other hand, those persons interested in the will who have appeared and filed written answer thereto. The only issues of fact involved therein are those which are framed by the allegations of the contest and the denials of the answer. [In re] Estate of Gregory, 133 Cal. 131, 136, 65 P. 315. As to those issues the burden of proof rests upon the contestants ([In re] Estate of Latour, supra; [In re] Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795; [In re] Estate of Cullberg, 169 Cal. 365, 146 P. 888), and the proponents are not called upon to submit any evidence until the contestants shall have produced some evidence legally sufficient to support their allegations upon one or more of those issues. If the contestants fail to produce such evidence, the decision of the contest must be against them, even though the proponents produce no evidence therein whatsoever. [In re] Estate of Latour, supra, 140 Cal. [at page] 421, 73 P. 1070, 74 P. 441. * * *" See, also, In re Estate of Henderson, 1925, 196 Cal. 623, 636, 238 P. 938, 942. The sentence with which section 1312, Code of Civil Procedure, formerly ended, "On the trial, the contestant is plaintiff and the petitioner is defendant," which was deemed of significance in the Latour decision, is now the opening sentence of section 371, Probate Code. No change in the rule has been made by the adoption of the Probate Code; the burden is on the contestant to prove his case, and if his case is that the will was not duly executed (as was true in Re Estate of Latour) he must prove this negative.

[7] There is a vital difference, in such a case, between the duty of going forward with the proof and the burden of proving the ground made the basis of the contest. If the contestant had only the burden of going forward, then his task would be accomplished by evidence which had the effect of destroying the prima facie case made by the petitioner. This could be done, for example, by so impeaching the petitioner's subscribing witnesses that the trier of fact would be disposed to disregard their testimony, with the result that the petitioner's prima facie case would no longer exist. But that is not the situation that pertains when the contestant is regarded as the plaintiff in an action independent of the proceeding to probate the will. The testimony of the petitioner's witnesses, in this case, was taken out of the hearing of the jury, and this was proper. In re Estate of Henderson, supra, 1925, 196 Cal. 623, 635, 238 P. 938, 942. When the contestant later called those same witnesses to testify that they had subscribed

their names to the will at the request of Abner H. Stone and in his presence and in the presence of each other, they were the contestant's witnesses, and if their testimony was entirely eliminated from the case, "the jury would have been compelled to find against the contestants upon the issue of nonexecution, unless they produced some evidence which tended affirmatively to prove such nonexecution." In re Estate of Relph, supra, 1923, 192 Cal. 451, 461, 221 P. 361, 365.

[8] The question before us appears, therefore, to be simple in its elements. As the order for the entry of a judgment notwithstanding the verdict should not have been granted unless there was "no evidence of sufficient substantiality to support a verdict in favor of plaintiff" (In re Estate of Leahy, 1936, 5 Cal.2d 301, 303, 54 P.2d 704, 705, repeating a portion of a quotation in Re Estate of Lances, 1932, 216 Cal. 397, 400, 14 P.2d 768, respecting the like rule as to a directed verdict), it follows that our problem has been resolved to finding an answer to this question: Did the contestant, or anyone, produce any evidence, including of course any inference reasonably to be drawn, which tended affirmatively to prove that the will of Abner H. Stone had not been duly executed?

We find no such evidence. There is evidence which supports these facts constituting a part of the contestant's theory of what happened. Abner H. Stone typewrote that which he intended should be his will, making an original and a carbon impression, both of which he signed. The original impression he had Jerome Stone place in his (Abner's) safe deposit box; the other he left in Jerome's possession. Eight days after Abner's death, which occurred on April 18, 1939, Abner's safe deposit box was opened in the presence of a county official, the two petitioners named as executors, the contestant, and several others, not including the subscribing witnesses, and the fact was at once discovered that the "will," which was the original impression and which had been in the box, had not been witnessed. About an hour after the party left the safe deposit vault and bank, Jerome reappeared at the bank with the carbon impression of the will, bearing the names of two subscribing witnesses. This was the document which was offered for probate and which the court received.

The jury could have concluded also that sufficient time elapsed, between Jerome's departure from and his return to the bank, for him to have obtained the carbon copy from his own safe deposit box, to have secured the attendance of the two subscribing witnesses at the office of his co-executor, Josef Widoff, who had been Abner's "family lawyer," and for them to have subscribed their names as witnesses on the carbon impression. All this could have happened—we need not note the details of evidence which support this theory of events—but there is no evidence that any of it did happen other than that, within the time allotted, Jerome did obtain possession of the carbon will, report to the office of Josef Widoff, and then reappear at the bank. This, of course, falls far short of proof that the will which was admitted to probate was not signed by the witnesses until after Abner's death. There is much evidence, which we need not detail, that warranted the jury in disregarding, because untrustworthy, the testimony of Jerome, of the two subscribing witnesses and of other witnesses, but, as we have already noted, the effect of destroying all their testimony was not to produce evidence and that it was the contestant's burden to do.

[9] A circumstance not yet related, attending the opening of Abner's safe deposit box, is deemed particularly significant by the contestant. To evaluate its significance we should know that the story of the two subscribing witnesses was such that, if true, it would follow that Jerome was present when the will was witnessed and knew that the event had taken place. From the reaction of Jerome to the discovery that the document found in the vault was not witnessed, aided by other evidence, the jury was fully justified, it seems to us, in concluding that at that moment Jerome neither knew that a will to be valid had to be witnessed nor that there was in existence one which had been witnessed. This of itself would serve to discredit the two subscribing witnesses, and also Jerome, all of whom had detailed the witnessing of the will in his presence. But there remains a fact not disputed, that the carbon impression bore the signatures of the two witnesses. This fact of itself, it has been held, is evidence that a will has been duly executed. In re Estate of Braue, 1941, 45 Cal.App.2d 502, 114 P.2d 386, relying upon In re Estate of Pitcairn, supra, 1936, 6

Cal.2d 730, 59 P.2d 90. That the subscribing witnesses did not state the truth in relating that Jerome was present when they placed their names upon the document, the jury had reason to believe. That it was not witnessed as required by the statute (section 50, Probate Code) the jury may have had reason to suspect, but there was no evidence to support their conclusion that it had not been.

[10] As there was no evidence tending affirmatively to prove that the will, which was admitted to probate, was not duly executed, the trial court properly ordered a judgment dismissing the contest, notwithstanding the verdict of the jury. This left pending for decision the matter of the petition that the will be admitted to probate. There can be no question that the trial court's decision to admit the will to probate was amply supported by the evidence.

The judgment and order appealed from are affirmed.

DESMOND, P. J., and SHINN, J., concur.

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56 Cal.App.2d 709

YOKOHAMA SPECIE BANK, Ltd., v. UNOSUKE HIGASHI et al.

Civ. 12183.

District Court of Appeal, First District, Division 2, California.

Jan. 19, 1943.

1. Improvements 🔑3
Navigable waters 🔑37(8)

A building which was constructed without license on tidelands of state became at once the property of the state, and on subsequent grant of the land to city, the building became property of city. St. 1919, p. 1359.

2. Improvements 🔑3

The erection of a building on tidelands by individuals without license is an "encroachment" on the sovereignty or a "purpresture" which belongs to the state as the owner of the soil to which it is affixed.

See Words and Phrases, Permanent Edition, for all other definitions of "Encroachment" and "Purpresture".

3. Fixtures 🔑9

Refrigerating system which was installed by tenant and was incorporated into building by removal of columns supporting part of building and substitution of refrigerating rooms in their place as supports of that part of building became an integral part of the premises so that under statute, the system was not removable as a "trade fixture", by holder of chattel mortgage on the system. Civ.Code, § 1019.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Fixture".

4. Appeal and error 🔑1122(2)

The reviewing court could remedy error of trial court in failing to make findings on affirmative allegations of cross-complaint, where facts were uncontradicted, and failure to make findings apparently was result of inadvertence.

◆

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by the Yokohama Specie Bank, Ltd., against Unosuke Higashi and others to foreclose a chattel mortgage, wherein the defendant City of Monterey filed a cross-complaint. From an adverse judgment, plaintiff appeals. Following outbreak of war with Japan, George J. Knox, as Superintendent of Banks, etc., was substituted as plaintiff.

Affirmed.

Stanton & Stanton, of Los Angeles, for appellant.

Argyll Campbell, of Monterey, for respondents.

DOOLING, Justice pro tem.

This action was brought by the Yokohama Specie Bank, Ltd., to foreclose a chattel mortgage originally given to the bank in 1931 by one Higashi, and subsequently renewed. The city of Monterey was joined as a defendant and filed a cross-complaint to quiet title to a portion of the property sought to be foreclosed. From a judgment quieting the title of the city of Monterey to a building supported by piles driven into the land under Monterey Bay and a refrigerating plant and attachments installed in said building the plaintiff appealed. Since the outbreak of the war with Japan the State Superintendent of Banks has been substituted herein as plaintiff and appellant.

It was stipulated by the parties that about 1915 a lease to certain frontage on the city wharf which extends into the waters of Monterey Bay was given by the city of Monterey to one Ferrante; that Ferrante put down piles on the land under the waters of the bay adjacent to this wharf frontage and constructed the building in question thereon; that subsequently Standard Fish Co. had a lease to the same wharf frontage and occupied the building; that about 1928 or 1929 Higashi went in under the lease of the Standard Fish Co. after which he secured a lease to the same wharf frontage himself from the city of Monterey and that he paid Standard Fish Co. $6,000 or $6,500 for its interest in the building; that Higashi placed the refrigerator in the building at a cost of $10,000; and that the refrigerator with its attachments is built into the building and could not be removed without injury to the building. It was further stipulated that the city of Monterey brought an ejectment suit against Higashi and Higashi was ejected as a tenant of the city in September, 1939, owing the city rent in the sum of $1,500 or thereabouts. The city of Monterey pleaded that the lands whereon the building is located were granted to the city of Monterey by the Legislature of California in 1919, and plaintiff stipulated to the truth of this allegation.

Since 1867 the city of Monterey has owned the lands under the waters of Monterey Bay within its corporate limits to a depth of twenty feet at low tide. Stats. 1867–68, p. 202. In 1919 the lands between the twenty-foot and sixty-foot depths were granted to the city by the state "provided, that the rights of all persons, if any exist, under any title derived from said State of California, in and to any part of said property and premises hereby ceded and granted, be and the same are hereby reserved from the operation of this act." Stats. 1919, p. 1359.

[1, 2] It seems clear, and appellant so asserts, that the lands upon which the building here in question is constructed lie between the twenty-foot and sixty-foot depths granted to the city in 1919. It is appellant's position "that the building was constructed adjacent to the wharf under permit express or implied from the state" and that title to it therefore did not pass to the city of Monterey under the grant from the state in 1919, but was reserved by the proviso to the private owner.

The weakness of this argument lies in the statement quoted from the brief "that the building was constructed * * * under permit express or implied from the state." Appellant points to nothing to support this assertion either in law or in the transcript. All that appears on the subject is the stipulation that in 1915 Ferrante put down piles and constructed the building thereon. No statutory authority in the city of Monterey to grant Ferrante permission to place a structure on the floor of the bay below the twenty-foot depth on lands then belonging to the state is shown. No express permit from the state was proved, and no facts which would support a finding of any implied permit from the state, assuming what we gravely doubt, that the sovereign state could be bound by a permit by implication only. The building so constructed without license upon the tide lands of the state became at once the property of the state. It was said in City of Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 23, 292 P. 1076, 1079, 80 A.L.R. 379:

> "The erection of a wharf, dock, or other construction over tide-lands by individuals without license is an encroachment upon the sovereignty or a purpresture which belongs to the state as the owner of the soil to which it is affixed."

As authority for this statement the court cites: People v. Davidson, 30 Cal. 379; Dana v. Jackson Street Wharf Co., 31 Cal. 118, 89 Am.Dec. 164; Taylor v. Underhill, 40 Cal. 471; Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331; Weber v. Board of Harbor Com'rs, 85 U.S. 57, 18 Wall. 57, 21 L.Ed. 798; 26 Cal.Jur., pp. 301, 311, 315 et seq., 590. We conclude that so far as the building is concerned it belonged to the state from the time of its construction and became the property of the city of Monterey by the statutory grant of 1919.

There is nothing in City of Santa Cruz v. Southern Pac. R. Co., 163 Cal. 538, 126 P. 362, 364, inconsistent with this conclusion. That case dealt with a public wharf extending across the strip between high and low tide, title to which strip had been granted to the town of Santa Cruz, Stats. 1871–72, p. 472, with the following reservation: "nothing herein contained shall in any manner be construed so as to prevent the construction and maintenance of wharves over, in, and through said lands by authority of the laws of the state of California." The court in that case said at page 549 of 163 Cal., at page 366 of 126 P., speaking of the wharf in question:

> "It was erected under the authority of the state. Hence it was within the reservation in the special act, and it is the property of the state, and the state alone has the right of possession and use, and the right to maintain an action to recover possession."

There was no similar reservation in the grant to Monterey by the act of 1919. Indeed the two cases are completely dissimilar. In the case before us a structure was placed by an individual without license upon the floor of the bay which was then owned by the state, and subsequently the state conveyed all of its title thereto to the city. In the Santa Cruz case the state first conveyed the strip between high and low tide to the city reserving the right to authorize the construction and maintenance of wharves across the strip so conveyed and the wharf was thereafter constructed across this strip by authority of the state and pursuant to the reservation in the grant. The question in the Santa Cruz case was whether upon the termination of the wharf franchise, title in the structure vested in the city or the state in view of the reservation of the right to the state to authorize wharfing privileges in the grant from the state to the city. No such question is involved in the case here presented.

As to the refrigerating system with its attachments, in addition to the stipulation that it is built into the building and could not be removed without injury to the building, there was testimony, uncontradicted, that it was built into the building, that pipes leading to the refrigeration rooms pass through various parts of the building, that the refrigerating rooms have concrete floors over wood, that in certain places columns have been removed which supported the upper floors and the roof, and that a part of the superstructure of the building rests upon the top of refrigerating rooms and is supported by them. It thus appears without conflict that after Higashi occupied the building which we have determined was then the property of the city he installed in the building a refrigerating system which became a structural part of the building itself. Subsequently he executed the chattel mortgage by which he purported to mortgage this refrigerating system to the Yokohama Specie Bank, Ltd.

It is appellant's claim that the refrigerating system constituted a trade fixture and hence was personal property subject to removal by the tenant and subject to the lien of the chattel mortgage given by him. It is respondent's position that it became a part of the realty, was at all times after its installation respondent's property, and therefore not subject to the chattel mortgage. There was no evidence of any agreement between the lessor and lessee as to the character of this installation (12 Cal.Jur. 580) and its character must therefore be determined by the rules established by Civil Code section 1019:

> "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

[3] We are satisfied that under the facts shown by the stipulation and the evidence above set out the refrigerating system by the manner in which it was affixed became an integral part of the building within the meaning of the quoted code section. Alden v. Mayfield, 163 Cal. 793, 127 P. 44, Ann.Cas.1914A, 258, 41 L.R.A.,N.S., 1022: Gordon v. Cohn, 220 Cal. 193, 30 P.2d 19; Etienne v. Millbrae G. & C. Club, 27 Cal.App.2d 452, 81 P.2d 245; Broadway Improvement etc., Co. v. Tumansky, 2 Cal. 2d 465, 41 P.2d 553; Frick v. Frigidaire Corp., 119 Cal.App. 707, 7 P.2d 321. The single fact that it had been so incorporated into the building by the removal of columns supporting a part of the building and the substitution of the refrigerating rooms in their place as supports of that part of the building clearly compels such conclusion.

The cases most strongly relied upon by appellant are readily distinguishable. In Murr v. Cohn, 87 Cal.App. 478, 262 P. 768, a service station building and pumps and a tank buried in the ground by a lessee of a vacant lot where the lease was for service station purposes, were held to be trade fixtures removable by the tenant. The building and pumps merely rested upon concrete blocks placed upon the surface. As to the tank this court said at pages 480, 481 of 87 Cal.App., at page 769 of 262 P.:

"It never became a part of the defendant's realty [citing cases], when it is considered that before the execution of the lease the lots were vacant, that at the time the lease was executed the defendant was informed to what use the plaintiffs intended to put the property, and that, upon the tank being removed, the soil can be dumped back into the hole in such a manner and to such an extent that there will be no injury whatever to the vacant lot."

In Goldberg v. Stanton, 84 Cal.App. 665, quoting from pages 666, 667, 258 P. 417, a lessee installed a refrigerator in a building in the following fashion: "No part of the refrigerator was physically attached by nails, bolts, screws or otherwise, to any part of the building excepting that on each of the sides of the refrigerator * * * a strip of quarter-round molding was tacked to the ceiling and to the refrigerator, 'making a neat looking job inside of the building.'"

The court said at page 667 of 84 Cal.App., at page 418 of 258 P.: "In the instant case it is apparent that in no just sense could the flimsy attachment of the refrigerator to the ceiling of the storeroom by means of the quarter-round molding be considered as 'permanent' within the meaning of the language contained in section 660 of the Civil Code."

[4] Through an apparent inadvertence the trial court failed to make findings on the affirmative allegations of the cross-complaint. Under the uncontradicted facts we can remedy that defect in this court. Kirk v. Culley, 202 Cal. 501, 261 P. 994; First Nat. F. Corp. v. Five-O Drilling Co., 209 Cal. 569, 289 P. 844; Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398.

The findings of the trial court are amended by adding thereto a finding "that all of the allegations of the cross-complaint of cross-complainant the City of Monterey are true." The judgment appealed from is affirmed.

SPENCE, Acting P. J., and STURTEVANT, J., concurred.

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56 Cal.App.2d 916

DONATO v. BOARD OF BARBER EXAMINERS OF STATE OF CALIFORNIA et al.

Civ. 13690.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1943.

1. Appeal and error 🔑19

The District Court of Appeal does not render advisory opinions.

2. Appeal and error 🔑781(4)

Where Board of Barber Examiners established schedule of minimum prices before hearing on appeal by barbershop proprietor who sought to enjoin enforcement of provisions of act relating to minimum price schedules for barbers, the case became "moot" insofar as it sought to preclude adoption of minimum price schedule. St.1941, pp. 1470–1472, §§ 6551–6558, 6594, 6600.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Case".

3. Appeal and error 🔑179(4)

Complaint, alleging that Board of Barber Examiners intended and threatened to establish schedule of minimum prices for various items of barber services, as apparently authorized by statute, and containing prayer for injunction restraining enforcement of the statute, failed to state cause for equitable relief respecting enforcement of the statute, so as to authorize reviewing court to consider constitutionality of the statute. St.1941, pp. 1470–1472, §§ 6551–6558, 6594, 6600.5.

4. Injunction 🔑26(1)

An injunction will not lie to prevent the Board of Barber Examiners from bringing action to enjoin violation of minimum price schedule established by the board, as authorized by statute. St.1941, p. 1472, § 6558.

5. Appeal and error 🔑179(4)

In suit to enjoin enforcement of act relating to minimum price schedules for barbers, allegations that Board of Barber Examiners directed barbershop proprietor to keep certain records, and that if he did not do so he would be subjected to penal provisions of the act, did not state cause of action so as to entitle reviewing court to consider constitutionality of the act, in view of fact that the act had no penal provisions. St.1941, pp. 1470–1472, §§ 6551–6558, 6594, 6600.5.

◆

Appeal from Superior Court, of Los Angeles County; Frank G. Swain, Judge.

Action by Don D. Donato against the Board of Barber Examiners of the State of California and Lake E. Young and others, as members of and constituting the Board, to enjoin defendants from enforcing provisions of statute relating to minimum price schedules for barbers. From an adverse judgment, plaintiff appeals.

Affirmed.

Tanner, Odell & Taft and A. Vernon Green, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondents.

Julius V. Patrosso and Earle M. Daniels, both of Los Angeles, amicus curiae on behalf of respondent Associated Master Barbers of California.

BISHOP, Justice pro tem.

[1] It is the policy of some states to have their courts render advisory opinions, but it is not the policy of this state. The task entrusted to us is to decide cases; the rendition of opinions is but an incident to the performance of that task. The parties before us desire an expression of our views on the constitutional question which they have argued, but because we are of the opinion that there is now no reasonable excuse for a discussion of the "merits" of the case, we have concluded we should not do so.

Plaintiff appealed from a judgment dismissing this action after the defendants' general demurrer to his amended complaint had been sustained without leave to amend. Plaintiff, the owner and proprietor of a barber shop, had alleged in his amended complaint that the defendant Board intended and threatened to establish a schedule of minimum prices to be charged for the various items of barber services, as it is apparently authorized to do by section 6556, Business and Professions Code, St. 1941, p. 1471. The prayer of the amended complaint was for an injunction that the defendants be restrained and enjoined from enforcing the provisions of sections 6551–6558, 6594 and 6600.5 of the Business and Professions Code, St.1941, pp. 1470–1472. The basic theory of plaintiff's case is that section 6556 is unconstitutional; no argument is suggested that if the provisions of this section, authorizing the adoption of a schedule of minimum prices, are valid, that any of the other sections referred to is invalid.

[2] Before this appeal was heard the defendant Board held its hearing and made its order establishing a schedule of minimum prices. Insofar, therefore, as it was sought to prevent the adoption of the schedule, the case has become moot. Consequently, unless some other issue presented by the appeal justifies our consideration of the constitutionality of the section 6556, there is no occasion to do so.

[3, 4] Respecting the enforcement of the code sections referred to in the amended complaint, its allegations were quite insufficient to state a cause for equitable relief. This is not surprising in view of the fact that at the time the pleading was filed the schedule had not been adopted and it could not be known whether or not the plaintiff would be hurt by its provisions, neither could it be foreseen that the defendant would be called upon to enforce the schedule against the plaintiff, nor yet the manner which it would adopt for its enforcement. Section 6558, Business and Professions Code, provides: "Any person who violates a minimum price schedule established by the board may be enjoined by a court of competent jurisdiction upon the petition of the board." Surely an injunction will not lie to prevent the board from bringing an injunction action, should the plaintiff decide to violate the schedule.

[5] The nearest approach to an allegation of fact on the subject of enforcement, in the amended complaint, was one to the effect that the defendant had directed the plaintiff to keep certain records, and "that if he does not keep said records, that he will be subjected to the penal provisions of said act." As the "act" has no penal provisions, this allegation adds nothing to the insufficient statement of facts.

The judgment is affirmed. See Brennan v. American Trust Co., 1935, 3 Cal.2d 635, 45 P.2d 207.

DESMOND, P. J., and PARKER WOOD, J., concur.

STROMERSON et ux. v. AVERILL.

Sac. No. 5368.

Supreme Court of California.

Feb. 1, 1943.

Rehearing Granted March 1, 1943.

1. Quieting title 🔑44(4)

In action to quiet title to realty, conflicting evidence supported finding that plaintiff acted as defendant's agent in purchasing realty so as to give defendant title thereto.

2. Appeal and error 🔑994(3)

In action to quiet title to realty, it was within province of trial court to determine credibility of witnesses.

3. Witnesses 🔑362

In action to quiet title to realty, wherein evidence showed that plaintiff acted as defendant's agent in purchasing realty, defendant's conduct in writing his name as assignee, without plaintiff's authority, in contract for sale to plaintiff, was not so reprehensible as to make defendant's testimony inherently unbelievable.

4. Appeal and error 🔑994(3)
Witnesses 🔑397

In action to quiet title to certain realty, impeachment of defendant by showing prior inconsistent statements as to ownership of other realty did not make defendant's testimony inherently unbelievable, but question of his credibility was for trial court.

5. Pleading 🔑129(2)

In action by husband and wife to quiet title to realty, wherein defendant denied plaintiffs' title and alleged that plaintiff husband purchased realty as defendant's agent, failure to deny paragraph of complaint alleging that realty was community property of plaintiffs did not constitute an "admission" that plaintiffs owned realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

6. Vendor and purchaser 🔑54

A vendee under contract to purchase realty acquires "equitable title" in fee simple where down payment is made and possession is given to vendee.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Title".

7. Frauds, statute of 🔑63(4)

A vendee under contract to purchase realty holds an "interest in real property" within statute of frauds where down payment is made and possession is given to vendee. Civ.Code, § 1624, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Real Property".

8. Trusts 🔑101

An agent who holds title for principal is a "trustee" for principal. Civ.Code, § 2219.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

9. Trusts 🔑63½, 92½

The existence of a constructive or resulting trust will render inapplicable provisions of statute of frauds requiring trust in relation to realty to be created or declared in writing and requiring agent's authority to be in writing. Civ.Code, § 852; § 1624, subd. 4; § 2309.

10. Principal and agent 🔑48

"Fiduciary relationship" exists between agent and principal. Civ.Code, §§ 2322, 2228–2239.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relationship".

11. Trusts 🔑101

Where agent is employed to purchase realty and purchases it in his own name and denies the trust, he holds it as a "constructive trustee" even though principal advanced none of purchase price.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

12. Principal and agent 🔑71

An agent's breach of his fiduciary duty to principal constitutes "constructive fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Fraud".

13. Trusts 🔑84, 101

An agent who was orally employed to purchase realty for principal and who obtained contract of purchase in his own name, paying for realty with principal's funds, although they were obtained on agent's loan of credit to principal, was a "constructive trustee" and a "resulting trustee" for principal, and hence statute of frauds did not bar principal's recovery of title from agent. Civ.Code, §§ 852, 853; § 1624, subd. 4; § 2309.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trustee".

14. Trusts ⚷91

A "constructive trust" is predicated on proposition that person holding property is under equitable duty to convey it to another because of consideration springing from fraud or unjust enrichment.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

15. Trusts ⚷62

A "resulting trust" arises where property is transferred under circumstances that raise an inference or presumption that person who makes transfer does not intend transferee to have beneficial interest.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

16. Trusts ⚷76

That purchase price paid for property in cases involving resulting trust is derived from money borrowed from grantee or income from property, and is in fact paid by grantee, is not an obstacle to the creation of a "resulting trust".

17. Trusts ⚷371(2), 373

In action between principal and agent to quiet title to realty, pleadings and findings showing that plaintiff purchased realty as defendant's agent under oral agency contract, and that defendant paid purchase price, were sufficient to establish a "resulting trust" or a "constructive trust" so as to permit defendant's recovery notwithstanding statute of frauds. Civ.Code, §§ 852, 853; § 1624, subd. 4; § 2309.

18. Trial ⚷404(2)

In action between principal and agent to quiet title to realty, wherein agent contended that under statute of frauds, principal could not recover though agent purchased realty as agent because agency contract was oral, no specific finding that resulting or constructive trust existed was necessary where facts were found showing that such relationship existed, since such a finding would be a "conclusion of law". Civ.Code, §§ 852, 853; § 1624, subd. 4; § 2309.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

19. Principal and agent ⚷100(1)

The possession of property by an agent is the possession of the principal.

20. Trial ⚷396(3)

In action between principal and agent to quiet title to realty, finding that principal was in possession of realty was not inconsistent with allegation by principal that agent cultivated realty.

21. Trial ⚷396(3)

In action between principal and agent to quiet title to realty, finding that contract to purchase realty was contract of principal was not inconsistent with allegations and evidence that contract was in name of agent.

22. Trusts ⚷89(5)

To establish resulting trust, evidence must be clear and convincing.

23. Trusts ⚷89(1)

Evidence that agent who had been employed to purchase realty for principal obtained contract of purchase in his own name, paying for realty with principal's funds although they were obtained on agent's loan of credit to principal, was sufficient to establish "resulting trust" for principal's benefit.

24. Appeal and error ⚷1012(1)

The rule that evidence must be clear and convincing to establish a resulting trust is primarily for trial court, the determination of that court being tested by the same rules with relation to substantial evidence that apply in other cases.

25. Evidence ⚷425

In action to quiet title to realty, admission of evidence that plaintiff acted as defendant's agent in signing contract to purchase realty did not violate "parol evidence rule".

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

26. Appeal and error ⚷1050(1)

In action to quiet title to realty, wherein defendant contended that plaintiff purchased realty as defendant's agent, admission of evidence giving general background of relation between plaintiff and defendant and farming enterprise in which they and other parties were engaged was not prejudicial.

27. Appeal and error ⚷1050(1)

In action to quiet title to realty, wherein defendant contended that plaintiff purchased realty as defendant's agent, admission of evidence that plaintiff had never claimed title was not prejudicial.

28. Appeal and error ⚷1050(1)

In action to quiet title to realty, wherein defendant contended that plaintiff purchased realty as defendant's agent, admission of copy of note given for down payment was not prejudicial to plaintiff, where defendant testified that paper admitted was a copy of note, and evidence showed that note was given for amount stated in copy, and also established signatures of defendant and plaintiff.

29. Appeal and error ⚷1050(1)

In action to quiet title to realty, wherein defendant contended that plaintiff purchased realty as defendant's agent, admission of letter stating that plaintiff's counsel had promised to have a conference with plaintiff at which plaintiff would definitely state whether he claimed any interest in contract was not prejudicial to plaintiff.

30. Pleading ⚷93(1)

Inconsistent defenses may be pleaded and one of such defenses cannot be used to destroy the other, or cannot be considered as constituting a "waiver" of the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

31. Appeal and error ⚷891

A petition for leave to introduce additional evidence on appeal, alleging the commencement, after entry of the judgment appealed from, of another action inconsistent with theory on which judgment appealed from was rendered, would not be granted in order to reverse judgment, where the other action was commenced merely to toll the statute of limitations.

32. Quieting title ⚷50

In action to quiet title to realty, wherein defendant contended that plaintiff purchased realty as defendant's agent and such contention was upheld, court should take accounting, and ascertain obligations plaintiff had assumed, value of his services, and amount of his expenditures as agent, so as to require defendant to do equity before recovering title.

33. Principal and agent ⚷85

Unless otherwise agreed, principal must reimburse agent for, or exonerate him from, authorized payments made by agent on behalf of principal and payments and obligations under contracts on which agent is authorized to make himself liable.

34. Trusts ⚷374

Where resulting or constructive trustee takes title with beneficiary's consent, he is entitled to reimbursement.

◆

In Bank.

Appeal from Superior Court, Madera County; Ernest Klette, Judge Assigned.

Action to quiet title by H. C. Stromerson and wife against Roger Averill. From a judgment for defendant, plaintiffs appeal.

Reversed and remanded with directions.

For prior opinion, see 126 P.2d 392.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

Barcroft & Barcroft, of Madera, and David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

CARTER, Justice.

In an action by plaintiffs, husband and wife, to quiet title to 562 acres of land, defendant in his answer claimed title thereto asserting that plaintiff, H. C. Stromerson, as defendant's agent had entered into a contract to purchase the land from Miller & Lux, Inc., a corporation, for defendant. From a judgment for defendant, plaintiffs appeal.

Prior to 1933, defendant, Roger Averill, was engaged in farming operations in the San Joaquin Valley. Two men, Lincoln and Davis, were working for him in that enterprise. Plaintiff, H. C. Stromerson, and defendant had been friends of long standing. While said plaintiff was residing in Los Angeles it was agreed between him and defendant that Stromerson would move to Madera County where he would be trained to be a farmer and employed by defendant in the latter's farming activities and be paid a salary. Stromerson took the position of foreman; Lincoln was also a foreman while Davis was the superintendent. A parcel of land with an area of 160 acres was purchased from Miller & Lux, Inc., by contract in Stromerson's name as vendee. All the payments were later made under the contract and a deed was executed by the vendor to Stromerson as grantee. Presumably that parcel of land was the same that was involved in an action by Stromerson against Averill in which the former's title was quieted against the latter. An appeal from that judgment was pending when the instant action was tried; the judgment was thereafter affirmed. Stromerson v. Averill, 39 Cal.App.2d 118, 102 P.2d 571. That parcel was leveled and prepared for cultivation, a house was built on it for Stromerson's use and he resided therein. Some property stood in the name of Averill and other in the names of Lincoln and Davis. All the properties were farmed together as a whole. Prior to March 6, 1936, Averill entered into negotiations with Miller & Lux, Inc., to purchase the 562 acre parcel involved in this litigation which is contiguous to the 160 acres, above-mentioned. Averill told Stromerson he had bought the 562 acres. A contract of purchase was executed by Miller & Lux, Inc., as vendor and Stromerson, as vendee, providing that title would be conveyed upon the payment of the purchase price which was $16,876.50, payable $1,775 down, $334.50 on May 20, 1936, $1,054.75 on April 20, 1937, $1,054.74 on December 15, 1937, and the balance in nine installments payable annually commencing on March 6, 1938. All the payments falling due under the contract have been made. Averill made the down payment from funds borrowed from a Mr. Allen to whom he gave a promissory note signed by himself, Davis and Stromerson. Most of the principal of this note was subsequently paid by moneys coming from accounts in the names of defendant's associates which in turn were created by advances from the San Joaquin Cotton Oil Company. This company advanced money to finance farming operations in the San Joaquin Valley. Averill was no where mentioned in the contract of purchase. Averill requested Stromerson to take the contract of purchase in his name. The farming operations were financed chiefly through the San Joaquin Cotton Oil Company. A budget was submitted to that company setting forth the estimates of the advances necessary for the operation of the various parcels of land. A chattel mortgage upon the crops to be produced was given to secure the advances, the mortgagor, at Averill's request, being the person in whose name the land stood. The notes for which the mortgages were given to secure were endorsed by Averill. The advances were repaid chiefly by the returns from the crops raised. Bank accounts were kept, first in the name of Averill, Lincoln, Davis and Stromerson, from which checks were issued to defray the farming expenses. Later the accounts were designated from time to time, Averill and associates, Stromerson, and Lincoln and Stromerson. Advances received from the San Joaquin Cotton Oil Company were paid into the accounts, the one receiving it depending upon the state of depletion at the particular time. Payments on the contract of purchase were made from these accounts. Stromerson drew salary checks on the accounts. All the land was farmed as a unit operation. Davis and Averill gave Stromerson orders with respect to farming the 562 acres which he carried out. In connection with the agency, Averill testified on cross-examination:

"Q. And he (Stromerson) was your agent for all purposes? A. Yes, sir.

"Q. What were his duties, under the agency? A. Well, he carried the contract in his name, and he carried the deed to the 160 acres in his name, the same as Davis and the same as Lincoln did."

Averill had offered to form a trust of the properties farmed and give Stromerson, Lincoln and Davis an interest. When the latter were discussing such offer as set forth in a trust agreement, Stromerson stated that he would prefer to have an 80-acre parcel as his own. He asserted no claim to the 562 acres, and stated that if the three of them would "stick together" they could get some land from Averill.

Under these circumstances we believe that the evidence was sufficient to sustain the conclusion that plaintiff Stromerson was acting as Averill's agent in the purchase of the 562 acres of land. Plaintiffs discuss at length the testimony given by Stromerson but it does nothing more than create a conflict in the evidence which has been resolved against them by the trial court.

[2, 3] Reference is made to conduct on defendant's part in regard to an assignment of the contract of purchase. Stromerson assigned the contract in blank and it was delivered to the San Joaquin Cotton Oil Company as security for advances. Defendant obtained the contract from that

company and wrote his name in as assignee and endeavored to have the vendor accept the assignment. The vendor refused. Later, at the demand of the company, defendant drew a line through his name and signed a statement on the contract that he withdrew as assignee. It was within the province of the trial court to determine the credibility of the witnesses. Defendant testified that he supposed he had a right to fill his name in the blank space as assignee although he stated that Stromerson had not so authorized him. As the evidence shows that Stromerson was acting as defendant's agent, the contract and the rights thereunder were defendant's property. Hence, it cannot be said that his conduct was so reprehensible as to make his testimony inherently unbelievable.

[4] Plaintiffs particularly refer to asserted admissions on the part of defendant that they were the owners of all rights in the property under the contract. The instances to which reference is made are not necessarily admissions, and do not require a reversal of the judgment. Prior to the execution of the contract of purchase Stromerson applied for and obtained a federal land bank loan on the 160 acres (not here involved) and defendant admitted that if the person to whom the application was made said that he told him plaintiffs were the owners, he did so. It is a crime to make false statements in obtaining such loans. However, the parcel involved is not in question in the instant litigation, and it was at most merely an impeachment on a collateral matter. We cannot say that the credibility of defendant was so impaired that his evidence could not be believed by the trial court.

In connection with the above loan defendant appeared as a creditor of Stromerson and signed an agreement that the receipt of $900 should constitute a full satisfaction of his claims against plaintiffs. As above indicated that occurred prior to the transaction involving the property here in question. The purpose of having the land in the names of the various associates and having them apply for the loans such as was done on the 160 acres, was because of a restriction on the amount that could be loaned to one person. Mr. Holliday, the man to whom application was made knew of that practice. The reason for defendant's claim of $900 from the loan was because he desired the funds to pay for pumps. He never considered there was any obligation owing from plaintiffs to him; he claimed the property instead.

In connection with the payment of the note given to Allen for the down payment on the purchase price, certain checks were received from Stromerson by defendant, but they were demanded by the latter from the former as amounts to which he was entitled from an account created by the farming operations. They did not constitute a loan.

Reference is made to other asserted admissions of defendant but they are either not necessarily inconsistent with his claim that Stromerson was his agent, or only concern the credibility of witnesses with which we are not concerned.

[5] It is contended by plaintiffs that there was a fatal admission in defendant's answer which is contrary to the finding that defendant was the owner of the property. The claim is untenable. In their complaint plaintiffs alleged that defendant claimed an interest in the contract of purchase and the property embraced therein but that defendant's claim was without right. In a separate allegation, paragraph III of the complaint plaintiffs alleged: "That plaintiffs * * * are husband and wife, and that the property described herein is the community property of said H. C. Stromerson and Leone Stromerson, his wife." Although that paragraph was not denied by defendant he did deny that plaintiffs entered into the contract and that the plaintiffs are the owners of the property or the contract; and alleges that Stromerson acted as defendant's agent, and that the contract and property are owned by defendant and plaintiffs have no interest therein. Under these circumstances there cannot be any doubt that there was a sufficient denial to raise the issue. The failure to deny paragraph III did not constitute an admission that plaintiffs were the owners. That paragraph was concerned with the character of plaintiffs' ownership as between themselves if they were owners at all. Their ownership under any circumstances was denied.

It is asserted by plaintiffs that the statute of frauds is a bar to defendant's recovery. Particular mention is made of Civil Code, section 1624(4), requiring a writing subscribed by the party to be charged as an essential prerequisite for "an agreement * * * for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged." And section 2309 requiring that authority to enter into a contract required by law to be in writing must be given by an instrument in writing. Defendant asserts that those sections may be relied upon only by the principal as against claimed liability to a third person on a contract made with the latter for the principal; and further that there is no statute of frauds affecting the case, and that he is not therefore required to and does not rely upon either a constructive or resulting trust to escape the statute.

[6, 7] Consideration must be given however to section 852 of the Civil Code which reads: "No trust in relation to real property is valid unless created or declared: 1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; 2. By the instrument under which the trustee claims the estate affected; or, 3. By operation of law." First it must be determined whether the interest of a vendee under a contract to purchase real property where a down payment is made and possession is given to him, is real property. Under such circumstances the vendee acquires an equitable title to the property in fee simple. Elliott v. McCombs, 17 Cal.2d 23, 109 P.2d 329; Miller v. Dyer, 20 Cal.2d 526, 127 P.2d 901, 141 A.L.R. 1428; 25 Cal.Jur. 603. The interest of a vendee under a contract in the circumstances here presented holds an interest in real property within the contemplation of the statute of frauds. 27 C.J. 201; Williston on Contracts, Rev.Ed. vol. 2, § 491; and cases collected 38 A.L.R. 1348. It therefore must follow that the contract to purchase the property in the case at bar, conferred the equitable title thereto upon Stromerson. The instrument was in his name alone as vendee, hence the equitable title ran to him. It was the same as if he had received the deed from the vendor except that under those circumstances he would have held the legal rather than the equitable title. Any agreement to transfer such equitable title would be within the statute of frauds. Likewise, a trust in relation thereto would be a "trust in relation to real property" as contemplated by section 852 of the Civil Code.

[8] The agency agreement between Stromerson and defendant, which as we have seen the evidence established, necessarily included a promise upon Stromerson's part to take the equitable title in his name, hold it for defendant and transfer it to him. That agency agreement was therefore in effect a trust agreement also. An agent who holds title for the principal is a trustee as well as agent for the principal. See Civ.Code, § 2219; Restatement, Agency, § 423.

[9] The rules with respect to the rights of undisclosed principals or disclosed principals where such disclosure appears only from evidence outside of the contract, it being made solely in the agent's name, to the person with whom the contract is made, do not affect the foregoing conclusion. Those principles are concerned only with the liabilities as between the agent and the other contracting party, and the latter and the principal. Furthermore, it has been held that those principles may not be invoked in violation of the statute of frauds. Corporation of America v. Harris, 5 Cal.App.2d 452, 43 P.2d 307. The essence of the matter is that the equitable title was acquired by Stromerson at defendant's request to hold for him. The agency agreement was therefore in effect an agreement to hold real property in trust, and unless it can be said there is a resulting or constructive trust which need not be in writing (Civ.Code, § 852), defendant may not enforce the agency agreement. The existence of a constructive trust or resulting trust will render inapplicable the statute of frauds whether we consider section 852 of the Civil Code, having to do with trusts, or Civil Code section 1624(4) and 2309, having to do with the requirement that an agent's authority be in writing, assuming that the latter sections are applicable in a controversy between the agent and his principal.

[10-12] There can be no doubt that a fiduciary relationship exists between an agent and his principal. Civ.Code, §§ 2322, 2228–2239; 1 Cal.Jur. 788. It should be equally clear that where an agent is employed to purchase real property and purchases it in his own name and denies the trust, he holds it as a constructive trustee, even though the principal advanced none of the purchase price. That principle follows from the rule that the breach on the part of the agent of his fiduciary duty constitutes constructive fraud. Such a trust is not banned by the statute of frauds. Civ.Code, § 2224; Restatement, Agency, § 414; Restatement, Restitution, § 194; Williston on Contracts, Rev.Ed., vol. 4, § 1024; and cases collected 42 A.L.R. 10, 54 A.L.R. 1195, 135 A.L.R. 232. Such cases as Bauman v. Wuest, 32 Cal.App. 217, 162 P. 434, representing a contrary view, failed to consider the existence of a constructive trust ensuing from the constructive fraud resulting from the breach of the fiduciary relation, discussing only a resulting trust, and spring from an early English case, Bartlett v. Pickersgill, 1 Eden 515, Id., 1 Cox 15, which has been overruled. See Heard v. Pilley, L.R. 4 Ch.App. 548; Rochefoncauld v. Boustead, 1 Ch. 196; Williston on Contracts, Rev.Ed., vol. 4, § 1024. The same result follows from an application of the above rule where the property was taken in the name of the agent at the principal's request, as distinguished from the case where it was to be taken in the agent's name contrary to the instructions of the principal. The breach of the fiduciary relation is even more pronounced because by having the agent take the property in his own name shows a greater degree of trust and confidence existing between the principal and the agent. The only difference is that the breach of the fiduciary relation comes with the repudiation by the agent of his duty to hold the property for his principal when he repudiates his trust, rather than a breach in the inception when he acquires property in his name for himself when he should have acquired it for the principal and in the latter's name.

[13-16] Stromerson thus held the property as constructive trustee for defendant. A constructive trust is predicated upon the proposition that the person holding the property is under an equitable duty to convey it to another because of considerations springing from fraud or unjust enrichment, while ordinarily a resulting trust arises where property is transferred under circumstances that raise an inference or presumption that the person who makes the transfer does not intend the transferee to have the beneficial interest, the intention of the parties being a factor of importance. In the instant case it may well be said that Stromerson held the title for defendant as a resulting trustee. Where a transfer of property is made to one person and the consideration is paid by or for another, a trust is presumed to result in favor of the person by or for whom the payments are made. Civ.Code, § 853. Where, as here, Stromerson was acting as defendant's agent, and assuming that the funds for the payment on the contract of purchase came from an account in his name as agent in the farming operations, which account was supplied by advances by the San Joaquin Cotton Oil Company on crops to be raised on the various properties and income from produce, the funds were those of defendant, principal. It is not significant that the agent Stromerson signed the note for the down payment and also the contract, thus probably incurring personal liability, because he was loaning his credit to his principal; even if he advanced the funds necessary from his own assets, such would be a loan to the principal. In either event it would be implicit in the agency-principal relation between Stromerson and defendant that the latter would reimburse the former for any outlays made on his behalf, and protect him from loss resulting from the assumption of personal liability. The fact that the purchase price paid for property, in cases involving resulting trusts, is derived from money borrowed from the one to whom title is transferred, or the income from the property, and is in fact paid by the grantee is not an obstacle to the creation of a resulting trust; the grantee may advance or loan his credit as well as the money. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478.

[17, 18] We are not inclined to reverse the judgment on the ground that neither a resulting or constructive trust was pleaded. The trial of the case was long, the testimony covering 1,300 pages of transcript. The case was vigorously contested and all of the facts explored. It is alleged in the complaint that Miller & Lux, Inc. was the owner of the property and on March 6, 1936, it and Stromerson entered into the contract here in question; that by reason of the contract Stromerson is the owner of the contract and the equitable owner of the property; that defendant claims an interest in the equitable title to the property and the contract but his claim is without right and he has no interest therein. Defendant in his answer admits that he claims an interest in the property, denies that Stromerson entered into the contract and avers that the contract was the property of defendant; that the contract was signed by Stromerson at defendant's request as his agent; denies that Stromerson is the owner of the property or the equitable owner of the property, or that Stromerson was in possession of the property and alleges that Stromerson's use and cultiva-

tion of the property was as the defendant's agent. The court found that Miller & Lux, Inc. entered into the contract with defendant; that defendant executed the contract by and through Stromerson, and Stromerson in executing the same acted as defendant's agent, and "for the sole use and benefit of" defendant; that the contract belonged to defendant and he held possession of the lands and "has paid all sums which have been paid on account of the purchase price, provided for in said written agreement * * *"; that defendant is the equitable owner of the property, and Stromerson has no interest therein. Those pleadings and findings embrace substantially all of the facts necessary to establish a resulting or constructive trust. It appears therefrom that the agency existed; that the contract was made by Stromerson as defendant's agent; and that the purchase price was paid by defendant. The resulting or constructive trust flowing therefrom is a conclusion of law from the facts established and need not be specifically found in those terms. With the inferences and implications which flow from those findings we are satisfied that they are sufficient under the circumstances to establish a resulting or constructive trust.

[19-21] Nor is there any inconsistency between the pleadings and the findings or the latter and the evidence. True, it is found that defendant was in possession of the property while it is alleged by defendant that Stromerson cultivated it, but the possession of the agent is that of the principal. The finding that the contract was that of defendant when it was in the name of Stromerson, means nothing more than that the entire beneficial interest in the contract and property was vested in defendant because of the circumstances presented.

[22-24] Plaintiffs refer to the rule that the evidence must be clear and convincing to establish a resulting trust. We are convinced from the record that the evidence was sufficient. That rule is primarily for the trial court, the determination of that court being tested by the same rules with relation to substantial evidence as apply in other cases (25 Cal.Jur. 248.)

[25] For several reasons it cannot be said that the parol evidence rule was violated in admitting evidence to vary the terms of a written agreement (the contract of purchase) in showing that Stromerson was acting as defendant's agent in signing the contract because the contract was in his name alone. Suffice it to say that the contract directly involved was the agency contract not the contract of purchase. The latter contract was not the written memorial of the relation between Stromerson and defendant.

[26] Plaintiffs make many assignments of error with respect to the introduction and rejection of evidence. At the outset it must be remembered, in considering whether prejudicial error was committed, that this is an equity case tried by the court without a jury. Plaintiffs complain of the admission of evidence with relation to defendant's first contact with Stromerson with reference to going to Madera County, and of Lincoln and Davis having title to property in their names for defendant and the status between them and defendant. Those matters give the general background of the relations between Stromerson and Averill and the complete picture of the farming enterprise in which all were engaged. Stromerson had been advised by defendant of the relationship between Davis and Lincoln and defendant in respect to the lands, title to which stood in their names. Stromerson working as a foreman, Davis as superintendent, and Lincoln as foreman, employed on the project as a whole. The evidence had some relevancy. In any event it was not prejudicial.

[27] It is urged that Lincoln and another employee were improperly permitted to testify that Stromerson never made any claim to be the owner of the property. While it may be generally true that evidence of a person's failure to assert a claim to property is not admissible unless the circumstances require him to speak, all the circumstances here indicate the lack of prejudicial error.

[28] A copy of a note given to Allen for the down payment on the purchase price of the property was introduced over plaintiffs' objection that no proper foundation was laid. Although on cross-examination defendant would not say the copy was an exact duplicate of the original, the whereabouts of which was unknown, he did testify on direct examination that it was a copy. There was no serious dispute that the note was given for the amount stated in the copy, the difficulty being in regard to the signatures it bore.

Defendant testified that he executed it, and it appeared that Stromerson also signed it.

[29] Objection is made to the acceptance in evidence of a letter from counsel for Miller & Lux, Inc. to defendant. It is not clear that the objection to the admission of the letter was not withdrawn by plaintiffs. In any event no prejudicial error flowed from the mere statement therein that the writer had contacted plaintiffs' counsel and the latter "had promised to have a conference with Mr. Stromerson * * * at which time Mr. Stromerson would definitely state whether or not he claims any interest in this contract." That did not necessarily carry the inference that Stromerson was not claiming the property.

Other errors are claimed with reference to the reception of evidence. We are convinced from an examination of the record that in some of the instances referred to no error occurred, and in others if error was committed, it was not prejudicial.

It is claimed that inasmuch as in another action a court came to a contrary conclusion as to the ownership of the 160 acres which was affirmed on appeal (Stromerson v. Averill, supra), the present judgment may not stand because wholly inconsistent therewith. We are not so persuaded. The 562 acres here involved was purchased some time after the said 160 acres, and while it was all involved in the same general dealings between defendant and Stromerson and the farming operations, we cannot say that squarely contrary results have been reached in separate judgments on the same issue.

[30, 31] Plaintiffs have filed a petition in this action for leave to introduce additional evidence. It appears therefrom that since the entry of the judgment, the appeal from which is here considered, defendant has commenced by filing a verified complaint in the Superior Court of Fresno County, an action against Stromerson to recover $35,572.69 claimed to have arisen from an open book account and representing "monies loaned and advanced" by defendant to Stromerson; and that a writ of attachment has been issued in that action and levied upon the property here in question. In affidavits accompanying the petition it is stated that the major portion of the sum claimed in the complaint is money "claimed to have been loaned by (defendant) * * * to (Stromerson) * * * to enable plaintiffs to pay for leveling, plowing, cultivating and otherwise improving" the property here involved. It is asserted by plaintiffs that such conduct on defendant's part consisted in the assumption by him of a position wholly inconsistent with that taken in the instant action in which he claims Stromerson acted as his agent and had no beneficial interest in the property; that defendant in that action is attaching property which he asserts in the instant action is his own; and that such conduct renders defendant's testimony inherently improbable and false. Defendant stated at the oral argument of this appeal that the action was instituted to prevent the running of the statute of limitations. We are not inclined to grant plaintiffs' petition in order to reverse the judgment. The situation is in some respects analogous to the pleading of inconsistent defenses in the same manner. It is the general rule that one of such defenses cannot be used to destroy or considered as constituting a waiver of the other. See Miller v. Chandler, 59 Cal. 540; Billings v. Drew, 52 Cal. 565; Harding v. Harding, 148 Cal. 397, 83 P. 434; Buhne v. Corbett, 43 Cal. 264; Calexico Lumber Co. v. Emerson, 54 Cal.App. 239, 201 P. 612; 21 Cal.Jur. 134. As we have seen, defendant commenced the second action merely to toll the statute of limitations if the judgment in the instant action was reversed on this appeal. Plaintiffs' remedy is to plead, for whatever effect it may have, the judgment in the instant action as a defense to the second action.

[32-34] We agree with plaintiffs that the court has failed to require defendant to do equity in the case and further proceedings should be had. The nature of the action has been heretofore discussed. Such cases as this should not be tried piecemeal. The entire issue between the parties should be adjusted. As it stands, Stromerson assumed personal liability under the contract to purchase the property. If defendant does not discharge the obligation, it is shouldered upon Stromerson, defendant's agent. Further, it appears that there may be outstanding notes and chattel mortgages upon which Stromerson is liable in connection with his conduct as an agent for defendant, and the court made no finding with respect to the financial obligation, if any, existing between the parties. As we have seen, the decree determines that the contract and property belong to de-

fendant and that Stromerson has no interest therein. It rests upon a theory of agency and a constructive or resulting trust arising therefrom. There necessarily was implicit in the agency agreement an agreement upon the part of defendant, principal, to reimburse the agent Stromerson for any detriment suffered by him in carrying out his duties. It is the general rule that unless otherwise agreed, the principal owes a duty to his agent to reimburse him for or exonerate him from authorized payments made by the agent on behalf of the principal, and payments and obligations under contracts upon which the agent is authorized to make himself liable. Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380; Dolman Co., Inc., v. Rubber Corporation of America, 109 Cal.App. 353, 293 P. 129; Restatement Agency, § 439. It does not appear that there was any agreement between defendant and Stromerson that the former was not to exonerate the latter from or reimburse him for obligations incurred by the latter on behalf of the former, but on the contrary the circumstances point to an implied agreement that such exoneration and reimbursement would be made. Also, where the resulting or constructive trustee takes title with the consent of the beneficiary he is entitled to reimbursement. See Watson v. Poore, supra; Robles v. Clarke, 25 Cal. 317; Woodard v. Wright, 82 Cal. 202, 22 P. 1118; Milloglav v. Zacharias, 33 Cal.App. 561, 165 P. 977. The conduct of Stromerson in giving his personal credit on the contract and the crop mortgages was at the direction of defendant, his principal. He may also have rendered services and made expenditures for which he has not been reimbursed. The trial court should therefore take an accounting, ascertain the nature and extent of the outstanding obligations which Stromerson has assumed, the value of any services he has rendered and the amount of any expenditures he has made in the course of his duties as agent for defendant including the contract of purchase, and make such order in the premises as a condition to defendant's recovery as will protect plaintiffs from liability under those obligations and reimburse them for such services and expenditures if any.

The judgment is reversed and the cause remanded to the trial court to take such further proceedings as may be necessary to determine what if any obligations plaintiffs or either of them have assumed as agent or trustee for defendant, and any amounts due from defendant to plaintiffs or either of them arising out of the transaction in relation to the acquisition, development or operation of the property involved in this action, and render judgment accordingly, making any amount due plaintiffs a lien upon defendant's interest in said property, and providing for the release, discharge and exoneration of plaintiffs and each of them from any obligations in connection with the purchase, development or operation of said property, and thereupon make a decree quieting defendant's title to said property subject to the payment of such lien and the discharge of said obligations by defendant.

SHENK, CURTIS, and TRAYNOR, JJ., concurred.

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21 Cal.2d 498

In re RYAN'S ESTATE.

LEARY v. SCULLY et al.

Sac. 5448.

Supreme Court of California.

Jan. 23, 1943.

As Modified on Denial of Rehearing Feb. 19, 1943.

1. Descent and distribution 🔑41

At common law, inheritance descended, on failure of lineal descendants, to decedent's collateral relations of first purchaser's blood.

2. Descent and distribution 🔑39, 41

At common law, decedent's kindred on both paternal and maternal side succeeded to his property where it was impossible to trace descent, but succession was confined to those of decedent's whole blood.

3. Descent and distribution 🔑41

The common law rule, limiting descent to decedent's whole blood kindred, applied where first purchaser was known and decedent's collateral relative of half blood was known to be of such purchaser's blood, as well as where it was impossible to trace descent.

4. Descent and distribution 🔑41

Decedent's half blood kindred, who are of blood of ancestor from whom estate came to decedent, share therein equally with decedent's whole blood kindred of such ancestor's blood under statute. Probate Code, § 254.

5. Descent and distribution 🔑41

In California, there is no general rule limiting descent to decedent's kindred who are of first purchaser's blood or of decedent's immediate ancestor's blood.

6. Descent and distribution 🔑14

Under statute providing that intestate's half blood kindred who are not of blood of intestate's ancestor, from whom inheritance came to intestate, must be excluded from inheritance, such kindred are excluded in favor of both whole and half blood kindred of such ancestor's blood. Probate Code, § 254.

7. Descent and distribution 🔑14

Under statute respecting inheritance by intestate's kindred of half blood, an intestate's maternal half blood cousins are excluded from paternal ancestral property, which must be divided equally among intestate's whole blood cousins and paternal half blood cousins, who in turn are excluded from maternal ancestral property, which must be distributed to full blood cousins and maternal half blood cousins. Probate Code, § 254.

8. Descent and distribution 🔑41

The common law canon, limiting descent to decedent's kindred of first purchaser's blood, applied only to real property.

9. Descent and distribution 🔑6

Generally, statutes relating to descent of ancestral estates do not cover personal property.

10. Descent and distribution 🔑75

At common law, words "inherit" and "inheritance" related to real property, which descended to deceased owner's heirs.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherit" and "Inheritance".

11. Descent and distribution 🔑76

In California, personal property, as well as real property, passes to deceased owner's heirs rather than his personal representative.

12. Wills 🔑466

The word "devise" has not acquired broadened meaning as applicable to personalty, as well as realty, to same extent as words "inherit" and "inheritance," but corresponding word for testamentary gift of personal property is "bequest".

See Words and Phrases, Permanent Edition, for all other definitions of "Devise" and "Bequest".

13. Descent and distribution 🔑41

Generally, decedent's kindred of half blood have same rights in succession as those of whole blood, in absence of express statutory limitation on succession by half blood kindred.

14. Descent and distribution 🔑14

A discrimination against decedent's half blood kindred in succession to ancestral estate is the exception and should not be extended beyond obvious intent.

15. Descent and distribution 🔑14, 41

The statute providing that intestate's half blood kindred inherit equally with those of whole blood, unless inheritance came to intestate by descent, devise or gift of one of his ancestors, in which case kindred not of such ancestor's blood must be excluded from inheritance in favor of those who are, is inapplicable to personal property. Probate Code, § 254.

16. Statutes 🔑199

Whether word "devise" in statute should be interpreted as including personal property or applying solely to real property depends on legislative intent, which, when not expressed, must be ascertained from all circumstances.

17. Statutes 🔑181(2), 217

In ascertaining whether legislature intended word "devise" in statute to include personalty or to apply solely to realty, courts may consider historical background of statute and consequences of particular interpretation.

18. Descent and distribution 🔑14

The words "devise" and "gift" in statute providing that where inheritance came to intestate by descent, devise or gift of one of his ancestors, intestate's half blood kindred who are not of such ancestor's blood must be excluded from inheritance in favor of those who are, are limited to real property. Probate Code, § 254.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

19. Descent and distribution ⚷14

The ancestral character of property is destroyed by its alienation.

20. Descent and distribution ⚷14

Under statute providing that where inheritance came to intestate by descent, devise or gift of one of his ancestors, his half blood kindred who are not of such ancestor's blood must be excluded from inheritance in favor of those who are, such exclusion operates only as to specific property coming from a specific ancestor and remaining vested in heir in kind until his death intestate. Probate Code, § 254.

◆

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Proceedings in the matter of the estate of Katherine Ryan, deceased, by Elizabeth Leary against Helen Scully, Kathryn Neville Elliott, and others to determine heirship. From an order determining heirship, petitioner, defendant Scully, and two other defendants appeal.

Reversed.

For prior opinion, see Cal.App., 120 P.2d 183.

John F. Quinn and Irving T. Quinn, both of Eureka, for petitioner and appellant.

Hill & Hill, of Eureka, and Lewis T. Sterry, of Los Angeles, for respondents and appellants.

Michael McHugh, Mahan & Mahan, L. E. Mahan, Denver Sevier, and Chris R. Petersen, all of Eureka, for respondents.

Jordan L. Martinelli and Samuel W. Gardiner, both of San Rafael, amici curiae.

WARD, Justice pro tem.

In this proceeding to determine heirship the trial court held that the estate of Katherine Ryan, who died intestate, should be distributed in due course of administration equally to twenty-six first cousins of the deceased. The cousins are both paternal and maternal, and in each line some are of the half blood of the deceased. Elizabeth Leary, the only maternal whole blood cousin, and the three paternal whole blood cousins have filed appeals, which by stipulation are submitted on a single bill of exceptions.

Appellants contend that half blood cousins on the paternal side are excluded by section 254, Probate Code, from sharing in property which came to Katherine Ryan from her mother by descent, devise or gift, and that half blood cousins on the maternal side are excluded from paternal ancestral property.

Section 254, Probate Code, provides: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are." Formerly § 1394, Civ.Code. This case involves particularly the construction of the words "in favor of those who are."

The decedent's mother, Julia Leary Ryan, had a full brother, Jeremiah Leary, and a half sister, Abbie Leary Murray. Appellant Elizabeth Leary, daughter of Jeremiah Leary, is decedent's cousin of the whole blood on the maternal side. The sixteen children of Abbie Leary Murray are decedent's maternal cousins of the half blood.

Similarly, decedent's father, John Ryan, had a full sister, Ellen Ryan Scully, and a half brother, Thomas Neville. The three children of Ellen Ryan Scully are decedent's paternal cousins of the whole blood and are appellants herein. The six children of Thomas Neville are decedent's paternal cousins of the half blood.

The appellants' contention is that as to property which came to Katherine Ryan by descent, devise or gift from her mother, distribution should be made equally to the four whole blood cousins and to the maternal half blood cousins, excluding the six paternal half blood cousins; as to property which came to Katherine Ryan by descent, devise or gift from her father, it should be divided between the four full blood cousins and the six paternal half blood cousins, excluding the sixteen maternal half bloods.

It is not contended that full blood cousins are excluded from sharing in any part of decedent's estate because of its ancestral origin. It is conceded that full blood cousins on the paternal side share in property of the decedent which came to her from her mother, and vice versa.

[1] The problem can be analyzed best by considering the historical background of section 254. The section is a survival

of two common law canons of descent. It was the rule at common law that on failure of lineal descendants the inheritance descended to the decedent's collateral relations who were of the blood of the first purchaser. 1 Jones' Blackstone, p. 1007. For example, using the names which Blackstone employs in his illustrations, George Stiles purchases land, which descends to his son, Geoffrey. Upon the death of Geoffrey, his son John succeeds. John dies without issue. John's paternal uncle, brother of Geoffrey, may succeed, since he is of the blood of George, first purchaser. But John's uncle on the maternal side could not succeed, since not of the blood of George.

The reason for the rule, according to Blackstone, was feudal, "that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person." 1 Jones' Blackstone, p. 1008. It has been said of this explanation: "Attempts have been made to represent it as a specifically feudal rule, one which takes us back to a time when only the descendants of the original vassal could inherit; but such attempts seem to be unnecessary; a rule whose main effect is that of keeping a woman's land in her own family is not unnatural and may well be very ancient." 2 Pollock and Maitland, History of English Law, 2d Ed., p. 300.

[2] If a point was reached where it was impossible to trace descent back further, the law, as it developed, permitted descendants on both sides to succeed. For instance, if upon the death of John Stiles it was known that his grandfather George Stiles had inherited the property, but it could not be known whether George had inherited from his father, Walter Stiles, or his mother, Christian Smith, the law would admit the descendants of George Stiles either paternal or maternal in their due order to be heirs of John Stiles. 1 Jones' Blackstone, p. 1010. But while permitting the kindred of the decedent on both sides to succeed, the common law confined succession to those who were of the whole blood of the decedent. According to Blackstone, this was because there was a greater probability, although not a certainty, that collateral relatives of the decedent would be of the blood of the first purchaser if his whole blood relatives. "* * * The whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his." I Jones' Blackstone, p. 1018.

[3] The rule limiting descent to whole blood kindred of the decedent was not, however, confined to cases where it was impossible to trace descent, but was applied where the first purchaser was known and the collateral relative of the half blood was known to be of the blood of such purchaser. That is, if John Stiles had a half brother, born of his father but of a different mother, John's half brother could not inherit from John's estate which was known to have descended to John from the common father. The estate would pass to more remote collaterals, in default of which it would escheat, rather than pass to John's half brother. 1 Cooley's Blackstone (4th ed.) pp. 615, 618; 1 Jones' Blackstone, pp. 1014, 1019. As applied to half blood relatives of the decedent known to be of the blood of the first purchaser this canon of descent is not based upon reason and was in fact condemned by Blackstone. 1 Jones' Blackstone, p. 1019.

Pollock and Maitland say of the rule excluding half bloods from all right of inheritance as collateral kindred: "* * * we strongly suspect that the rule that was ultimately established had its origin in a few precedents. About such a matter it is desirable that there shall be a clear rule; the import of the rule is of no great moment. Our rule was one eminently favourable to the king; it gave him escheats; we are not sure that any profounder explanation of it would be true." 2 History of English Law, 2d Ed., supra, p. 305.

The rule excluding half bloods has been modified in England. 16 Am.Jur. 838. In this country a number of states have statutes derived from the common law which provide for descent of ancestral property among those who are of the blood of the ancestor from whom the property came to the decedent. 4 Tiffany, Real Property, 3d Ed., p. 386; 16 Am.Jur. 836; McDonnall v. Drawz, 212 Minn. 283, 3 N.W.2d 419, 141 A.L.R. 976. Under such statutes succession is by those heirs of decedent who are of the blood of the ancestor from whom the estate passed immediately to the intestate, rather than of the blood of a more remote "first purchaser." 16 Am.Jur. 839; 4 Tiffany, supra, p. 387. Various restrictions are also made by statutes in this country on inheritance by kindred of the half blood. 4 Tiffany, Real Property, supra, p. 383; 16 Am. Jur. 833. Section 254, Probate Code, combines features of both doctrines.

[4] The common law rule excluded half bloods entirely from inheriting real property. Section 254 only excludes them from succeeding to property which came to the decedent by descent, devise or gift from an ancestor where they are not of the blood of such ancestor. Where the half blood kin are of the blood of the ancestor from whom the estate came to the decedent, they share in it. There is no uncertainty in the meaning of section 254 in this particular. Under the section the paternal half blood cousins of Katherine Ryan are entitled to share in property which came to her from her father equally with paternal whole blood cousins. The disputed question is as to the right of the paternal half blood cousins to share in property which came to Katherine Ryan from her mother, and as to the right of maternal half blood cousins to share in property which came to her from her father.

[5] Under the common law full blood kindred were excluded where not of the blood of the first purchaser from whom the decedent derived the estate. In this state a general rule limiting descent to those who in fact or fiction are of the blood of the first purchaser or of the decedent's immediate ancestor has never obtained. In In re Pearsons' Estate, 110 Cal. 524, 42 P. 960, the decedent left as his heirs aunts and uncles, all of the whole blood, both on the paternal and maternal sides. The court upheld the contention of appellants, maternal aunts and uncles, that they could not be excluded from property which came to the decedent from his father, which property constituted the larger part of his estate. The court held that the exclusionary provision of section 254 applied only to kindred of the half blood. That section commences: "Kindred of the half blood inherit equally with those of the whole blood." If the section had stopped there, kindred of the half blood would have been in exactly the same position as those of the whole blood, but the section continues with the "unless" clause. The court held that such clause made an exception to the rule that kindred of the half blood inherit equally with those of the whole, and as an exception to that rule it applied only to kindred of the half blood, who were excluded if not of the blood of the ancestor from whom the property came to the decedent. This means, as applied to the instant case, that appellant Elizabeth Leary, cousin of the whole blood on the maternal side, is not to be excluded from property which came to decedent from her father, although she is a maternal cousin, nor are the other appellants, whole blood paternal cousins, to be excluded from property which came to decedent from her mother. The parties concede this to be the law.

A rule excluding half bloods not of the blood of the ancestor from whom the decedent derived estate, while permitting whole blood relatives not of the blood of the ancestor to participate is without reason. Why should Elizabeth Leary, full blood maternal cousin, share in estate which came to decedent from her father, while half blood maternal cousins are excluded? Elizabeth Leary, equally with the half blood maternal cousins, is not of the blood of the decedent's father. Chancellor Kent's comment is that the laws of this country in respect to inheritance by the half blood seem to have been the result of accident or caprice, rather than the dictate of principle. 4 Kent's Commentaries, 406, as quoted 61 Am.Dec. 656.

[6] Respondents' contention is that in the particular circumstances of this case section 254 does not exclude half blood cousins not of the blood of the ancestor from sharing in ancestral property. To develop the argument it is pertinent to quote section 254 again: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance *in favor of those who are*." (Italics added.)

The italicized words were added when the Probate Code was adopted in 1931. Respondents rely on them and on a line of cases decided before the amendment for the proposition that heirs of the half blood not of the blood of the ancestor are excluded only in favor of heirs of the *whole blood* who are of the blood of the ancestor. In re Estate of Sayles, 215 Cal. 207, 8 P.2d 1009; In re Estate of Edwards, 202 Cal. 130, 259 P. 440; In re Estate of Belshaw, 190 Cal. 278, 212 P. 13; In re Estate of Smith, 131 Cal. 433, 63 P. 729, 82 Am.St. Rep. 358; In re Estate of Warnock, 36 Cal.

App.2d 464, 97 P.2d 831. In view of the plain import of section 254, paternal half bloods cannot be excluded from sharing in property which came to the intestate from her father, and, under the decision in the Pearsons case, supra, the maternal full bloods cannot be excluded from paternal ancestral property herein, but must receive equal shares with the paternal full bloods. This means, in respondents' analysis, that if maternal half bloods are excluded from paternal ancestral property, while maternal whole bloods and paternal half bloods share it with paternal whole bloods, the exclusion of maternal half bloods takes place not only in favor of paternal whole bloods, but also in favor of the single maternal cousin of the full blood and the paternal cousins of the half blood. Since the maternal half bloods in the circumstances cannot be excluded from paternal ancestral property "in favor of" paternal full bloods only, they cannot be excluded at all in this case, in respondents' view. The result, according to respondents, is that all cousins of decedent share equally.

Acceptance of respondents' view would involve these consequences. If decedent Katherine Ryan left surviving her maternal cousins of the half blood and paternal cousins of the whole blood, the maternal half blood cousins would be excluded from paternal ancestral property. But if she left surviving her maternal cousins of the half blood and paternal cousins of the half blood, or paternal cousins of both the whole and half blood, all would share equally in paternal ancestral property, for the exclusion of the maternal half bloods, in respondents' view, can take place only in favor of paternal *whole* bloods. Similarly, if she left surviving maternal cousins of the whole blood and of the half blood and paternal cousins of the whole blood, all would share equally in paternal ancestral property, for the maternal whole blood cannot be excluded under the rule of the Pearsons case, and their inclusion would result in excluding maternal half bloods in favor of others than paternal full bloods. Although a rule excluding half bloods not of the blood of the ancestor while permitting whole bloods not of the blood to share in ancestral property is unreasonable, we are of the view that the application of section 254 should not be limited by interpreting it in a manner which will give rise to further purposeless distinctions, such as those which result from respondents' analysis. The remedy is with the Legislature.

The first fallacy in respondents' argument is their premise that relatives of the half blood not of the blood of the ancestor are excluded only in favor of *whole* blood relatives who are of the blood of the ancestor. The cases which respondents cite, when read in the light of their facts, cannot be accepted as authority for respondents' premise. In re Estate of Sayles, supra; In re Estate of Belshaw, supra; In re Estate of Edwards, supra; In re Estate of Smith, supra; In re Estate of Warnock, supra. The true rule, before as well as after the amendment of 1931, is that half blood kindred not of the blood of the ancestor are excluded in favor of both whole and half blood kindred who are of the blood of the ancestor. It was held in Re Estate of Sayles, supra, that the amendment did not change the meaning of the section, but merely clarified it.

The fact that in the present case the exclusion of the maternal half blood cousins from paternal ancestral property will operate also in favor of the maternal full blood cousin, Elizabeth Leary, does not mean that the exclusionary provision becomes a nullity. The exclusion of maternal half bloods, as directed by the section, must be given effect notwithstanding its result is to favor also the maternal full blood cousin. The relatives of the blood of the ancestor are favored thereby, although less favored than if the maternal whole blood cousin also could be excluded. She cannot be excluded because her rights as an heir are fixed by section 226, Probate Code, and do not depend on the origin of the estate. That is, section 254 requires that paternal cousins, both whole blood and half blood, be favored as to paternal ancestral property where there are half blood cousins not of the blood of the ancestor. Section 226 demands that they should not be favored at the expense of the maternal whole blood cousin, who under that section is entitled to inherit without regard to ancestral origin of property. The same analysis applies to the paternal whole blood cousins sharing in maternal ancestral property.

The statement is made above that respondents are not correct in their premise that half blood relatives not of the blood of the ancestor may be excluded only in favor of *whole* blood relatives of the blood of the ancestor. In the cited cases either there was not a relative of the blood of the ancestor, or there was a whole blood relative of the blood of the ancestor who was related to the decedent in a more remote degree than the half blood relative. For example, in Re Estate of Sayles, supra, a first cousin of the decedent of the blood of the ancestor claimed to be her heir to the exclusion of half-brothers and half-sisters not of the blood of the ancestor. It is held in this line of cases that the half blood relative succeeds, to the exclusion of the more remote whole blood relative, since the section reads: "Kindred of the half blood inherit equally with those of the whole blood in the same degree * * ." None of the cases involved a question of succession as between maternal and paternal relatives in the same degree. Since the contending relatives were not related in the same degree, it was not necessary to the decisions to declare that when the half bloods and the full bloods are related to the decedent in the same degree, then half bloods not of the blood of the ancestor are excluded only in favor of *whole* bloods of the same degree who are of the blood of the ancestor. In such cases as In re Estate of Sayles, supra, and In re Estate of Warnock, supra, the kindred of the blood of the ancestor all happened to be of the whole blood, which may account for the statements made in the opinions. The weakness of a rule excluding half bloods not of the blood of the ancestor only in favor of *whole* blood relatives of the blood of the ancestor is that it implies that half bloods of the blood of the ancestor are excluded, contrary to the plain terms of section 254.

In the basic case, In re Estate of Smith, supra, the decedent left paternal ancestral property. She was survived by her husband and two half sisters on her mother's side. Under section 1386(2), Civil Code, one-half of the property would go to the surviving husband, one-half to the sisters. The court rejected the contention that since the sisters were not of the blood of the decedent's father, they were not entitled to succeed. It said: "And nothing seems plainer to us than that under this statute the half blood are only excluded when there are others in the same statutory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate." [131 Cal. 433, 63 P. 730, 82 Am.St.Rep. 358.] Note that the court did not say of the *whole* blood of decedent.

In Re Estate of Belshaw, supra, where the appellants were whole blood relatives of the decedent and of the blood of the ancestor, but more remote in degree than a half blood relative not of the blood of the ancestor, the court stated the contention of respondent as follows: "Respondent's position is that the second clause [of section 254] is operative only when there are kindred of the *whole* blood of the same degree as the kindred of the half blood and that kindred of the half blood inherit such property in preference to those of the whole blood of more remote degree." (Italics added.) [190 Cal. 278, 212 P. 14.] The court held in accord with the last portion of this contention, but it was not necessary for the court to decide, and we find no statement intimating, that half blood relatives not of the blood of the ancestor could be excluded only in favor of *whole* blood relatives of the blood of the ancestor.

The holding herein that half blood cousins not of the blood of the ancestor are excluded under section 254 in favor of both whole and half blood cousins in the same degree who are of the blood of the ancestor, does not conflict with In re Estate of Edwards, supra, but is entirely consistent therewith. In that case, unlike the present, there were no heirs, either of the whole or half blood, who were of the blood of the ancestor. There were only whole and half blood heirs who were not of the blood of the ancestor. The exclusion of half blood kindred not of the blood of the ancestor is to take place only when there are kindred of the blood of the ancestor to be favored thereby. Where none, as in the Edwards case, it is equitable and in accordance with section 254 that whole and half blood relatives of the decedent, none of whom are of the blood of the ancestor, should be on a parity.

The problem is one of construction of the words "in favor of those who are." If these words are not given the construction here declared the alternative is to apply them to those of the *half* blood who are of the blood of the ancestor. In re Pearsons' Estate supra [110 Cal. 524, 42 P. 961], holds that the phrase "all those who are not of the blood of such ancestor" means all those half bloods who are not of the blood of the ancestor. The word "those" appearing a third time in the section as it now stands must mean either all those who are of the blood of the ancestor, whether of the half blood or whole blood of the decedent, as we have held, or it must have the same meaning as the second "those." There is no possible basis for construing the concluding phrase, "those who are," as referring only to those whole bloods who are of the blood of the ancestor. Confining it to half bloods of the blood of the ancestor would have this consequence. Only when there were half bloods of the blood of the ancestor would the exclusion operate. If there was only a whole blood relative of the blood of the ancestor, the half blood in the same degree not of the blood of the ancestor would not be excluded. This would be a distinction without reason and is not compelled by the section.

Amici curiae urge that on the facts of this case maternal whole blood cousins, as well as maternal half blood cousins, should be excluded from paternal ancestral property; that paternal cousins succeed to paternal ancestral property; maternal cousins to maternal property. In the Pearsons case, supra, there were aunts and uncles of the decedent, both paternal and maternal, all of the whole blood. It was held that all shared equally in ancestral property. Amici curiae contend that although the Pearsons case was correctly decided under section 1394, Civil Code (now § 254, Prob. Code), a different rule would apply had there been a half blood relative. Had there been a maternal uncle of the half blood, for instance, the maternal aunts and uncles would be excluded from paternal ancestral property, in the analysis of amici curiae. Thus amici curiae contend for an extension to whole blood kindred in certain circumstances of the rule of descent based on origin of property. The extension of the rule in the analysis of amici curiae is to depend on the irrelevant circumstance of whether there are half blood, as well as whole blood, kindred.

This construction cannot be accepted. It is based on a theory that if the phrase "those who are," concluding section 254, refers to all those who are of the blood of the ancestor, both half blood and whole blood of the decedent, then the preceding "those" must have the same reference. This by necessary implication changes the rule of the Pearson case, which held that the phrase "all those who are not" appearing in the section refers to half blood only and excludes only them. The limitation which amici curiae place on their construction excluding whole bloods—that it should apply only where there is a half blood relative—finds no justification in the language of the section.

[7] We conclude that the maternal half blood cousins are excluded from paternal ancestral property, which is to be divided equally between the four cousins of the whole blood and the paternal cousins of the half blood; that the paternal cousins of the half blood are excluded from maternal ancestral property, which is to be distributed to the four full blood cousins and the maternal half blood cousins.

Respondents further contend that if it be conceded that maternal half blood cousins are excluded from paternal ancestral property under section 254, and paternal half bloods from maternal property, it does not appear from the bill of exceptions that any of the property of the decedent herein is ancestral within the meaning of the section. Respondents contend that section 254 applies only to real property, and that it does not apply unless the identical property which came to the decedent from the ancestor constitutes part of the estate of the decedent.

The bill of exceptions shows the following:

"That during the hearing one Kenneth D. Sevier was duly sworn, examined and testified that part of the estate, of which deceased died possessed was received by said deceased, by descent, devise or gift, from her father, part from her mother.

"Whereupon the appellants and their attorneys, requested the said Court to receive testimony showing the ancestral origin of the estate of said Katherine Ryan, deceased, but the Court refused to receive further evidence touching the class or character of the funds or property belonging to the estate of said deceased, to which ruling the said appellants, the Scully heirs, and others, then and there excepted."

Observe that the recital as to the testimony of the witness is in the language of the code section. If, as contended by respondents, the section applies only to real property, the testimony of the witness in the same words has the same meaning. If the word "devise" in the code section shows that it refers to real property only, it has the same connotation when used by the witness in testimony adduced with reference to that section.

Since the question whether the section applies only to identical real property received from an ancestor will necessarily be involved upon further proceedings had pursuant to reversal of the order herein, it should be determined.

In Re Estate of Warnock, supra, the court assumed without discussion that the section would apply to corporate stock, and considered whether it would apply to stock purchased with the proceeds from the sale of the stock received by the decedent under the will of his aunt. It was there held (36 Cal.App.2d at page 467, 97 P.2d at page 832) that the "inheritance, though changed in form, never lost its identity and therefore still retained its ancestral character." The holding was not necessary to the decision, since the section was held inapplicable because the half blood and whole blood kindred were not of the same degree.

The court relied on the settled interpretation of sections 228 and 229, Probate Code, and the similar provisions in section 1386, Civil Code, which preceded the Probate Code. Those sections provide for division of community property between relatives of the decedent who dies intestate and relatives of the predeceased spouse, and for succession by relatives of the predeceased spouse where the property of the decedent had been the separate property of the predeceased spouse. In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27; In re Estate of Brady, 171 Cal. 1, 151 P. 275. However, there are differences in the wording of these sections and section 254, to be noticed later.

[8, 9] Respondents' argument that section 254 applies to real property only rests in part on its wording and in part on historical considerations. The common law canon limiting descent to those of the blood of the first purchaser applied only to real property. Personal property passed to the administrator, who, "usually, whether rightly or wrongly, appropriated to his own use all the surplus after payment of debts, until by statute it was provided that such surplus should be distributed, in a certain manner, to the widow and children, or, in default of children, to the next of kin." 4 Tiffany, Real Property, 3d Ed., p. 374. There seems to have been some uncertainty whether the exclusion of the half blood applied to personal property, but it was settled in England by 1690 that it did not. Ector v. Grant, 112 Ga. 557, 37 S.E. 984, 53 L.R.A. 723; 16 Am.Jur. 833–843; 42 Yale Law Journal, 102. In this country, "generally the statutes relating to the descent of ancestral estates do not cover personal property." 16 Am.Jur. 843; L.R.A.1916C, 935. They have been held to apply to personalty, however. Rountree v. Pursell, 11 Ind.App. 522, 39 N.E. 747.

[10-12] Respondents find in the use of the words "inherit," "inheritance" and "devise" indication that section 254 applies only to real property. At common law "inherit" and "inheritance" related to real property which descended to heirs. Under our system personal property also passes to those who succeed to real property, that is, to heirs, rather than to the personal representative. Use of these words alone would not add much weight to the argument, but their use with "devise" gives strength to respondents' contention. The word "devise" has been held to apply to personal property when necessary to carry out the intent of a testator (see Black's Law Dictionary, 3d Ed., p. 573), and was construed as applicable to personalty in the ancestral estate statute involved in Rountree v. Pursell, supra. (In Childs v. Gross, 41 Cal.App.2d 680, 107 P.2d 424, the word "devise" as the last word of section 125, Probate Code, was held to include personal property. In Re Estate of Ross, 140 Cal. 282, 73 P. 976, it was held applicable to real property only as used in section 1310, Civil Code, which was later amended to include "bequest.") The word "devise" has not acquired a broadened meaning applicable to personalty to the same extent as the word "inherit" and "inheritance." The corresponding word for such property is "bequest." Sections 228 and 229, Probate Code, construed in Re Estate of Putnam, supra, and In Re Estate of Brady, supra, include the word "bequest" in the phrase "by gift, descent, devise or bequest." The provision for succession to property which had been community property of the decedent and a predeceased spouse formerly did not include the phrase "by gift, descent, devise or bequest," and hence at all times has been distinguishable in its wording from section 254.

[13] Other sections of the code regulating succession apply alike to real and personal property. But this does not mean that section 254 could not be confined to realty if the language of the section, construed in the light of its historical background, impels such conclusion. The effect of confining section 254, which is a limitation on succession by kindred of the half blood, to real property means that as to personal property they inherit

equally with kindred of the whole blood. In the absence of an express limitation on succession by kindred of the half blood it is generally held in this country that they have the same rights as those of the whole blood. In re Estate of Lynch, 132 Cal. 214, 64 P. 284; 4 Tiffany, Real Property, 3d Ed., p. 383.

[14, 15] The doctrine of ancestral estates, whether applied to kindred of the whole or half blood, is being looked on with increasing disfavor in the states where it still exists. See article, W. W. Ferrier, Jr., Rules of Descent Under Prob.Code, §§ 228 and 229, and Proposed Amendments, 25 Cal.Law Rev. 261, at 280, citing supporting references. "A discrimination against the half blood is the exception, and is not to be extended beyond the obvious intent." In re Estate of Smith, supra, 131 Cal. at page 436, 63 P. at page 730. Furthermore, our particular statute, combining features of both doctrines, is objectionable in that it illogically excludes kindred of the half blood who are not of the blood of the ancestor, while permitting kindred of the whole blood who likewise are not of the blood of the ancestor to share. These considerations impel a conclusion that section 254 does not apply to personal property.

[16-18] From some of the cases cited it is quite clear that the word "devise" can be interpreted either to include personal property, or to apply solely to real property. How it should be interpreted in any particular statute depends upon the legislative intent, which, when not expressed, must be ascertained from all the circumstances. In attempting to ascertain such intent, the courts are permitted to consider the historical background of the statute, consequences that will flow from a particular interpretation and other factors. Considering these factors, we are inclined to the belief that as used in section 254 it was intended to be limited to real property. For the same reasons the word "gift," as used in the *particular section,* can have no broader significance than the word "devise."

The question remains as to whether section 254 applies only to the identical real property which came to the decedent from his ancestor, and which remains part of his estate on his death. An attempt to trace property in changed form involves administrative difficulties of great complexity.

[19] The rule was well settled in England that a conveyance of real property destroyed its ancestral character, that property acquired with the proceeds from the sale of ancestral property was acquired by purchase and was not ancestral. The sale of ancestral property was described as breaking the descent by alienation. 12 Columbia Law Rev. 625. The proposition that the ancestral character of property is destroyed by its alienation is the law in this country today. 4 Tiffany, Real Property, 3d Ed., p. 389; 16 Am.Jur. 845; L.R.A.1916C, 913. Omitting for the moment the California cases of In re Estate of Putnam, supra; In re Estate of Brady, supra, and In re Estate of Warnock, supra, counsel have cited no decision where an ancestral estate statute has been applied where the identical property did not remain part of the decedent's estate, and our research, so far as it has gone, has disclosed none, except cases involving partition in kind, and the sale of property of minors and insane persons under guardianship. Note, 103 A.L.R. 233; L.R.A.1916C, 910.

In Rountree v. Pursell, supra, 39 N.E. at page 753, where the particular statute involved was held to apply to personalty as well as realty, it was held nevertheless that the property must remain in specie: "It must be the same thing that came from the ancestor; the same parcel of real estate; the same article of personal property."

[20] The above conclusions are strengthened by the fact that the exclusion of half blood kindred takes place only on the condition that the property "came to the intestate by descent, devise or gift from some *one* of his ancestors." The word "one" indicates that the exclusion is intended to operate only as to specific property which came from a specific ancestor and remained vested in the heir in kind until the time of his death, intestate.

We are of the view that the fact that section 254 is derived more particularly from the common law doctrine of ancestral estates, with a well defined meaning and historical background, justifies confining it to the identical property received from the ancestor, although sections 228 and 229, Probate Code, apply to property in changed form, under In re Estate of Putnam, supra, and In re Estate of Brady, supra. The dictum in Re Estate of Warnock, supra, should not be the law.

The order is reversed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concurred.

CARTER, Justice (concurring).

I concur in the judgment of reversal, although I seriously doubt that the Legislature intended when it enacted section 254 of the Probate Code that kindred of the half blood should be excluded from an inheritance because they are not of the blood of the ancestor from whom the estate descended, while kindred of the whole blood likewise not of the blood of such ancestor are permitted to participate in such estate. But I can see no escape from the conclusion that section 226 of the Probate Code controls the descent of property insofar as kindred of the whole blood are concerned, and the mere circumstance of the existence of kindred of the half blood in the same degree who are excluded from the inheritance by the provisions of section 254 of the Probate Code should not operate to deprive kindred of the whole blood from succeeding to their inheritance under the provisions of section 226 of the Probate Code. I believe, however, that the inequities resulting from the construction placed upon section 254 of the Probate Code by the majority opinion should be corrected by the Legislature by appropriate amendment to said section.

I do not, however, agree with that portion of the majority opinion which holds that the words "inheritance came to the intestate by descent, devise, or gift of some one of his ancestors" as used in section 254 of the Probate Code embrace only real property and only the specific real property so received. Those words cannot be said to have any such restricted meaning. The thing which comes to the intestate is described as the "inheritance." Inheritance is used as synonymous with succession in section 250 of the Probate Code, and the provisions on succession treat real and personal property the same. The word inheritance as used in the law of descent applies to both personal property and real property. In re Turner's Estate, 191 Wash. 145, 70 P.2d 1059. The common law definition of inheritance which limited it to real property was founded upon the rule that title to real property passed on death to the heirs while title to personal property passed to the personal representative. Center v. Kramer, 112 Ohio St. 269, 147 N.E. 602. But in California title to both real and personal property vests in the heirs or beneficiaries under the will upon death. Prob. Code, § 300. By virtue of the same rule, property coming by "descent" embraces both real and personal property. Property comes by descent when it is acquired by an heir by virtue of the intestacy of the decedent, and inasmuch as title to both kinds of property passes to the heirs and none to the personal representative, property which comes by descent is both real and personal. See Hudnall v. Ham, 172 Ill. 76, 49 N.E. 985.

In a case involving the right of inheritance between whole bloods and half bloods under a statute, it has been squarely held that the words "gift, devise or descent" include both real and personal property. In re Hullett's Estate, 46 Ind. App. 412, 89 N.E. 509; Rountree v. Pursell, 11 Ind.App. 522, 39 N.E. 747.

CURTIS, J., concurred.

21 Cal.2d 516

CARSON ESTATE CO. v. McCOLGAN et al.
WATSON LAND CO. v. SAME.

L. A. 18356.

Supreme Court of California.

Jan. 29, 1943.

Taxation ⚷376(1)

Corporation which made several purchases and sales of bonds and corporate stock was "doing business" as such term is used in Franchise Tax Act provision for deductions from gross income, dividends received from corporation doing business in the state, and dividends received from such corporation were deductible from taxpayer corporations' gross income. Gen. Laws 1937, Act 8488, § 8(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

In Bank.

Appeals from Superior Court, Los Angeles County; James D. Garibaldi, Judge.

Actions by Carson Estate Company and by the Watson Land Company against Charles J. McColgan, as Franchise Tax Commissioner, etc., and others to recover franchise taxes paid under protest which actions were consolidated for trial. From a judgment for defendant, plaintiffs appeal.

Affirmed in part and reversed in part.

Prior opinion, 130 P.2d 202.

Mackay, McGregor & Reynolds and George G. Witter, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondents.

TRAYNOR, Justice.

The actions in these cases, consolidated for trial, were brought to recover state franchise taxes measured by the net income of Carson Estate Company for the years 1932 to 1936, inclusive, and of Watson Land Company for the years 1933 to 1935, inclusive. In each of these years the plaintiffs received dividends from Francis Land Company, a California corporation, which they deducted from their gross income. The defendant disallowed the deduction on the ground that the Francis Land Company was not doing business in this state during the years in question and that the dividends were therefore not deductible under section 8(h) of the Bank and Corporation Franchise Tax Act (Stats. 1929, ch. 13, p. 19, as amended, Deering's Gen.Laws 1937, Act 8488). Plaintiffs paid under protest the additional taxes, with interest, measured by the amount of such dividends, and now appeal from a judgment denying them a refund of such taxes and interest.

Plaintiffs offered no evidence with respect to the activities of Francis Land Company during the year 1932. The record reveals, however, that it entered into the following transactions during the years 1933 to 1936, inclusive: In 1933 it purchased $20,000 par value bonds for $16,643.88, and in 1934 sold $12,000 par value of these bonds for $16,678.88. At various times during 1935 it made eleven purchases and sales of corporation stock at profits ranging from $88.43 to $725.92, and one purchase and sale at a loss of $98.13. In 1936 it made two such transactions, one at a loss of $611.57, the other at a loss of $149.09. It is clear from the foregoing transactions that Francis Land Company was doing business during the years 1933 to 1936, inclusive, and that the dividends received during those years were deductible from plaintiffs' gross income. Golden State Theatre & Realty Corp. v. Johnson, Cal.2d, 133 P.2d 395.

The judgment is affirmed as to the additional tax, with interest, measured by 1932 net income, and is reversed as to the additional tax, with interest, measured by net income of the years 1933 to 1936, inclusive, with directions to enter judgment in favor of plaintiffs for the tax refunds as prayed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

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56 Cal.App.2d 814

Ex parte WAY.

Cr. 2256.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1943.

1. Jury 🔑10

The right of "trial by jury," guaranteed by state constitution, exists only in such cases where right existed at common law. Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial by Jury".

2. Breach of the peace 🔑16
Jury 🔑21(6)

A proceeding under statute on a charge of threats to commit a breach of peace is not a "criminal proceeding", but is a "quasi-criminal proceeding", and person charged is not entitled to trial by jury. Pen. Code, §§ 701–714 and §§ 701, 702, 706; Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Proceeding" and "Quasi-Criminal Proceeding".

3. Jury ⚿21(6)

The failure of statute providing a proceeding on a charge of threats to commit a breach of peace to provide for a trial by jury does not offend constitutional guaranty of trial by jury. Pen. Code, §§ 701–714 and §§ *701*, *702*, *706*; Const. art. 1, § *7*.

Original proceeding in habeas corpus by Walter Way to secure his release from custody.

Writ discharged.

Kenneth C. Zwerin, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and Matthew Brady, Dist. Atty., Preston Devine, Asst. Dist. Atty., and Raymond D. Williamson, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

In his petition for a writ of habeas corpus the petitioner alleged that he was imprisoned under an order of the municipal court upon a charge of "Threats Against Life" and that his confinement was illegal because (a) there was no examination in writing of the informer; (b) the petitioner did not personally waive a jury trial; and (c) the magistrate acted arbitrarily in fixing the amount of the security required of petitioner to keep the peace.

At the hearing of the petition for a writ, the petitioner waived the first and third grounds and rested his case solely upon the question of the right to a trial by jury. This waiver was based upon the petitioner's concession that the facts were against him on the first ground, and that, he being on parole from the state penitentiary, he would be taken into custody and held under the prior conviction, even though the security required should have been merely normal.

The question whether a party is entitled to a trial by jury on a charge of threats to commit a breach of the peace has not been decided in this state. The authority under which such proceedings are had is found in sections 701–714 of the Penal Code. Section 701 provides that an information may be laid before a magistrate that a person has threatened to commit an offense against the person or property of another. Section 702 requires the magistrate to take the deposition of the informer and witnesses and cause them to be subscribed to. Section 706 provides that if "there is just reason to fear the commission of the offense" the magistrate may direct the person complained of to enter into an undertaking to keep the peace. Such undertaking shall be in such amount, not exceeding five thousand dollars, "as the magistrate may direct."

The petitioner argues that, since this procedure is statutory, the statute must be strictly followed. But he also argues that the remedy comes from the common law and that he was therefore entitled to a trial by jury, as in other criminal cases. It is apparent that the code sections do not provide and do not contemplate a trial by jury. All the authority to conduct the hearing and to require the security is conferred upon the "magistrate." He "must take testimony" and he may require the security if "there is just reason to fear the commission of the offense."

[1] Apparently conceding that the code sections do not in terms provide for a trial by jury the petitioner cites and relies upon section *7* of article I of the Constitution which declares that the right of trial by jury "shall be secured to all." This section, however, has been the subject of numerous limitations. Thus it has been held frequently that the right exists only in such cases where the right existed at common law. In the early case of Koppikus v. State Capitol Commissioners, 16 Cal. 248, 253, 254, the court said "The provision of the Constitution, that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. It is true, that the civil law was in force in this State at the time of the adoption of the Constitution, but its framers were, with few exceptions, from States where the common law prevails, and where the language used has a well defined meaning. * * * There must be an action at law, as contradistinguished from a suit in equity, and from a special proceeding, or a criminal action, and an issue of fact joined therein upon the pleadings, before a jury trial can be claimed as a constitutional right." Thus it has been held that the section does not apply to actions for divorce (Cassidy v. Sullivan, 64 Cal. 266, 267, 28 P. 234); to a public officer prosecuted under section *772* of the Penal Code, (Cline v. Superior Court, 184 Cal. 331, 335, 193 P. 929); to proceedings for the exam-

ination of persons addicted to the use of narcotics (In re Liggett, 187 Cal. 428, 430, 202 P. 660); or to actions in equity where equitable issues alone are involved. Farrell v. City of Ontario, 39 Cal.App. 351, 359, 178 P. 740, approved in Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 69, 87 P.2d 1045.

This procedure in the common law is treated by Blackstone, Cooley's Fourth Edition, vol. II p. 1414, section 251, as a means of preventing the commission of crimes rather than a means of punishing for crimes committed. He says: "This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior. * * * But the caution that we speak of at present is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless, perhaps, for a man's imprudence in giving just ground of apprehension."

In Herz v. Hamilton, 198 Iowa 154, 197 N.W. 53, 54, the court, in reference to a similar statutory proceeding, said: "This proceeding is not for the punishment of any criminal offense. The actual commission of any crime is not essential to an order requiring the giving of security to keep the peace. The binding over by the magistrate is not a punishment either at common law or under our statute. Ford v. State, supra [96 Miss. 85, 50 So. 497]; Howard v. State, supra [121 Ala. 21, 25 So. 1000]; Reg. v. Rogers, 7 Mod. 28, 87 Eng.Rep. 1074.

"The court did not err in refusing to grant the petitioner a jury trial, nor is the statute under which the proceedings were had unconstitutional because of a failure to provide for such trial."

[2] This ruling is based upon the practically uniform holding that such proceedings are not criminal; that, though they are sometimes referred to as being quasi-criminal, they are quite the opposite of criminal proceedings, the latter seeking the punishment for crimes committed, the former seeking to prevent the commission of a crime. In accord with this view are Howard v. State, 121 Ala. 21, 25 So. 1000; Arnold v. State, 92 Ind. 187; Ford v. State, 96 Miss. 85, 50 So. 497; State ex rel. Beslow v. Sargent, 74 Minn. 242, 76 N.W. 1129.

The only authority cited by petitioner is Davis v. State, 138 Ind. 11, 37 N.E. 397. It is true that a jury trial was had in that case, but the opinion is confined to the claimed errors in the proceedings. A jury seems to have been accepted without comment, but there is no holding that the accused was entitled to a trial by jury. In any event if that jurisdiction requires a jury trial it stands alone so far as our search of authority discloses.

[3] We conclude that the petitioner was not entitled to a trial by jury, and that the failure of the code sections to provide for such a trial does not offend the constitutional guaranty.

The writ is discharged and the petitioner is remanded to custody.

SPENCE, J., concurred.

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56 Cal.App.2d 934

BRADSHAW v. SUPERIOR COURT OF SAN BERNARDINO COUNTY et al.

Civ. 3224.

District Court of Appeal, Fourth District, California.

Jan. 30, 1943.

1. Justices of the peace 🔑159(6)

Under statute regarding appeal from justice's court judgment, respondent is precluded from excepting to sureties other than within five days after service of written notice of filing the undertaking but time within which respondent may except to sufficiency of sureties does not begin to run until he receives notice of filing of the undertaking. Code Civ.Proc. §§ 978, 978a.

2. Justices of the peace 🔑159(10)

Under statute regarding appeal from justice's court judgment, service of written notice of filing of undertaking on respondent is one of the necessary steps to perfect the appeal, since it is on service of such notice that respondent's right to except to sufficiency of sureties starts running. Code Civ.Proc. §§ 978, 978a.

3. Justices of the peace ⚷159(6)

Corporations acting as sureties on undertaking on appeal from justice's court judgment are subject to the same requirements as to justification as individuals. Code Civ. Proc. §§ 978, 978a.

4. Justices of the peace ⚷159(10)
Mandamus ⚷57(1)

Where time for appealing to superior court from justice's court judgment had expired, but notice of filing of undertaking had not been served on respondent so as to enable respondent to exercise right to except to sufficiency of sureties, the attempted appeal was ineffectual and writ of mandamus was granted to compel superior court to grant respondent's motion to dismiss appeal. Code Civ.Proc. §§ 978, 978a.

◆

Mandamus proceeding by Alice Bradshaw against the Superior Court of San Bernardino County and others to compel the respondent court to grant a motion to dismiss an appeal.

Writ of mandamus granted.

Swing & Swing and Ralph E. Swing, all of San Bernardino, for petitioner.

P. E. Bingman, of San Bernardino, for respondents.

GRIFFIN, Justice.

The question involved in this application grew out of an attempted appeal from the justice's court to the superior court of San Bernardino County. The action in the justice's court was one for claim and delivery of an automobile. The plaintiff, Fred A. Curl, sought to recover an automobile of the alleged value of $600 from the defendant Alice Bradshaw. The automobile was taken from defendant's possession under proceedings authorizing such action. The customary bond was given in the sum of $1,000. Judgment for defendant for the return of the automobile and for $157 damages for loss of its use. Judgment was entered and notice of entry was given on October 22, 1942. On October 28, 1942, notice of appeal on questions of both fact and law was given and on that date filed. Thereafter, on October 30, 1942, an undertaking on appeal was filed. It recited generally that the defendant secured judgment against the plaintiff in the sum of $157.50; that "the undersigned American Surety Company of New York and Fred A. Curl" jointly and severally undertake in the sum of $100 that the appellant will pay all costs which may be awarded against him on the appeal which we "acknowledge ourselves jointly and severally bound"; that the appellant claims a stay of proceedings and execution and "jointly and severally undertake * * * in the further sum of $415 (being twice the amount of said judgment, including costs)" that the appellant will pay the amount of the judgment so appealed from and all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the superior court. The undertaking was signed "American Surety Company of N. Y., by Hiram N. Bracken, Attorney in Fact." The undertaking was not signed by Fred A. Curl. No *notice* of the *filing* of the *undertaking* was ever given to the defendant Bradshaw or her counsel. On appeal from the judgment in the justice's court action the records and files were duly transferred to and filed with the clerk of the superior court on November 13, 1942, 22 days after the rendition of the judgment and eight days before the expiration of the 30 days within which an appeal might be taken. On December 8, 1942, petitioner was first advised that the appeal, together with the undertaking and the records in the justice's court had been transmitted to and filed with the county clerk. On that day petitioner gave notice that she would, on the 14th day of December, 1942, move the superior court in which the appeal was then pending, for an order dismissing the appeal on the ground that it was ineffectual for any purpose and gave the superior court no jurisdiction thereof because no undertaking on appeal was filed as required by sections 978 and 978a of the Code of Civil Procedure, and on the further ground that no notice of the filing of any undertaking had been or was given petitioner, and that the justice's court had no authority to transmit the papers to the superior court, and that petitioner had no opportunity to except to the sufficiency of the undertaking and the sureties thereon. A copy of the notice of motion to dismiss, together with the copy of the affidavit filed therewith are attached to this petition. On December 19, 1942, the respondent superior court entered its order denying the motion to dismiss the appeal and petitioner alleges that it threatens to and will proceed to hear the appeal upon its merits, and that the respondent superior court refuses to dismiss the appeal.

It is now claimed that it is the duty of respondent court to grant the motion and dismiss the appeal; that there is no appeal from the order denying said motion; that petitioner has no other plain, adequate or speedy remedy at law; that the court is without jurisdiction to determine its merits on the appeal; that the attempted appeal is ineffectual for any purpose due to the fact that no notice of the filing of the undertaking was given and no opportunity afforded petitioner to except to the sureties thereon or the sufficiency of the undertaking; and that since it purports to be an undertaking with two sureties and one of the sureties was the plaintiff in the action, it is void, citing Keefe v. Superior Court, 23 Cal.App. 750, 139 P. 899.

The question whether the failure to give notice of the filing of the undertaking under sections 978 and 978a of the Code of Civil Procedure, prior to the amendment of those sections in 1935 and 1937, was jurisdictional and rendered the appeal ineffectual, was presented in Rigby v. Superior Court, 162 Cal. 334, 122 P. 958, and it was there determined that it was not jurisdictional and did not render the appeal ineffectual. In discussing this question, in relation to the statute as it then read, the court said (page 339 of 162 Cal., page 960 of 122 P.):

"Section 974 declares how an appeal is to be taken. Notice of the filing of the undertaking is no part of the process there prescribed. Section 978 provides that an undertaking on appeal must be filed, and that, unless it is filed, the appeal is 'not effectual for any purpose.' Section 978a provides that 'notice of the filing of the undertaking must be given to respondent.' It does not specify whether such notice is to be given before the filing or after the filing, nor within what time, nor whether it is to be written or oral. No action by respondent is made to depend upon or follow the giving of this notice. The exception to the sureties seems to have no direct relation to or connection with this notice. It may be taken before or after any formal notice of the filing of the undertaking, provided it is taken within five days after such filing. There is no declaration that the failure to give this notice will render the appeal ineffectual, or that it will affect the appeal in any manner. The right of appeal is clearly given, and the mode of taking it is clearly fixed, by section 974. In view of the express declaration of section 978 that if the undertaking is not filed the appeal becomes ineffectual for any purpose, the absence of any such provision with respect to the failure to give notice of such filing is significant, and it indicates that there was no intention to make such notice necessary to the validity of the appeal." See, also, W. P. Jeffries v. Superior Court, 13 Cal.App. 193, 109 P. 147; Blake v. Superior Court, 17 Cal.App. 51, 118 P. 448.

The amendment to section 978a in 1935 (Stats.1935, p. 1962) and in 1937 (Stats. 1937, p. 627) made a change in reference to the right of notice of filing of the undertaking and the time within which respondent may except to the sufficiency of the sureties, which has a direct relation to the notice. Since the amendments it reads as follows (the new parts added by the amendments italicized and the eliminated parts are in parentheses):

"The undertaking on appeal must be filed within five days after the filing of the notice of appeal and *written* notice of the filing of the undertaking must be (given) *served upon* the respondent, who may except to the sufficiency of the sureties within five days (after the filing of the undertaking) *after service of such notice. Unless within five days after notice of such exception*, the sureties excepted to, or other sureties, justify before the justice upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given * * *."

In lieu of the last sentence the old section read: "The adverse party may except to the sufficiency of the sureties within five days after *the filing of the undertaking*, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." (Italics ours.)

The new requirement that the notice of the filing of the undertaking must be written and served upon the respondent rather than given the respondent would not, when considered alone, change the effect of the holding in the previous cases above quoted.

However, it should be observed, in considering the remaining portion of the amendment with the portion above discussed, that under section 978a, supra, prior to 1935, the adverse party might except to the sufficiency of the sureties upon the undertaking on appeal "within five days after the filing of the undertaking." The section now provides that such exception may be taken "within five days after service" of such notice. Under the old provisions of the section, the time might run within which such exception to the sufficiency of the sureties might be taken before the respondent had any notice of the filing of the undertaking on appeal. This change in the section was manifestly a reasonable one and contemplated at least a step toward correcting the evils suggested in Rigby v. Superior Court, supra, 162 Cal. page 338, 122 P. 958, and of having a "straw bond" imposed upon the respondent, without notice. The 1937 amendment to that section, as a part of this procedure, added the additional provision that where sureties excepted to failed to justify within five days after notice of failure of justification, a cash deposit may be made with the clerk of the court. The marked distinction between the present law and the old law, in addition to that which is hereinafter mentioned, is that under the old law the respondent knew that if he desired to except to the sufficiency of the sureties he must be diligent in searching the records to determine when the undertaking was filed, but after the present amendment he knew that his time to except to the sufficiency of the sureties would not start to run until he received written notice of the filing of the undertaking. In American Surety Co. v. Superior Court, 1933, 218 Cal. 377, at page 379, 23 P.2d 508, at page 509, it was said: "* * * the notice of filing the undertaking must be served on respondent, and his duty to inspect it and his right to except thereto do not arise until such notice is received."

[1-4] It therefore appears by the amendment that the respondent is precluded from excepting to the sureties other than "within five days after service" of the written notice of filing the undertaking and that a respondent now knows that his time to except to the sufficiency of the sureties will not begin to run until he receives notice of the filing of the undertaking. The written notice of the filing of the undertaking and the opportunity to except to the sufficiency of the sureties are therefore intricate parts of the procedure by which jurisdiction is now vested in the superior court and although all of the deficiencies related in Rigby v. Superior Court, supra, above quoted, have not been met, and the Legislature has not specifically declared, which it might well have done if it so intended, that the failure to give such written notice of the filing of the undertaking causes the appeal to be ineffectual, it does seem clear that if it did so intend it, the purpose of the amendment requiring *written* notice to be *served* and fixing the period within which the respondent might except to the sufficiency of the sureties, would not only afford an opportunity to the appellant to deprive respondent of his right to except to them, but would make the amendment of no particular benefit to the respondent, nor would it correct the evils to which complaint has been directed, i. e., to compel the respondent to be diligent and make daily inquiry as to whether a proper undertaking had been filed and also to prevent the filing of "straw bonds." We must therefore conclude that the amendments made subsequent to the rendition of the previous decisions disclose a legislative intent to require "written" notice of the filing of the undertaking to be "served" upon respondent, one of the necessary steps to perfect the appeal, for it is upon the service of such notice that the right of the respondent to except to the sufficiency of the sureties starts running. Peters v. Superior Court, 31 Cal.App. 82, 159 P. 875; McCracken v. Superior Court, 86 Cal. 74, 78, 24 P. 845; Bardwell v. Superior Court, 137 Cal.App. 491, 493, 31 P.2d 401; Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 483, 114 P. 978. Corporations acting as sureties are subject to the same requirements as to justification as individuals. Fox v. Hale & Norcross S. M. Co., 97 Cal. 353, 32 P. 446.

The motion to dismiss the appeal should have been granted. Writ granted according to the prayer of the petition.

BARNARD, P. J., and MARKS, J., concurred.

56 Cal.App.2d 840

CHARONNAT v. SAN FRANCISCO UNIFIED SCHOOL DIST.

Civ. 12191.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1943.

Hearing Denied March 25, 1943.

1. Appeal and error 🔑1008(1)

In action for injuries to pupil whose leg was broken by fellow pupil in school yard, whether school district provided proper supervision and whether supervisor assigned was negligent were questions of fact for trial court. School Code, §§ 2.801, 5.543.

2. Schools and school districts 🔑121

Evidence warranted recovery from school district for injuries to eleven year old pupil whose leg was broken by fellow pupil in school yard, on ground that district failed to provide proper supervision in assigning only one teacher to supervise yard where some 150 boys were engaged in many games, and that teacher assigned was negligent. School Code, §§ 2.801, 5.543.

3. Schools and school districts 🔑89

To establish that school district's failure to provide adequate protection in school yard where some 150 boys were engaged in many games constituted "negligence", it was not necessary that injury to pupil whose leg was broken by fellow pupil must have been foreseeable by school authorities or yard supervisor. School Code, §§ 2.801, 5.543.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

4. Schools and school districts 🔑89

The law imposes duty on school authorities to provide sufficient supervision in school yard where some 150 boys are engaged in games so that fighting which may occur may be stopped before serious injury results, although a school district is not an "insurer" of safety of pupils. School Code, §§ 2.801, 5.543.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

5. Schools and school districts 🔑89

A school district could not escape liability to eleven year old pupil whose leg was broken by fellow pupil in school yard during recess on ground that district was not liable for willful misconduct of a pupil, where evidence supported inference that there was negligent omission to provide adequate supervision, and that had supervisor assigned seen the fighting serious injury would have been anticipated. School Code, §§ 2.801, 5.543.

6. Schools and school districts 🔑89

That fellow pupil broke pupil's leg in school yard did not of itself absolve school district from liability if district was negligent in failing to provide adequate supervision. School Code, §§ 2.801, 5.543.

7. Appeal and error 🔑1011(1)

Trial court's finding of negligence on conflicting evidence could not be disturbed.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by Thomas Charonnat, a minor, etc., against the San Francisco Unified School District to recover damages for personal injuries sustained in a school yard. From a judgment for plaintiff, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and Irving G. Breyer, all of San Francisco, for appellant.

Ben K. Lerer, Albert Picard, and Francis McCarty, all of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff, an elementary school student, through his guardian ad litem, brought this action under section 2.801 of the School Code to recover damages alleged to have been sustained as a result of having his leg broken by another student during the noon hour in the school yard of the Pacific Heights Grammar School. The action was tried by the court sitting without a jury, and the court found in plaintiff's favor, awarding him judgment for $2,500, from which judgment the defendant school district appeals.

The accident happened on February 24, 1938. The school yard of the Pacific Heights School where plaintiff was injured was approximately 180 feet long and 120 to 130 feet wide, and during the time in question some 100 to 150 students were playing in various parts of the yard. The vice-principal of the school was assigned to supervise the play in the yard from 12 to 1 o'clock, and was the only teacher on duty in that yard at that time. Plaintiff, then aged 11 years, was playing with another student named Harris, around the base of a flagpole in the yard. The base was 3 or 4 feet high, and 7 or 8 feet in diameter. Another student, Keith Thomas, about the same age as plaintiff, came up to the base of the flagpole and told plaintiff to let him get on the base. Plaintiff refused, and Thomas pushed plaintiff off. Plaintiff got back and pushed Thomas off; Thomas then kicked plaintiff off, and an exchange of kicks and blows took place between the two boys. Plaintiff then went over to an iron picket fence about four feet away from the flagpole base and was jumping up and down on the fence when Thomas came over, grabbed plaintiff's leg and twisted it until it broke. During this entire altercation, which lasted about five minutes, the boys were talking "above a normal tone" and when Thomas began twisting plaintiff's leg plaintiff screamed as loud as he could, three or four times, telling Thomas not to twist his leg, that he would break it. Another boy, who was about ten feet away, testified that plaintiff yelled loudly, "Stop, stop, you are going to break my leg"—"Ouch, you are hurting me." However, Thomas kept on twisting the leg until the shin bone was broken; and plaintiff fell to the ground crying and yelling "Oh, my leg." The vice-principal testified that on account of the usual commotion and noise on the school ground she did not hear or see any part of the altercation between the two boys; that her attention was first attracted when she heard a loud scream, and the Harris boy came up to her and told her that the Thomas boy had twisted plaintiff's leg; that thereupon she went over to the flagpole and found plaintiff grasping the iron fence; that he was crying hysterically and shrieking "My leg is broken"; whereupon he was assisted into the classroom by two larger boys.

There is a conflict in the testimony as to how far away from the two boys the vice-principal was standing while the quarrel was going on. The testimony on the part of plaintiff shows she was at all times in close proximity to the boys—from 15 to 20 feet away; whereas she testified that she first took up her position near the flagpole and then walked over to another area and was about 40 or 50 feet distant from plaintiff when she heard the loud scream. Prior to the day in question there had been quarrels and fights between boys on the school grounds; and on the day plaintiff was injured there were present at the school some 19 or 20 teachers available for supervision assignment, but the vice-principal alone was assigned to that duty in the boys' yard, which duty she had been performing every school day for some time.

Section 2.801 of the School Code provides: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees * * *." Section 5.543 of said code provides: "Every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds or during recess." And section III, subdivision (d) of the rules and regulations of the State Board of Education, provides: "Where special playground supervision is not provided, teachers shall supervise the conduct and direct the play of the pupils of their classes in the school or on the school grounds during intermissions and before and after school. * * *"

In the present case the trial court found that the teacher in charge of the yard was in close proximity to the place where the argument started and the injuries were inflicted, and would and should have prevented the injuries if she had used "ordinary, or any, reasonable care or diligence to observe the conduct of said plaintiff, said Keith Thomas, and the children under her supervision"; that "by and through the carelessness and negligence of said defendant, the said plaintiff and said other children in said school were carelessly and negligently, improperly and insufficiently cared for and watched"; and that "the injuries so received by the said plaintiff were caused by the negligent supervision by said defendant over the said plaintiff and the other children in the said school yard of said Pacific Heights School at the time and place hereinbefore mentioned, and that not sufficient teachers or other employees of the defendant were present in the said school yard during the time of said accident or at any of the times between the hour of twelve o'clock noon and until after the occurrence of said accident." The court also found that plaintiff was not guilty of contributory negligence.

Appellant contends that to hold it liable under the facts of the present case is to hold in effect that the school district is an insurer of the safety of its pupils, because, appellant contends, there is an entire absence of evidence in the record showing any negligence on the part of the school district, its officers or employees. This contention is based upon the argument that by assigning one teacher to yard duty it had provided proper supervision, and because the injury in question could not have been anticipated by that teacher, she was not negligent in her supervision. Appellant argues also that the type of school yard supervision employed in the present case, of having a vice-principal in the boys' yard supervising approximately 150 pupils, was the usual school yard supervision that had been in practice for years and is the practice now, and that no matter how many teachers might have been assigned to the yard supervising pupils, an injury such as occurred here could still not have been prevented.

[1, 2] Obviously, however, the question of whether defendant provided proper supervision under the circumstances, and whether the supervisor was negligent, were questions of fact for the trial court; and we are of the opinion that its findings thereon are sustained by substantial evidence. In part the evidence shows that the yard was large, and was occupied by some 150 boys of various ages, and many games were going on; and the trial court may well have concluded that it was negligence on the part of the school authorities to assign only one teacher to "hold pupils to a strict account for their conduct" (§ 5.543, Sch.Code), and that if more than one teacher had been assigned to yard duty on the day in question, one of them would have seen or heard the fight going on at the flagpole base and stopped it before it resulted in serious injury. As said by the court in Forgnone v. Salvadore U. E. School Dist., 41 Cal.App.2d 423, 106 P.2d 932, 934, "* * * the purpose of the law requiring supervision of pupils on the playgrounds and on the school property during school hours is to regulate their conduct so as to prevent *disorderly and dangerous* practices which are likely to result in physical injury to immature scholars under their custody." (Italics ours.) And in Buzzard v. East Lake School Dist., 34 Cal.App.2d 316, 93 P.2d 233, it was held that improper supervision of pupils on the school grounds may create a liability on the part of the school district for injuries received by one pupil on account of the recklessness of a fellow student while they were engaged in recreation on the premises during an intermission.

[3, 4] Nor is it necessary that the very injury which occurred must have been foreseeable by the school authorities or the yard supervisor in order to establish that their failure to provide adequate protection constituted negligence. "Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of such safeguards." Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044, 1048. It is not unreasonable to anticipate that where as here boys are at play, and there are arguments and fights, that the fighting may result in serious injury; and under such circumstances the law imposes the duty on the school authorities to provide sufficient supervision so that the fighting may be stopped before serious injury results. Of course, the law does not make the school district an insurer of the safety of the pupils; but the district is liable under said section 2.801 for its negligence, or for the negligence of its officers or employees; and here, as above pointed out, it would seem that had the district provided more than one supervisor for the yard the fight might have been stopped before serious injury resulted; or had the supervisor who was standing in close proximity to the plaintiff and Thomas, been using due care, she would have seen or heard the fighting in time to have avoided serious injury.

[5] Appellant also contends that it is not liable for the negligence or wilful misconduct of a pupil, and cites a number of cases to support this contention. However, we do not deem those cases controlling here. As the court said in Buzzard v. East Lake School Dist., supra, in dealing with practically the same group of cases: "Each of the cases relied on by the appellant were properly determined upon the particular facts involved therein. They may be readily distinguished from the circumstances upon which the present case was decided. Most of the last cited cases were founded on claims for injuries sustained by pupils on account of the conduct of other stu-

dents engaged in playing games, on the school premises, over which the supervisors of sports had no control, and which acts could not have been reasonably anticipated. None of those cases present accidents which were the result of negligent omissions to regulate the conduct of pupils on the playgrounds with respect to known acts or practice of pupils from which, by the exercise of reasonable prudence, the school authorities should have anticipated that injuries were likely to follow." [34 Cal.App.2d 316, 93 P.2d 236.] This language applies also to the case mainly relied on by appellant, Reithardt v. Board of Education, 43 Cal.App.2d 629, 111 P.2d 440. In that case it was held that the accident happened at a time when no supervision was required, and that the defendants could not have reasonably anticipated that anyone could be injured under the circumstances there present; that no danger was present except in such an instance as occurred—the wilful and deliberate act of another student. In the present case the evidence is legally sufficient to support the inference that there was a negligent omission on the part of the defendant to provide adequate supervision of the conduct of the pupils, and that had the supervisor seen the fighting some serious injury would have been anticipated.

[6] Appellant also argues that even though it be held that there was some negligence on the part of the school district, it was not the proximate cause of the injury to respondent; that the proximate cause of such injury was the intervening act of plaintiff himself, or the intervening act of the fellow student, or a combination of both. The trial court found, however, on sufficient evidence that plaintiff was not guilty of any negligence contributing to his injury; and the mere fact that some third party agency is the immediate actor in causing the injury is not of itself enough to absolve the school district from liability if it can be determined that it was negligent in failing to provide adequate supervision. Taylor v. Oakland Scavenger Co., supra; Forgnone v. Salvador U. E. School Dist., supra; Buzzard v. East Lake School Dist., supra.

[7] From the foregoing it will be seen that in the final analysis this is a factual case; and since the evidence, although conflicting in some important respects, is legally sufficient to support the trial court's findings on the issues of negligence, it is beyond the power of this court to interfere therewith.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

Hearing denied; TRAYNOR, J., dissenting.

57 Cal.App.2d 36

PEOPLE v. WADE.

Cr. 3618.

District Court of Appeal, Second District, Division 3, California.

Feb. 4, 1943.

Forgery ⚿44

Evidence *held* insufficient to sustain conviction of forgery.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Raymond Wade was convicted of forgery, and he appeals.

Reversed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

BISHOP, Justice pro tem.

Suspicion points strongly to defendant's guilt, but the evidence is insufficient to establish it. This case has many parallels with that of People v. Hidalgo, which was first reversed (1933, 128 Cal.App. 703, 18 P.2d 391) because of the insufficiency of the evidence, but later affirmed (1933, 134 Cal.App. 293, 25 P.2d 270) when the insufficiencies had been cured. In the Hidalgo case the defendant was charged with six counts of forgery and found guilty on each count; in our case the number of counts is four. Blank checks had been stolen from the Baker Ice Machine Company, a foreign corporation, and Hidalgo admitted having had the checks in his possession. Blank checks, in our case, had been stolen from the book of Dealers Wholesale Company, whether a one-man business, a partnership, or a corporation is not revealed, and until he presented four of them for goods and cash, the defendant is not shown to have had any of the stolen checks. It was proved, however, that he had access to the office where the checks were kept locked up, although it does not appear whether the office was occupied or unoccupied at the times the defendant might have been in it.

In the Hidalgo case the checks bore the names of "L. Baker" and "H. Spencer," below that of the Baker Ice Machine Company, as those who had signed the checks. There was, it appears, a Mr. "J. L. Baker" whose signature, followed by the word "President", was one of several signatures "authorized" at the bank, where the company had an account. The company's general manager, Mr. McKenzie, could authorize other signatures. The office manager of the company's branch office testified that the signature "L. Baker" on the checks was not that of J. L. Baker, and that he did not know either L. Baker or H. Spencer. In the case under review the checks bear the name "Raymond Shirm" over the words "General Manager" where the signature of the person executing the checks was meant to be. A Mr. Raymond J. Schirm was a witness at the trial and in answer to the question "What is your business or occupation?" replied "I am manager of the Dealers Wholesale Company, in North Hollywood." What his position with the company was on November 15, 1941, just five months earlier, the date of the checks and the date they were passed by the defendant, the jury was not told, but from his testimony the jury could infer that he was in a position of some authority. As already suggested, the jury was not informed whether the North Hollywood establishment was a branch store of the Dealers Wholesale Company or what relation Raymond J. Schirm, or whoever was the "manager," bore to the "general manager" or to the governing board or head of the company. There was no evidence of any sort, even from the bank for whatever value it might be, as to who had authority to execute the company's checks. The name appended to the four checks in question was not the signature of Raymond J. Schirm, the evidence shows, but there is not a word of testimony that in November, 1941, or at any other time, there was not a Raymond Shirm who did have authority to execute the company's checks or to authorize someone to sign his name to them.

Neither in the Hidalgo case nor in this was there any evidence that the defendant had executed the checks; if they were forged it was by some other's hand. In our case we have an "expert" witness, stipulated to be so, who gave it as his opinion that the signatures on the face of the checks and the endorsements on the back, including the addresses given, were written by different people and that none of them was written by the defendant. The jury was quite within its rights in disregarding this expert, for one of the witnesses who identified the defendant as the passer of one of the checks testified that he endorsed it in his presence. A comparison of the handwriting of this identified endorsement, and of the others as well, with the signatures on the faces of the checks would not warrant the jury in concluding that he who endorsed the checks also executed them.

In the Hidalgo case the payee was unknown to the office manager who testified. The evidence is a bit stronger on this phase of our case; Raymond J. Schirm not only did not know the payee, but added, "We never did have anybody by that name work," and he answered affirmatively the question "so far as you are concerned, that person, as having any money coming to you from your concern, is a wholly fictitious person?" But the witness had not drawn the checks, and the people failed to show that as far as others in the concern were concerned there was no reason to draw these checks payable to P. J. Kloch.

In this case, then, as in the Hidalgo case, the evidence was insufficient to prove that the checks were forged, let alone to prove that the defendant had forged them, and the evidence was insufficient to establish that the payee was not a real person or that he had not authorized the defendant to endorse and cash them. Because of these defects the Hidalgo judgment was reversed with a statement of principles and a citation of authorities which we will not repeat. The Supreme Court denied a petition to take over the case and neither do we have cause to doubt that it was correctly decided.

The judgments of conviction, and the order denying the defendant a new trial, are therefore reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

56 Cal.App.2d 761

PUTNAM v. PUTNAM.

Civ. 12206.

District Court of Appeal, First District,

Division 2, California.

Jan. 25, 1943.

1. Appeal and error 🔑1097(1), 1195(1)

Where, on appeal, reviewing court states a rule of law necessary to a decision, that rule becomes the "law of the case", and must be adhered to throughout its subsequent progress, though on its subsequent consideration of the case reviewing court may be of opinion that former decision was erroneous.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error 🔑1099(3)
Divorce 🔑255

Where District Court of Appeal, in prior action for declaration of rights of parties under written property settlement agreement requiring husband to pay $75 a month for support of wife and child, which agreement was incorporated into final divorce decree, determined that agreement did not contemplate payment of stipulated monthly sum after son had obtained his majority, the decision, either under doctrine of "res judicata" or "law of the case", precluded wife from thereafter recovering stipulated monthly payments.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Consolidated actions by Pansy Putnam against William Mason Putnam for money allegedly due under a contract. From a judgment for plaintiff, the defendant appeals.

Reversed.

Phil F. Garvey and Julia M. Easley, both of San Francisco, for appellant.

Elmer P. Delany, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff commenced two actions to recover sums alleged to be due under a written contract. The defendant answered, denying that the sums claimed were due, and setting up special defenses, one of which was the plea that these actions should abate the outcome of another action involving the same subject matter then pending on appeal. All defenses were summarily denied; the two actions were consolidated for trial, and plaintiff had judgment as prayed.

A brief statement of facts will suffice. In 1923 the parties, then husband and wife, entered into a written property settlement agreement which was approved and incorporated into a final decree of divorce. Under its terms the defendant agreed to pay to the plaintiff the sum of $75 monthly "for her care, maintenance and support, and the care, maintenance and support of said minor child, provided that if said second party shall divorce first party, and remarry, said allowance of $75.00 per month shall cease and terminate upon such remarriage, and thereafter first party shall pay to second party such monthly allowance for the care, maintenance and support of said minor child, as the parties hereto may mutually agree upon, and if they are unable to agree upon any such sum, then first party agrees to pay to second party for such care, maintenance and support of said minor child, such sum as may be fixed by the Superior Court of the City and County of San Francisco, State of California, as a reasonable sum for such purposes."

Prior to the commencement of these two actions the husband commenced a proceeding in the same court in declaratory relief for a decree determining his rights and obligations under the agreement subsequent to the time when the minor son reached his majority. This proceeding went to judgment; an appeal was taken therefrom, and a reversal was entered in this court on May 5, 1942. 51 Cal.App. 2d 696, 125 P.2d 525. In due time thereafter the remittitur issued from this court and was filed with the superior court.

The main issue presented and decided on the former appeal was whether the husband was required to pay the stipulated sum of $75 monthly after the son had reached his majority. In holding that the contract did not contemplate such payments, and that the husband was entitled to a judicial determination of what his duties under the contract should be since the time when the son had reached his majority this court said: 51 Cal.App.2d at page 699, 125 P.2d at page 526, "* * * when the appellant agreed to pay $75 a month for the support of the wife and 'the care, maintenance and support of said minor child' did the parties contemplate that these payments should continue after the child had reached his majority? Manifestly they did not so contemplate, any more than they intended that these payments should continue after the death of either the wife or the son. * * *

"By its express terms the alimony payments were to be made jointly for the benefit of the wife and the minor son. When the latter reached his majority all payments for his benefit automatically ceased to be due. What portion of that amount is to be paid to the wife alone is something upon which the contract is silent. It is also silent as to the contingency that the wife might die while the son was still a minor. We cannot assume that a court of equity is unable to reform the contract to meet these contingencies which the contracting parties overlooked."

[1] We will not enter into a discussion of the question whether the doctrine of res judicata or that of the law of the case applies to a situation of this kind. In Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652; 101 P.2d 497, the former doctrine was invoked. In Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17, the rule of the law of the case was followed. In the Sutphin case the appeal was from a judgment in a second suit brought upon the same lease involved in a former suit and judgment. In the Gore case the question arose upon a second appeal to the same appellate court raising the issue of jurisdiction on the former appeal. In Orwitz v. Board of Dental Examiners, 55 Cal. App.2d 888, 132 P.2d 272, the court followed the res judicata theory. In Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471, the question arose on successive appeals in the same action. In Tally v. Ganahl, 151 Cal. 418, 421, 90 P. 1049, 1050, the Supreme Court thus defined the law of the case rule: "The doctrine of the law of the case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this, although in its subsequent consideration, this court may be clearly of the opinion that the former decision is erroneous in that particular." In Reed v. Ring, 93 Cal. 96, 28 P. 851, it was intimated that the doctrine of the law of the case applied though the action in which the ruling was made was dismissed in the trial court after remittitur was filed and a new action was commenced involving the same issue of title to land. In Allen v. Bryant, 155 Cal. 256, 258, 100 P. 704, 705, the Supreme Court said that the rule of the law of the case "* * * presupposes error because, if the governing principle of law had been correctly declared, there would be no occasion for the invocation of the doctrine."

[2] In the present case we of course do not presuppose error in the former appeal, particularly since a petition to transfer that cause to the Supreme Court was denied. Rather we must now assume that the question of the husband's liability under the contract was correctly decided. But, under either theory, the parties are now foreclosed from further litigation of that particular issue and the judgment herein must be reversed. Since the remittitur on the former appeal has been returned to the superior court several months ago, there is no reason why the parties should be put to further needless expense of litigation by a retrial of the present action. The appellant made a timely request that the present trial be delayed until the judgment in the former action became final. This request should have been granted and no further proceedings should be taken herein, unless it should appear that the appellant fails to use rea-

sonable diligence in bringing the former action to trial.

The judgment is reversed.

STURTEVANT and SPENCE, JJ., concurred.

56 Cal.App.2d 892

JOHNSON v. BIMINI HOT SPRINGS et al.

Civ. 13619.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1943.

Rehearing Denied Feb. 26, 1943.

Hearing Denied March 29, 1943.

1. Theaters and shows 🔑6

In action against owner of public bath house for injuries to patron slipping and falling on shower room floor, evidence *held* sufficient to warrant trial court's finding that there was a soapy substance on floor.

2. Theaters and shows 🔑6

In action against owner of public bathhouse for injuries to patron slipping and falling on shower room floor, evidence *held* sufficient to warrant trial court's finding that plaintiff slipped because of soapy substance in water on floor.

3. Theaters and shows 🔑6

A public bathhouse owner, consenting to use of soap in shower room, with knowledge that such use created dangerous condition, failed to exercise ordinary and reasonable care for its patrons' safety and protection as "business invitees", and hence was liable for injuries to patron slipping on shower room floor because of soapy substance in water thereon.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitees".

4. Negligence 🔑48

The liability of proprietor of business premises for injuries to patron rests on proprietor's superior knowledge of perilous instrumentality and danger therefrom to invitees.

5. Theaters and shows 🔑6

In action against owner of public bathhouse for injuries to patron slipping and falling on shower room floor, evidence *held* sufficient to support trial court's finding that defendant negligently permitted a soapy substance to be on floor.

6. Theaters and shows 🔑6

In action against owner of public bathhouse for injuries to patron slipping and falling on shower room floor because of soapy substance thereon, evidence *held* to warrant trial court's finding that plaintiff was not contributorily negligent though she observed dirty appearance of floor, slope thereof, and grayish stuff in water thereon before falling.

7. Corporations 🔑432(6)

In action against corporation for injuries to patron of its public bathhouse, it was competent for defendant's resident assistant manager and assistant secretary to testify as to nature and scope of his authority.

8. Evidence 🔑244(1)

In action against corporation for injuries to patron of its public bathhouse as result of fall on shower room floor, declarations as to slippery condition of floor and use of soap in showers by defendant's resident assistant manager and assistant secretary were admissible in evidence against defendant.

9. Appeal and error 🔑989

It is appellate court's province, in reviewing trial court's findings, to consider, not relative weight of conflicting evidence, but legal sufficiency thereof to support findings.

SHINN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Marie Johnson against the Bimini Hot Springs, also known as Bimini Income Properties, Inc., and another for personal injuries. From a judgment for plaintiff against named defendant, it appeals.

Affirmed.

Crider, Runkle & Tilson and A. F. Mack, Jr., all of Los Angeles, for appellant.

Porter C. Blackburn and G. M. Grant, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant, the owner of a public bathhouse and plunge which it operated for profit, appeals from a judgment in favor of plaintiff for damages for personal injuries sustained by her as a result of slipping and falling allegedly by reason of a soapy substance on the shower room floor. Trial was without a jury. Judgment was also in favor of defendant Zuchelli, the assistant manager of defendant corporation.

The contentions by defendant are: that (1) it was not negligent; (2) the trial court erred in admitting certain evidence; and (3) plaintiff was contributively negligent. The amount allowed as damages is not in question on this appeal.

The shower room was described as follows: It was 12 feet in length and 11 feet in width. The entrance was near the center of the west side. On each side of the entrance there was a cold shower. The water for these two showers came directly from the city water system and was not heated. One shower was in the center of the north wall. Three showers were on the east wall and spaced about 3 feet apart. One shower was in the center of the south wall. The water for these 5 showers on the north, east and south walls came directly from the ground, was of a temperature of 95 degrees Fahrenheit, and was not heated after it came from the ground. There were two drains in the floor, the perforated covers of which were flush with the surface of the floor. One of the drains was about 4 feet from the north wall and was equidistant from the east and west walls. The other drain was about 3 feet from the south wall and also equidistant from the east and west walls. The floor sloped gradually downward from the east and west walls to the drains, and the grade of each slope (a distance of 6 feet) was one inch. The floor was a sand-float red cement finish. The red color was not paint, but was in the cement. In the center of the ceiling there was a 100-watt light. The east wall of the shower room extended to the ceiling, which was 12½ feet from the floor. The other walls did not extend to the ceiling, but the tops of those walls were 10½ feet from the floor. There were no partitions between the showers. The shower pipes were the "gooseneck" type and extended out of the the walls about 10 inches. The shower valves were in the "goosenecks" and were operated by a hanging cord. There was no receptacle for soap, or any receptacle or shelf in the shower room. There was nothing in the shower room except the shower pipes and shower heads. The shower room was not a part of the bath department of the bathhouse, but was for the use of the patrons of the plunge. The water system for the bath department was separate from, and not connected with, the water system for the plunge showers. The water for the bath department was heated.

Plaintiff testified in substance (except as to the extent of her injuries) that after her admission had been paid by a friend, she entered defendant's plunge about 1 p.m. of October 11, 1940, and remained there until 3:15 p.m., when she, barefoot and clad in a bathing suit, went into the shower room to take a shower. It was the first time she had been in the shower room. The floor and her feet were wet. She turned on the first shower to the left of the door but it was scalding hot. She started to another shower on the other side of the room, was walking at a slow, ordinary walk and had walked a distance of approximately 3 feet when she stepped on something that threw her feet up and she fell upon the floor, striking her left elbow, left shoulder and head. She was more or less unconscious for a moment immediately after the fall. As she was walking to the shower, and before she fell, she saw that the floor in front of her was "mostly" maroon red, "some places redder than others," "some sections like a maroon floor would look dirty," and it had "grayish stuff on it, sort of soapy flem [sic]." As she lay upon the floor after the fall, there was a "slick feeling" under her arm and when she was moved by those helping her, she could feel her body "sliding on that soap or slick surface." She testified further: "Q. What was on the floor? A. Soap. Q. Did you see it on the floor? A. Well, it looked grayish but I knew it by the feeling of it that it was soap." It was a rather smooth cement floor and had a very heavy paint on it. In places where the paint had worn off, the floor was rougher, but other portions of it were very slippery. About two weeks after the fall she and her sister talked with defendant Zuchelli at his office in the bathhouse. (Over objection by defendant corporation that such conversation was hearsay and not binding upon the corporation, she testified concerning that conversation.) He said he was the manager over all managers. In response to a statement by plaintiff as follows, "Mr. Zuchelli, you certainly found the floor in a very slippery condition." he said, "I certainly did." He said further that the reason the floor was so slippery and got in that condition was that people came there purposely to wash themselves and their hair in the soft mineral water with soap, and it was impossible to stop them from using soap. She did not use soap and did not see anyone using soap in the shower room.

Plaintiff's sister testified in substance the same as plaintiff did concerning the conversation with defendant Zuchelli.

A witness, the swimming instructor, called by defendant, testified that he assisted in taking plaintiff from the floor immediately after the accident and he did not see any foreign matter or soap on the wet floor.

A patron of the bathhouse, called by defendant, testified that she (the witness) was taking a shower under one of the showers on the back wall (east) and plaintiff was under a shower on the north wall to the right of the witness, which was not the shower next to the left of the entrance. Plaintiff left that shower to go to a shower to the left of the witness and when she had gone about 3 or 4 yards at a moderate speed, and was in front of the witness, she (plaintiff) slipped about 2 inches on her left foot, fell and grabbed for the witness as she fell but did not get hold of her. The floor was wet with water. She (witness) did not see soap or any foreign substance on the floor and she had not washed her hair there.

Another patron, the sister-in-law of the previous witness, called by the defendant, testified that she was in the room when plaintiff came in but she was not there when plaintiff fell. She (witness) had just gone through the door to leave, heard plaintiff fall, turned around, saw plaintiff lying on the floor, and went back into the room. Before the accident she (witness) did not see soap or any foreign substance on the floor. After the accident she did not look at the floor to determine whether there was any foreign substance on the floor. She had not been shampooing her hair or using soap there.

A witness, who was night janitor at the time of the accident and about 1½ years prior thereto, testified that he swept and hosed the shower room every night and that he had never found any soapy water or "slippery stuff" on the floor. On Saturday and Sunday nights he put chlorine all over the room, scrubbed it with a brush and hosed it again. The patrons get soap when they take a bath but not when they take a shower. He did his work after the pool had closed and by that time the floor of the shower room was dry.

A witness, who was the locker attendant at the time plaintiff fell, testified that the shower room was under her direction when she was on duty. She did not see soap or any foreign substance on the floor during the day of the accident. In answer to a question whether the mineral water in the showers was used for shampoo purposes, she said, "I couldn't say about that." Thereupon another question was, "You couldn't say?" to which she answered, "They might use it for shampoo, we also have mineral baths and they might shampoo their head in there, and we also have a tub."

A witness, a consulting civil engineer, who qualified as an expert in building construction, called by defendant, testified that he inspected the shower room the day he gave his testimony. He made friction-resistant tests on the floor when it was dry, and at another time when it was wet. The result of the dry test was that the dry floor showed about 14% greater friction resistance than the average of other similar dry shower floors similarly tested. The result of the wet test was that the floor indicated 33% greater friction resistance when wet than when dry.

Defendant Zuchelli testified that he was the assistant secretary and resident assistant manager of defendant corporation at the time of the accident (it was stipulated that he was such secretary and manager). That subject to the approval of the manager, he hired, fired, adjusted hours, determined payrolls, collected rents, approved bills, made all purchases, and did what one might do to adequately run a business for someone else. The manager did not stay on the premises. The next morning after the accident, plaintiff telephoned to him, the resident assistant manager, said she did not know a doctor and asked him to suggest a name of a doctor. He told her that their employees were sent to the defendant's compensation doctors and if she wanted to go there, he thought she would get the best treatment. He had a conversation with plaintiff and her sister on October 14th, in his office the substance of which was that they were not satisfied with the compensation doctors and they knew a certain doctor and he (witness) told them to change doctors if they were not satisfied. He did not say he would pay for any medical treatment or anything else. He did not say that the floor of the shower was always slippery. The floor was "always kept as neat and clean and non-slippery as the floor in your own bathroom." During a period of at least 3 or 4 weeks she (plaintiff) telephoned his office on an average of 3 to 5 times a day and he talked with her on 50% of the occasions. In those conversations she said she was suffering, was dissatisfied with the compensation doctors, and that she wanted to know if he could do anything about it. He said he could not do anything whatever. In response to questions by the court, he said he had had difficulty occasionally "with patrons who wanted to use the shower room as a bathing place and use soap there," but they stopped them as soon as they saw they tried to do so.

"Q. By the court: What did you see them try to do? A. Wash their hair.

"Q. By the court: With what? A. Soap. I never saw them, your Honor, that is hearsay."

He testified further:

"Q. By the court: So that before Mrs. Johnson was hurt, before she came to see you, you had had difficulty in the shower room caused by patrons using soap to wash their hair? (Objection by defendant was overruled.) A. Not then, your Honor, just the necessity of wanting people to do so.

"Q. By the court: Did you tell that to Mrs. Johnson? A. I didn't tell her that, she asked me if people ever used soap in there and I said, 'Occasionally, but we stop it as soon as we see them doing so.'

"Q. By the court: Once, or more than once? A. Well, I never stopped it at all, nor did I ever have any report to me that that ever had been stopped.

"Q. By the court: Why did you say you stopped it? A. If it occurred it was stopped by those people who were in charge of the locker room." No signs were posted warning the patrons not to use soap in the showers. He told the employees not to let the patrons use soap in the showers. He testified further that the party who sells admission tickets had a stock of soap which came from the stockroom.

"Q. Is it [soap] available to all those who patronize the Bimini showers? A. Well, it is available if they ask for it.

"Q. Is that for sale or does it go along as a gift to the patrons? A. It isn't for sale, if they ask for it it is handed to them." He testified further: "Q. Well, then, as I understand it, the use of the soap goes along with the purchase of the ticket if requested by the prospective patient? A. That is correct." He testified further: "By the court: Q. Mr. Zuchelli, you testified a little while ago that your practice is to supply soap to patrons who are going into that shower, was that your practice before October 11, 1940? A. Yes, sir, it was."

The findings of the court included the following: (1) "That the said defendant negligently and carelessly permitted the floor of the shower room to have deposited on it a soapy substance consisting of soap in its dissolved and liquid form, the presence of which the plaintiff did not know and comprehend; that the said soapy substance caused the floor of the said shower room to become slick and slippery"; and (2) that plaintiff proceeded "in the ordinary and customary manner, with the circumspection and care to use the shower room so provided by said defendant, and as she was proceeding across a part of the floor of said shower room, and as she stepped upon said floor, her right foot came in contact with the slick and slippery substance thereon and was thereby thrown violently to the floor of said shower room, with such force that she suffered physical injuries." The court concluded that plaintiff was not guilty of contributory negligence.

[1] One question is whether there was a soapy substance on the floor. There was no soap receptacle, or any receptacle or shelf in the shower room where soap could be placed. It is not reasonable to assume that it was placed on the tops of the three walls which were 10½ feet from the floor. The other wall extended to the ceiling. There was nothing in the shower room except the shower pipes and heads, which extended out of the walls about 10 inches. There was no partition between the showers and there was not a separate drain under each shower. The sloping floor carried the water from the 7 showers to 2 drains located in the center line of the floor about one-third of the length of that line from each end of the room. Plaintiff said she saw "grayish stuff," "a sort of soapy flem [sic]" on the dirty appearing red floor (of different shades of red) in front of her before she fell and that she knew, immediately after she had fallen, that it was

soap by the feeling of it on her body as she lay upon the floor. The resident manager of defendant, Zuchelli, said, according to plaintiff, the reason the floor was so slippery was that patrons washed themselves and their hair in the soft mineral water with soap, and said it was impossible to stop them from using soap. The resident manager said that before plaintiff's accident he had had difficulty in the shower room caused by patrons using soap to wash their hair; that he told plaintiff that people used soap in the showers occasionally but they (employees of defendant) stopped them as soon as they saw them using soap. He also said he directed the employees not to allow the patrons to use soap in the showers but that no signs were posted announcing that the use of soap in the showers was prohibited. He also said that the ticket seller had a stock of soap which was available to all who patronized defendant if they asked for it; that the soap was not for sale but "the use of soap goes along with the purchase of a ticket, if requested"; that this practice "to supply soap to patrons who are going into that shower," existed before October 11, 1940. Whether a soapy substance was on the floor was a question of fact for the trial court. The evidence was sufficient to warrant its affirmative finding.

[2] Another question is whether plaintiff slipped by reason of the water alone on the floor or by reason of a soapy substance in the water. This also was a question of fact for the trial court. According to defendant's witness, who made the friction-resistance tests, the floor when wet with water was 33% safer, insofar as slipperiness was concerned, than when it was dry. The evidence was sufficient to warrant the finding that plaintiff slipped by reason of a soapy substance.

[3-5] Another question is whether defendant negligently permitted a soapy substance to be on the floor. The admonitions to the employees, by the resident manager, to prohibit the patrons from using soap in the shower room, and the statement by him to plaintiff that the use of soap therein caused a slippery condition, indicated that he knew the use of soap in the shower room created a dangerous condition for the patrons. The practice of defendant in furnishing soap to its patrons for use in that shower room was inconsistent with its oral instructions to its employees not to let the patrons use soap in the shower room. Such inconsistency between its words, indicating an effort to prohibit the use of soap in the shower room, and its deeds, indicating encouragement to use soap in the shower room, showed a failure on the part of defendant to exercise the amount of care required of it for the safety of its patrons who had paid a fee for the privilege of using the premises. Such furnishing of soap established that defendant consented to the use of soap in the showers. The granting of consent to use soap in the shower room, when defendant had knowledge that such use of soap created a dangerous condition, was a failure by defendant to exercise ordinary and reasonable care for the safety and protection of its business invitees. It did not appear that any of defendant's employees or officers actually knew, in the particular instance here involved, that the soapy substance was on the floor. It did appear, however, that the circumstances of this particular instance were such that defendant should have known of, or should have taken reasonable precaution to guard against, the presence of the foreign matter on the shower room floor. Defendant knew that soap was furnished to the patrons upon request for use in the showers, that no signs were posted directing that soap should not be used therein, that it was reasonably probable that soap would be used therein and reasonably probable the use thereof would cause a slippery condition on the floor. "The true ground of liability rests on the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to invitees, over that of the invitee." Touhy v. Owl Drug Co., 1935, 6 Cal.App.2d 64, 66, 44 P.2d 405, 406. Plaintiff had never been in the shower room prior to the accident. She did not use soap therein and did not see anyone using soap there. It did not appear that plaintiff knew that defendant furnished soap to its patrons for use in the shower or that it permitted soap to be used therein. The transcript shows that the locker attendant, who also had charge of the shower room, said, "No," in response to a question as to whether she saw the shower room floor on the day of the accident. Apparently that answer, "No," was a typographical error in view of her answers that the floor was wet and that she helped to lift the plaintiff from the shower room floor. If, in fact, the answer was, "Yes," and the locker attendant saw the shower

room floor on that day, it does not appear whether she saw it before or after plaintiff fell. If she saw it before the accident, it does not appear how many times she saw it, whether she was in the shower room or where she was when she saw it, or what inspection she made of it, if any. It was stated in Chardon v. Alameda Park Co., 1934, 1 Cal.App.2d 18, at page 24, 36 P.2d 136, at page 139, "The cases cited by defendant * * * deal generally with the rule governing liability for injuries to invitees caused by defects on private premises; whereas the proprietor of a public amusement park is charged with a stricter accountability for the safety of those who have paid an admission fee to enter his premises." It was further stated in that case, at page 21 of 1 Cal.App.2d, at page 137 of 36 P.2d, "But it is also well settled that the proprietor of a public place of amusement is required to exercise the precaution, skill, and care commensurate with the circumstances to maintain the place * * * in a reasonably safe condition for the use intended * * *." It was stated in Tuttle v. Crawford, 1936, 8 Cal.2d 126, at page 130, 63 P.2d 1128, at page 1130, "Whether the floor of a store or public market place was so negligently maintained as to render the person responsible for its condition liable in damages is a question of fact to be decided by the jury. The same rule is also applicable to contributory negligence." The evidence was sufficient to support the finding that defendant negligently permitted a soapy substance to be on the floor.

[6] Another question is whether plaintiff was guilty of contributory negligence. It is true, as testified by plaintiff, that whatever it was that she saw on the floor the day of the accident was what she saw as she was walking before she fell. The description of the floor and the water thereon, as it appeared to her when she was walking before she fell, has been stated hereinabove. The different shades of red color in the floor, the dirty appearance of the red floor, the slope thereof, and the "grayish stuff" in the water were not such dangers that it should be concluded as a matter of law that she was contributively negligent. That was a question of fact, and the finding of the court that plaintiff was not guilty of contributory negligence was warranted by the evidence.

[7, 8] Another question is whether the alleged declarations of defendant Zuchelli, regarding the slippery condition of the floor and the use of soap in the showers, were admissible against the defendant corporation. It was stipulated that Zuchelli was resident assistant manager and assistant secretary of the corporation, and that he was the manager over all managers at the bathhouse. It was competent for him as resident assistant manager and assistant secretary of the corporation to testify as to the nature and scope of his authority. Kast v. Miller & Lux, 1911, 159 Cal. 723, 727, 115 P. 932. His testimony, stated above in some detail as to his duties, showed that he was authorized to and he did perform such duties as would usually be required of one in full charge of the personnel and operation of such an institution as the defendant corporation. His agency and the scope thereof were established properly at the trial. The declarations of defendant Zuchelli were admissible. In the case of Shields v. Oxnard Harbor Dist., 1941, 46 Cal.App.2d 477, 116 P.2d 121, the defendant McDougall, an agent of the defendant corporation, was involved in an accident while operating an automobile owned by the corporation. The court said at page 488 of 46 Cal.App.2d, at page 129 of 116 P.2d, "The rule is established in California that after evidence of an agency has been received as in the instant case, declarations or admissions of the agent are admissible against the employer. Sec. 1870, subsec. 5, Code Civ. Proc. Therefore, the trial court properly admitted in the present case evidence of declarations and admissions made by defendant McDougall at the time of and after the accident." The opinion in that case does not show what statements were made by the agent, but the reporter's transcript therein shows (p. 26) that the plaintiff testified as follows: "I said, 'Well, it kind of looks like you [McDougall] are in the wrong.' 'Yes,' he says, 'I guess it does.'"

The evidence shows that it was not intended that the plunge showers should be used for bathing with soap, inasmuch as no soap receptacles were provided, there was a separate department for bathing, and defendant's employees asserted that they had attempted to prohibit the use of soap in the plunge showers.

[9] The trial court had the benefit of the personal observation of the witnesses. It is the province of an appellate court in reviewing the findings of a trial court to consider not the relative weight of con-

flicting evidence but the legal sufficiency thereof to support the findings.

The judgment is affirmed.

DESMOND, P. J., concurs.

I dissent. In defendant's public bathhouse were a plunge, tub and shower baths. When patrons bought bath tickets they were furnished soap if they requested it. The floor of the women's shower room was of concrete. It had a "float finish" which gave it a porous texture and it was not slick; it had 33% greater friction resistance when wet than when dry. It was admitted by plaintiff at the trial that the floor was properly and safely constructed. The court found that "* * * defendant negligently and carelessly permitted the floor of the shower room to have deposited on it a soapy substance consisting of soap in its dissolved and liquid form, the presence of which the plaintiff did not know and comprehend; that the said soapy substance caused the floor of the said shower room to become slick and slippery." This is the only finding of negligence.

Plaintiff testified as follows: "Q. By Mr. Tilson: Did you actually see any soap on that floor before you fell? A. I would say that there was soap on there.

"Q. I mean could you see it as you were walking along? A. Well, you know, it looks like a flem.

"Q. The only question I asked was, you said you could see soap on the floor, I am asking you when you walked this three feet to where you fell, could you see this soap on the floor? A. Well, it was soap.

"Q. Did you see it as you were walking this six feet? A. A grayish white soap which appeared on top of the drain.

"Q. Did you see it as you were walking that three feet? A. Yes, I saw there was that soapy flem. * * *"

There was evidence from which the court could have concluded that defendant's employees and assistant manager had knowledge that women patrons washed their hair in the soft water of the showers and that they occasionally used soap. The effect of the judgment is to impose upon the proprietor of a public bathhouse the duty of seeing that the patrons do not use soap in bathing themselves. If liability is to be imposed in such cases it could readily be extended to apply to club buildings, hotels and other establishments where bathing facilities are provided for the common use of members and patrons. I do not think it is a sound rule which imposes such restriction upon the ancient and respected custom of the use of soap and water in the bath. The proprietor of a public bathhouse is furnishing a public service and he has a right to conduct his business so as to meet the reasonable demands of his patrons. Every business has its own natural characteristics; it is not to be expected that the floor of a bathhouse or a ballroom or a skating rink will be kept in the same condition as to safety as the floors of storerooms and hotel lobbies are kept. There are certain peculiar hazards attached to the use of the former. If the premises, although of such a nature as to render their use somewhat hazardous, are nevertheless maintained in a condition such as is commonly found and is to be expected in similar establishments and in a condition essential to their proper use for the purposes to which they are devoted, there is no negligence. Defendant was not negligent in failing to police the women's showers to see that no soap was used.

The responsibility of using care is not entirely upon the proprietor. The customer or patron is under the duty to anticipate those hazards which inherently and commonly attend the use of premises for particular purposes. Plaintiff not only should have anticipated that there might be some soapy substance on the floor of the shower room but she actually saw it. I cannot help believing that if she had exercised the care which her knowledge of the facts demanded, she would not have had her regrettable accident. The evidence, in my opinion, failed to establish liability of defendant for negligence, and the judgment should be reversed.

Hearing denied; TRAYNOR, J., dissenting.

56 Cal.App.2d 905

ADAMS v. NATIONAL AUTOMOBILE INS. CO. et al.

Civ. 13623.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1943.

As Modified Feb. 10, 1943.

1. Parties 🔑88(5), 92(3)
Pleading 🔑205(4)

Demurrer in general language for misjoinder of causes of action and of parties which did not specify particulars in which it was claimed that there was a misjoinder was properly overruled.

2. Judgment 🔑240

Where defendant in injunction suit after its dismissal sued injunction plaintiff for malicious prosecution and in a separate cause of action sued surety on injunction bonds for liability thereunder, and recovered only actual damages, joint judgment against injunction plaintiff and surety which placed them in substantially same position they would be if separate judgments had been rendered against them in separate actions was not prejudicial to rights of either.

3. Appeal and error 🔑1030

Where a case has been fairly tried and judgment correctly determines rights of parties, irregularities of procedure will not justify a reversal.

4. Injunction 🔑235

Plaintiff's "voluntary dismissal" of injunction suit has same effect in fixing liability of a surety as follows final determination by court that plaintiff was not entitled to injunction.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Dismissal".

5. Injunction 🔑238

Dismissal of injunction suit as result of a mutual and voluntary agreement of parties constitutes a "waiver" by defendant of right to proceed upon injunction bond.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

6. Injunction 🔑251

Where landlord of both plaintiff and defendant in injunction suit paid plaintiff to dismiss suit and terms of agreement between plaintiff and defendant establishing prices to be charged by both upon dismissal indicated that defendant merely agreed to price schedule but still insisted that she had been wrongfully restrained from carrying on her business and did not intend to waive her rights in that respect, evidence supported implied finding in injunction defendant's suit on injunction bond that dismissal of injunction suit was "voluntary act" of injunction plaintiff, and that injunction defendant's right to sue on bond was not "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Act" and "Waive".

7. Appeal and error 🔑1008(1)

Where testimony of parties with reference to circumstances under which agreement was prepared and executed is necessary to construction of agreement, an appellate court will not disturb construction placed upon agreement by trial court.

8. Injunction 🔑251

Evidence that by reason of injunction restraining plaintiff from conducting beauty shop in new location plaintiff's business was closed for one month during which time plaintiff's assistants accepted other employment, 75 per cent of plaintiff's customers sought and were refused appointments, plaintiff was forced to sell her equipment at a loss, and that plaintiff had made expenditures in moving to new location and preparing premises for business, sustained award of $1,107.

9. Injunction 🔑235

On order continuing a restraining order in force is the equivalent of an "original order" as respects liability of surety thereon for damages suffered by injunction plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Original Order".

10. Injunction 🔑235

Where there was no evidence that any of the damages awarded injunction plaintiff accrued during time when restraining order alone was in force, and plaintiff did not give up her business against which restraint was directed until after restraining order had expired and preliminary injunction was dismissed, and it appeared that plaintiff's entire damage was sustained by reason of liquidation of her business on the latter date, plaintiff was entitled to collect her damages only against the sureties on the preliminary injunction bond and not on the restraining order.

11. Injunction ⚷253

Finding that enforced closing of plaintiff's business for an entire month by reason of temporary injunction was so disastrous to plaintiff's prospects of regaining her patronage and re-establishing business as to warrant her in liquidating business supported judgment against surety on injunction bond as to entire penalty of bond.

12. Injunction ⚷239

Where restraining order was in force before any bond was given, for purpose of measuring obligation of surety restraining order must be deemed to have been issued on date bond was given although order of that date only continued restraining order in force.

13. Injunction ⚷239

In furnishing bond under continued restraining order, surety did not assume liability for damages which had been theretofore suffered where bond was not given to comply with any requirement made at time of issuance of restraining order.

14. Injunction ⚷239

Bonds given to indemnify against damage which may result from injunctive process are construed as operating prospectively unless they are so worded as to express intent of surety to assume liability for damage which has accrued before giving of bond.

15. Injunction ⚷239

Bonds given by surety in connection with restraining order and temporary injunction must be regarded as creating separate obligations as if they had been given by different sureties.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Gizella Adams against National Automobile Insurance Company, and others, to recover under undertakings executed by defendant insurance company in connection with a restraining order and temporary injunction secured by defendant Dorothy Ann Goldstein, against plaintiff and for other relief. From a judgment for plaintiff, National Automobile Insurance Company appeals.

Modified and affirmed.

C. W. Bowers, of Los Angeles, for appellant.

Walter E. Egerman, of Los Angeles, for respondent.

SHINN, Justice.

The complaint herein contained three causes of action. The first was for the recovery of damages from National Automobile Insurance Co. upon two undertakings executed by that defendant in connection with a restraining order and a temporary injunction in an action in which plaintiff herein was defendant; the second was for damages against defendant Goldstein for malicious prosecution of the suit for injunction and for malicious use of the injunctive orders; the third was for the rescission of a lease of real property in which one Feder was lessor and plaintiff herein was lessee, and for the recovery of rent paid. Findings and judgment were in favor of plaintiff upon the first and second causes of action and in favor of defendant Feder upon the third cause of action. Defendant National Automobile Insurance Co. has appealed from the judgment, defendant Goldstein has not appealed and plaintiff has not appealed from the judgment as to the third cause of action in favor of defendant Feder.

Defendant Goldstein operated a beauty shop in premises which she rented from Feder. Plaintiff, who was operating a beauty shop, leased another storeroom from Feder close by the one occupied by Goldstein. When plaintiff had almost completed the fitting up of her new shop and was installing the equipment from her old one, she and Feder were made defendants in a suit for injunction brought by Goldstein, the contention of the latter being, as it is stated by counsel, that Feder had made an agreement with defendant Goldstein not to lease the premises in question for use as a beauty shop. Upon the filing of the complaint a restraining order was issued and served upon plaintiff herein, who thereupon discontinued the fitting up of her new shop in obedience to the restraining order; later a temporary injunction was issued and served upon plaintiff. National Automobile Insurance Co. executed a $500 bond in connection with the restraining order and a $1,000 bond in connection with the temporary injunction. After plaintiff herein had been under the restraint of these orders for a month she and defendant Goldstein entered into an agreement, hereinafter to be discussed, and thereupon defendant Goldstein caused her injunction suit to be dismissed by written request of her counsel filed with the clerk. Plaintiff became discouraged, did not open up the new shop and disposed of the fixtures and equipment of her business at a very considerable loss.

The complaint in the present action alleged the pertinent facts with relation to the execution of the two bonds by appellant. In the second cause of action it was alleged that the legal proceedings prosecuted by defendant Goldstein were without probable cause and actuated by malice. Damages were sought in the sum of $4,150, alleged to have been sustained by plaintiff as follows: $1,000 as the expense incurred in fitting up the new shop and preparing to move the business; $3,000 for the loss of plaintiff's business, and $150 alleged to have been paid by plaintiff to her attorney in connection with the restraining order and temporary injunction. The court found that plaintiff had sustained damage in the sum of $1,107, including $150 paid by plaintiff as attorney's fees. There was a finding that this damage was sustained by plaintiff by reason of the restraining order and the temporary injunction and a separate finding that damage in the same amount was sustained by plaintiff by reason of the malicious acts of plaintiff in the prosecution of the injunction suit and the procurement of the injunctive orders therein. Judgment was entered jointly against National Automobile Insurance Co. and Goldstein for said sum of $1,107.

Appellant demurred to the complaint upon the ground, among others, that there was a misjoinder of causes of action and also a misjoinder of parties defendant; the demurrer was overruled. The following contentions are urged for a reversal of the judgment: (1) there was a misjoinder of causes of action; (2) there was a misjoinder of parties defendant; (3) the judgment is erroneous in that it is a joint judgment against National Automobile Insurance Co. as surety on the bonds and against defendant Goldstein for malicious prosecution; (4) that the agreement between plaintiff herein and defendant Goldstein pursuant to which the injunction suit was dismissed by the latter was a waiver by plaintiff of any right to recover on either of the bonds; (5) that the evidence was insufficient to sustain the finding of damage, and (6) that the undertaking given in connection with the restraining order was without consideration and void.

Of the enumerated contentions we find the first five to be without merit; as to the sixth contention we find the judgment to be subject to modification.

[1] Points 1 and 2 may be considered together. The demurrer on the ground of misjoinder did not specify the particulars in which it was claimed that there was either a misjoinder of causes of action or parties. Being in general language it was not a good plea of misjoinder and the court properly overruled the demurrer upon that ground. Kreling v. Kreling, 1897, 118 Cal. 413, 420, 50 P. 546; Gardner v. Samuels, 1897, 116 Cal. 84, 88, 47 P. 935, 58 Am.St.Rep. 135; O'Callaghan v. Bode, 1890, 84 Cal. 489, 495, 24 P. 269.

[2, 3] It is true, as contended under the third point, that while a joint judgment was entered on the two causes of action, defendant Goldstein was not liable with appellant on the first cause of action, since she did not sign the undertaking, and appellant was not liable with Goldstein under the second cause of action for malicious prosecution. But these facts do not affect the validity of the judgment. Only actual damages were allowed plaintiff; in fact she sought no punitive damages. It would seem clear that neither of two defendants is prejudiced by a joint judgment against them where one has incurred liability for damages for his tort and the other by reason of his agreement of indemnity against the same damage. If, therefore, appellant was properly held liable upon either or both of the two undertakings for damages sustained by plaintiff by reason of the injunctive orders no possible prejudice could result to it by reason of the fact that defendant Goldstein was held liable in the same amount on the basis of malicious prosecution. Appellant and Goldstein would be in substantially their present positions if separate judgments in the same amount had been rendered against them in separate actions. Where a case has been fairly tried and the judgment correctly determines the rights of the parties, irregularities of procedure will not justify a reversal. Conaway v. Toogood, 1916, 172 Cal. 706, 713, 158 P. 200; Karlik v. Peters, 1930, 106 Cal.App.

126, 131, 132, 288 P. 863, and cases there cited.

[4-7] The alleged waiver by plaintiff in connection with the dismissal of the action is predicated upon a written agreement signed by plaintiff and defendant Goldstein reading as follows: "This Covenant, made this 21st day of March, 1941, by and between Gizella Adams and Dorothy Ann Goldstein, Whereas, the said Dorothy Ann Goldstein is now about to dismiss with prejudice that certain Los Angeles Superior Court action number 461–279, and Whereas, upon said dismissal the said Gizella Adams may open and maintain a beauty shop in the premises located at 7775 Beverly Boulevard, in direct competition with the beauty shop now owned and operated by Dorothy Ann Goldstein, located at 308 N. Ogden Drive, Now therefore, the parties agree that they will not lower or cut prices listed as follows: [Here follows schedule of prices to be charged.] This agreement to not lower or cut the prices to extend for a period of six months from the date of execution hereof. This covenant shall not be construed as a waiver of the right of Gizella Adams to recover damages from any party to the said law suit known as Los Angeles Superior Court No. 461–279. This covenant shall be effectual upon execution to begin with the date of the filing of the dismissal provided that said dismissal is filed not later than seven days from date of execution." The agreement was prepared by the attorney for defendant Goldstein and apparently at the latter's suggestion. The question of waiver will be answered when it is determined which of two rules of law should be applied to the facts of the case. The first rule, which is the one the trial court applied, is that the voluntary dismissal by a plaintiff of an action for injunction is to be given the same effect in fixing the liability of a surety as follows a final determination by the court that the plaintiff was not entitled to the injunction. Moore v. Maryland Casualty Co., 1929, 100 Cal.App. 658, 280 P. 1008. The other rule is that where the dismissal results from a mutual and voluntary agreement of the parties it does not have the same effect as a determination by the court that the injunction was improperly issued but will be construed as a waiver by the defendant in the injunction suit of the right to proceed upon the bond. Wilshire Mortgage Corp. v. O. A. Graybeal Co., 1940, 41 Cal.App.2d 1, 7, 105 P.2d 996, and cases there cited. The question is whether the trial court erred in ruling that the dismissal of the injunction suit was the voluntary act of Goldstein and not the result of an agreement between the parties for the dismissal. The court heard the testimony of the parties with reference to the circumstances under which the agreement was prepared and executed. It appeared that the landlord, Feder, paid defendant Goldstein some $380 as a consideration for the dismissal. Plaintiff herein had nothing to do with these negotiations or the payment of the money. The agreement itself recited that Goldstein was about to dismiss the injunction action, which of course she had the right to do without the consent of plaintiff herein, and we think it was entirely reasonable for the court to consider that the dismissal resulted from the agreement between Goldstein and Feder rather than from any agreement between Goldstein and plaintiff. We certainly could not say that the dismissal would not have been entered had plaintiff not consented thereto. Upon the contrary, the trial court might reasonably have inferred that it had been agreed upon between Goldstein and Feder independently of any proposed consent by plaintiff to the dismissal and as a transaction entirely apart from the arrangement with plaintiff of a schedule of charges for beauty shop services. The provision in the agreement that it was not to be deemed a waiver by plaintiff of her right "to recover damages from any party to the said law suit known as Los Angeles Superior Court No. 461–279" lends support to the construction given the agreement by the trial court. Such an attempted reservation might not have been effectual to preserve plaintiff's right to sue on the bonds if she had in fact procured or given her consent to the dismissal as one of the terms of an agreement with defendant Goldstein, but in a negative way the provision does indicate that plaintiff, while agreeing to the schedule of prices, was still insisting that she had been wrongfully restrained from carrying on her business and that she had no intention to waive her rights in that respect. If it was a fact, and in support of the implied findings of the court we must assume it to be a fact, that plaintiff's position in the matter was entirely passive and that her inaction in no degree influenced defendant Goldstein's action in dismissing the suit, the dismissal in legal effect was the sole and voluntary act of defendant Goldstein and the agreement to maintain

prices was to all intents and purposes the only agreement between the parties. It is well settled that an appellate court will not disturb the construction placed upon an agreement by the trial court under such circumstances. Neff v. Mutual Life Ins. Co., 1941, 48 Cal.App.2d 110, 112, 119 P.2d 404, and cases there cited. There was therefore sufficient support for the court's implied finding that there had been no waiver of plaintiff's right to sue on the bonds.

[8] There was also sufficient evidence to support the court's finding of damage in the amount of $1,107. Plaintiff's business was closed from the 20th day of February to the 21st day of March, 1941. During that time her assistants accepted employment elsewhere and she was unable to serve her customers, some 75% of whom had sought and been refused appointments because of plaintiff's inability to serve them. There was detailed evidence as to the amount of money spent in the process of moving to the new location, the installation of fixtures, the building of partitions, painting the shop and otherwise preparing it for occupancy. There was also evidence as to the value of plaintiff's equipment as a part of an operating business and its value when detached therefrom and sold piecemeal, as well as evidence of the losses sustained in the sale of the equipment. Nothing was allowed plaintiff in the way of damages for loss of anticipated profits. Plaintiff lost her business, and equipment which had cost her in excess of $2,000 brought, on forced sale, only $650. These facts furnished a good basis for the allowance of damages. The award as to defendant Goldstein was fully sustained by the evidence and was reasonable.

[9] As we have indicated, we think the judgment against appellant as surety was excessive and we reach this conclusion because we think it should have been limited to the penalty of the bond given upon issuance of the temporary injunction, namely, $1,000. It is appellant's contention that the $500 bond was entirely ineffectual because it in terms referred to a restraining order that was about to be issued and not to one that had been previously issued, and because no restraining order was issued in connection with the giving of the bond. Reliance is placed upon Carter v. Mulrein, 1889, 82 Cal. 167, 22 P. 1086, 16 Am.St. Rep. 99, but that case is not in point. The bond was ordered to be given as a condition to the continuance in force of the restraining order, and Lambert v. Haskell, 1889, 80 Cal. 611, 617, 22 P. 327, is direct authority for the proposition that the order continuing the restraining order in force was the equivalent of an original order. The point is not decisive, however, because we have concluded that no recovery should have been allowed upon this bond under the evidence and the findings as to damage.

[10-12] The temporary restraining order was issued February 20, 1941, without the requirement of a bond; it was served on that day. On the return day, February 28, the hearing was continued until March 5 on which date demurrers were sustained with five days to amend, the hearing was continued to March 12, and the temporary restraining order was continued in force upon condition that a $500 bond be given by 5 p. m. of March 5, which was done. On March 12 the temporary injunction was issued with bond of $1,000 and it remained in force until the action was dismissed on March 21. The $500 bond provided in part as follows: "Whereas, the above named Plaintiff has commenced, or is about to commence, an action in the Superior Court of the County of Los Angeles, State of California, against the above named Defendants and is about to apply for A Temporary Restraining Order in the said action against the said Defendants enjoining and restraining Them from the commission of certain acts; as in the Complaint filed in the said action is more particularly set forth and described. Now, Therefore, in consideration of the premises, and of the issuing of the said Temporary Restraining Order, the National Automobile Insurance Company," etc. [here follow the usual provisions of an injunction bond]. The finding was that plaintiff sustained damage by reason of the restraining order and the preliminary injunction. Obviously the finding must be understood as implying that plaintiff sustained some damage by reason of the restraining order, since the judgment exceeds by $107 the penalty of the bond given upon issuance of the temporary injunction. There was no evidence that any of the damages awarded plaintiff accrued during the time when the restraining order alone was in force, February 20 to March 12, nor was there any finding that any damage accrued during that period. Plaintiff did not give up the business until after March 21 and since she was not claiming damages for loss of profits in the mean-

time, her entire damage was sustained by reason of her liquidation of the business. There was evidence from which the court could have found, and inferentially did find, that the enforced closing of the business for an entire month was so disastrous to plaintiff's prospects of regaining her patronage and reestablishing the business as to warrant her in liquidating the same, and for that reason we believe that the judgment should stand as to the entire penalty of the bond given upon the issuance of the temporary injunction. But we can find no basis upon which to impose liability upon the surety by reason of the bond given to continue the restraining order in force between March 5 and March 12. On the latter date responsibility shifted from that bond to the bond on the temporary injunction. The restraining order was in force for 13 days before any bond was given and for 7 days thereafter. For the purpose of measuring the obligation of the surety the restraining order must be deemed to have been issued on March 5, although the order of that date only continued it in force. Lambert v. Haskell, supra, 1889, 80 Cal. 611, 617, 22 P. 327.

[13-15] In furnishing the bond the surety did not assume liability for damages which had been theretofore suffered. The bond was not given to comply with any requirement made at the time of the issuance of the restraining order, because no bond had been required. Bonds given to indemnify against damage which may result from injunctive process are to be construed as operating prospectively unless they are so worded as to express an intention of the surety to assume liability for damage which has accrued before the giving of the bond. Carter v. Mulrein, supra, 1889, 82 Cal. 167, 22 P. 1086, 16 Am.St.Rep. 99; Curtiss v. Bachman, 1895, 110 Cal. 433, 42 P. 910, 52 Am.St.Rep. 111; Alaska Improvement Co. v. Hirsch, 1897, 119 Cal. 249, 251, 47 P. 124, 51 P. 340. If, therefore, the closing of the business between February 20 and March 12 contributed to the total damage sustained by plaintiff it is impossible for us to tell from the record, and we are inclined to believe that it would have been difficult, if not impossible, for the trial court to determine how much of the damage was sustained before and how much after the bond on the restraining order was given. As that may be, the court did not attempt to do so. There is therefore no basis in the evidence nor in the findings for even an approximation of the amount of damage, if any, which plaintiff sustained while the restraining order was in force, either before or after the $500 bond was given. Plaintiff testified that she had no intention of giving up her business until after the 21st of March, when she for the first time realized that it would be hopeless to continue with it. The enforced abandonment of the business was the cause of her damage, and the evidence sufficiently shows that the decisive factor was the prolonged restraint which plaintiff was under by reason of the temporary injunction. The facts in this connection call to mind the adage that "It is the last straw that breaks the camel's back." Apparently that is what happened to plaintiff's business; it might have survived being closed one, two or three weeks, but not the fourth. So far as liability is concerned, the bonds must be regarded as creating separate obligations as if they had been given by different sureties. The effect of the restraining order upon the final result while the first bond was in force is too uncertain and remote under the evidence to furnish a basis of liability of the surety.

For the reasons we have stated, the judgment should be reduced to the amount of the penalty of the injunction bond, namely, $1,000. We think a judgment in this amount is a satisfactory result to be reached from a consideration of the rather difficult and intangible facts of the case.

The judgment is modified by reducing the same from $1,107 to $1,000, and as so modified is affirmed.

Neither side to recover costs on appeal.

DESMOND, P. J., and BISHOP, J. pro tem., concur.

56 Cal.App.2d 765

ENOS v. PICACHO GOLD MINING CO. et al.

Civ. 13689.

District Court of Appeal, Second District, Division 3, California.

Jan. 25, 1943.

Hearing Denied March 25, 1943.

1. Joint adventures 🔑1
Partnership 🔑3, 5

In order to bring a contract within legal designation of a "copartnership" or a "joint enterprise", it must appear that parties thereto are associated together for joint benefit of all, that they are joint owners of property belonging to the association, and share jointly in the profits as well as in same proportion bear the losses that might result from enterprise.

See Words and Phrases, Permanent Edition, for all other definitions of "Copartnership" and "Joint Enterprise".

2. Joint adventures 🔑1
Partnership 🔑3, 5

Before relationship of "partners" or "joint adventurers" can exist, it must be shown that there is a community of interest and an agreement to share jointly in profits and losses resulting from the enterprise.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer" and "Partner".

3. Joint adventures 🔑1

Mere fact that a corporation has interposed as an operating agent between two parties who hold its shares does not prevent parties from being "joint adventurers", but the elements of a joint adventure must be found in other matters than the interposition of the corporation.

4. Joint adventures 🔑7

Even if there were a joint adventure between defendant company and company which executed note to plaintiff for his services rendered to such company, that fact would not impose any liability on defendant company for plaintiff's note or make defendant company's mortgage on property of other company subject thereto, where plaintiff's note was executed long before the joint adventure, if any, was created.

5. Joint adventures 🔑4(1), 7

One who enters into a joint adventure with another does not by that fact alone become liable for previous debts of the other, even if they had been incurred in connection with subject matter of the joint adventure, nor is he thereby disabled from lending money to his fellow adventurer, or taking from him a mortgage to secure such a loan.

6. Mortgages 🔑151(1)

Where joint adventurer lends money to his fellow adventurer and takes from him a mortgage to secure such loan, mere existence of the joint adventure does not afford any reason why debts of mortgagor, not incurred in connection with joint adventure, should be placed ahead of the mortgage.

7. Fraudulent conveyances 🔑156(1), 162(1)

A conveyance made for a valuable consideration may not be attacked by grantor's creditor, even though transaction was entered into by debtor with intent to delay or defraud his creditors, unless grantee so intended or participated in or had knowledge of the fraudulent intent, and the same rule is applicable to a mortgage or other encumbrance as to a conveyance. Civ.Code, § 3439.

8. Corporations 🔑542(1)

Mere knowledge by defendant company at time it made loan and received mortgage from another company that plaintiff was an unsecured creditor of other company was not enough to show an intent on part of defendant company to defraud plaintiff or to charge defendant company with "notice" of such intent, if any, entertained by the other company, and, hence, would not authorize subjecting defendant company's mortgage to plaintiff's claim. Civ.Code, § 3439.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

9. Corporations 🔑590(1)

Where defendant company entered into a contract with another company of which plaintiff was an unsecured creditor for creation of a new corporation, which provided that other corporation was to transfer its property to new corporation and take such proceedings as might be necessary to effectively postpone all claims of its creditors so that title of new company should be clear of all claims of such creditors, failure to take any steps under latter provision regarding plaintiff's claim would not place plaintiff in a better position than that of an unsecured creditor in absence of showing that transaction was made in fraud of creditors. Civ.Code, § 3439.

10. Corporations 🔑542(1)

Where defendant company entered into contract with another company of which plaintiff was an unsecured creditor for creation of a new corporation, which provided that plaintiff was to make a loan to new corporation secured by mortgage, and that other company was to transfer its property to new corporation, adoption by other company of a reorganization plan which made no provision for paying plaintiff's claim, after transfer of its property pursuant to the contract, even if established, would not show an intent on part of defendant company to defraud plaintiff, in absence of showing that defendant company knew of reorganization plan. Civ.Code, § 3439.

11. Corporations 🔑542(1)

Where defendant company entered into contract with another company of which plaintiff was an unsecured creditor for creation of new corporation, which provided that plaintiff was to make a loan to new corporation secured by a mortgage, and that other corporation was to transfer its property to new corporation, defendant company as lender of money had right to stipulate in contract for use of the money lent, without being subject to the implication of fraud. Civ.Code, § 3439.

12. Fraudulent conveyances 🔑64(1), 162(1)

Where both insolvency or contemplation thereof on part of transferor and lack of valuable consideration for the transfer appear, the transfer is void under statute without any showing of actual intent to defraud by either transferor or transferee. Civ.Code, § 3442.

13. Fraudulent conveyances 🔑74(3)

The term "voluntarily", as used in statute making any transfer or encumbrance of property made or given voluntarily, or without valuable consideration, by a party while insolvent or in contemplation of insolvency, fraudulent and void as to existing creditors, is synonymous with companion phrase "without a valuable consideration", and adds nothing to the statute. Civ.Code, § 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntarily" and "Without a Valuable Consideration".

14. Corporations 🔑542(1)

Where agreement for transfer by company of which plaintiff was an unsecured creditor of its property to a new corporation provided that new corporation was to assume balance due from assignor company for purchase of certain machinery, certain other debts of such company and all further operating debts such company might incur up to the transfer, the assumption of liability was a sufficient "consideration" under the statute to uphold the transfer against attack by existing creditor on ground that transfer was fraudulent as to him. Civ.Code, § 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

15. Corporations 🔑542(1)

Where agreement for transfer by company of which plaintiff was an unsecured creditor of its property to new corporation provided that assignor company was to receive all or a substantial part of stock of new corporation, assignor company had received a "valuable consideration" for property transferred, so that transfer could not be set aside by plaintiff as fraudulent to existing creditors. Civ.Code, § 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Valuable Consideration".

16. Fraudulent conveyances 🔑78

Where a contract for transfer of property provides for consideration to transferor, so as not to be fraudulent as to existing creditors of transferor, the transfer does not become a "voluntary transfer" fraudulent as to existing creditors, merely because the consideration was not received immediately or at time fixed therefor. Civ. Code, § 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Transfer".

17. Corporations 🔑542(1)

Where defendant company entered into contract with another company of which plaintiff was an unsecured creditor for creation of a new corporation, which provided that plaintiff would make a loan to new corporation secured by a mortgage, and that other corporation was to transfer its property to new corporation, and it appeared that money loaned by defendant corporation was used to pay for and to improve the mortgaged property, plaintiff could not challenge existence of a valuable consideration for the mortgage. Civ.Code, § 3442.

18. Corporations ⚷590(1)

An essential foundation of rule that equity will regard new corporation to which property of old corporation is transferred as being a mere continuation of former corporation under a different name and hence new corporation will be held liable for debts of old corporation at least to extent of value of property which it received from old corporation without consideration, is lack of consideration running from new corporation to old corporation.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Herbert C. Enos against Picacho Gold Mining Company, Nipissing Mining Company, Ltd., and another on a note and for a decree that plaintiff's claim on note was a charge on mining property of the defendant Picacho Mining Company paramount to the mortgage of the defendant Nipissing Mining Company, Ltd. From a judgment for plaintiff for principal of the note and decreeing that plaintiff had a lien on mining property which was paramount to mortgage of defendant Nipissing Mining Company, Ltd., Nipissing Mining Company, Ltd., alone appeals.

Reversed as to defendant Nipissing Mining Company, Ltd.

Gibson, Dunn & Crutcher and Henry F. Prince, all of Los Angeles, for appellant.

Zach Lamar Cobb, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The defendant, Nipissing Mining Company, Ltd., appeals from a judgment in favor of the plaintiff.

The plaintiff, who is a mining engineer, was one of the organizers and first directors of Picacho Gold Mining Company, a corporation organized in 1934 in the State of Ohio, which will be hereinafter referred to as the Ohio company. He was appointed its general manager, and rendered sundry services to it, for which there was due to him on January 28, 1935, the sum of $7,850; and on that date a note in his favor for the sum stated, due on or before one year from its date, was executed and delivered to him by the Ohio company. The validity of this note is conceded by appellant. No security was given for the note, and by its terms interest was to be paid only out of the maker's net income—which has not yet made its appearance. Soon after the Ohio company was formed it obtained from one of its promoters an assignment of a contract, referred to in the record as a "bond and lease," by which it could acquire title to a certain gold mining property, on payment of a price, the balance of which appears then to have been $145,900. Thereafter the Ohio company acquired another similar contract for purchase of some adjoining mining property. This property was all in the Picacho Mining District, Imperial County, California, and no mines appear to have been in operation or opened thereon at the time these contracts were acquired. The Ohio company also made a conditional sale contract to purchase a considerable amount of mining machinery. The Ohio company had, as far as appears, no other property and no means of obtaining title to this mining property under these contracts unless it could obtain money from some source. All its stock except five shares was issued in exchange for the assignment above mentioned. It made several attempts, extending over a period of two years or more, to obtain a loan from the Reconstruction Finance Corporation. An application for such a loan was approved, but nothing came of it. The Ohio company borrowed some money from its stockholders with which to make payments on the contracts above mentioned. While this was going on plaintiff, on June 20, 1935, severed his connection, except as stockholder, with the Ohio company. Finally, that company made a written agreement with defendant The Nipissing Mining Company, Ltd., a Canadian corporation, hereinafter designated as Nipissing, which has given rise to this lawsuit. This agreement was authorized by the board of directors of the Ohio company on October 29, 1938, and approved by its stockholders on November 16, 1938. Pursuant to this contract, a new corporation, the defendant the Picacho Mining Company, hereinafter referred to as the California company, was organized under the laws of California, the Ohio company transferred to it the above mentioned contracts for purchase of mining property and machinery, Nipissing loaned the California company $200,000, out of this sum the balance due on the contracts for purchase of the mining property, then amounting, less a discount, to $93,666.67, was paid, a conveyance of the mining property was made to the California company, and that company made its note to Nipissing for the loan, and to secure this note executed to Nipissing a mortgage on the mining property. All of these acts after the organization of the California company were handled through an escrow, so that the various transfers and the mortgage all took effect simultaneously in December, 1938.

The plaintiff brought this action against all the corporations above mentioned, as well as some individuals, and by his amended complaint, filed at the trial "to conform to the proof," he sought a judgment against all the defendants on his promissory note, and also, as to Nipissing, a decree that his claim is a charge on the mining property prior to that of Nipissing. The trial court made findings in plaintiff's favor, gave him judgment for the principal of the note against the Ohio company and decreed that the transfer of the mining property by the Ohio company to the California company was void as to plaintiff and that he had a lien on the mining property which was paramount to the mortgage of Nipissing. In support of this judgment plaintiff relies on two propositions. First, he claims that by the contract between the Ohio company and Nipissing the two became joint adventurers in relation to the mining property; and, second, he contends that the Ohio company's transfer of its assets to the California company and the latter's mortgage to Nipissing were made with intent to delay and defraud plaintiff as a creditor of the Ohio company, and were void as to him. Subordinate to these are other contentions which can be considered in connection with them.

The contention regarding a joint adventure is based on the terms of the contract between the Ohio company and Nipissing, and to its understanding a further knowledge of the terms of that contract is essential. It is too long to insert here, but its salient provisions—those which must control its interpretation in this respect—may be stated as follows: After referring to the Ohio company's contracts for the purchase of the mining property, on which it recited that not more than $125,000 was then due, and stating that the Ohio company desired Nipissing to advance to it or the new company hereinafter mentioned $200,000 to be secured by a first mortgage on the mining property, the contract provided that Nipissing would incorporate a new corporation, under the laws of California, to which the Ohio company would cause the mining property to be transferred, that Nipissing would advance to this California company $200,000 to be secured by first mortgage executed by the California company on the mining property, that the balance of the price of this property should be paid from the loan, and that pending the completion of that transaction Nipissing would advance to the Ohio company $25,000 or more to finance current mining operations, which was to be repaid out of the loan. The California company was to assume certain debts of the Ohio company—which do not seem to include that to plaintiff. So long as any part of the money secured by the mortgage remained unpaid, Nipissing was to have full control and management of operations on the mining property. Nipissing was to have an option to buy 51 percent of the stock of the California company (other than six directors' shares), at any time within two months after the loan was paid, for $333,000, on which any amount unpaid on the loan would be credited. The Ohio company was then to receive the other 49 percent of the stock. In the meantime all the stock except six directors' shares was to be issued to and held by a trustee and not voted. Six directors' shares were to be issued as fully paid, three to nominees of the Ohio company and three to nominees of Nipissing. If the option was not exercised Nipissing was to cause the three directors' shares held by its nominees to be transferred to the Ohio company, and the latter was to receive from the trustee all the stock to be held by it. The terms of this contract were substantially carried out, the California company already referred to being the new corporation organized under it, except that no shares of stock of that corporation have been issued to a trustee, the only shares issued by it being the six directors' shares. The same person who was general manager of Nipissing became also general manager of the California company and acted as such without any compensation from the California company.

[1, 2] We cannot see in this contract, or in the acts of the parties in carrying it out, anything which can properly be deemed a joint adventure. In Dempsey-Kearns Theatrical & Motion Picture Enterprises v. Pantages, 1928, 91 Cal.App.

677, 682, 267 P. 550, 552, the court gave this definition of a joint adventure: "* * * in order to bring a contract within the legal designation of a copartnership or a joint enterprise, it must appear that the parties thereto are associated together for the joint benefit of all; that they are joint owners of the property belonging to the association, and share jointly in the profits as well as in the same proportion bear the losses that might result from the enterprise." This statement was approved and followed in Quinn v. Recreation Park Ass'n., 1935, 3 Cal.2d 725, 728, 46 P.2d 144, and United Farmers Ass'n. v. Sakiota, 1935, 7 Cal.App.2d 559, 560, 46 P.2d 770, as well as other cases; and the Sakiota case was cited in Stoddard v. Goldenberg, 1941, 48 Cal.App.2d 319, 324, 119 P.2d 800, 802, as authority for the proposition that before the relationship of partners or joint adventurers can exist, "it must be shown that there is a community of interest and an agreement to share jointly in the profits and losses resulting from the enterprise." In Spier v. Lang, 1935, 4 Cal.2d 711, 716, 53 P.2d 138, it was held that the element of joint participation in the conduct of the business is necessary to constitute the parties joint adventurers.

In the present case, Nipissing, before it exercises its option to buy stock of the California company, is merely a lender of money. It did, indeed, stipulate for certain other matters, such as its right to nominate three directors of the California company and to have control of operations on the property, which might conduce to the safety of its loan; and it required the proceeds of the loan to be applied to purposes which would enhance its security. None of these matters, however, can suffice to convert its loan of money into any other sort of transaction. It appears also that Nipissing had been engaged in the gold mining business for a long time, that the mines it was operating were nearly exhausted when this contract was made, and that it was looking about for another sphere of operations. Plaintiff lays stress on these facts, and they do show that the motive which induced Nipissing to enter into the transaction was probably the hope that it might by means of its option become the owner of a controlling interest in a new mine and thus continue its operations. But neither does such a motive alter the nature of the transaction. Until the option is exercised Nipissing has no interest by way of ownership in the property, and is not jointly participating in the conduct of the business with a view to obtaining profits therefrom. There is, it is true, a provision in the contract, and also in the mortgage, that until the mortgage is paid off any available profits shall be applied on the mortgage; but this is not an agreement to share in the profits. Money paid to Nipissing under this term of the contract would not come to it as profits, but as payment of interest or principal of its loan.

[3] Since the option has not yet been exercised, the situation to arise upon its exercise is not important here, except as it may throw light on the prior situation. After exercise of the option, Nipissing would be a stockholder in the California company, the Ohio company would be the holder of the other stock therein, except for directors' shares, and the California company would be the operator of the mine. As suggested in McSherry v. Market Corp., 1933, 129 Cal.App. 330, 333, 18 P.2d 776, cited by plaintiff, a corporation may be but an instrumentality to carry out a joint adventure, and hence the mere fact that a corporation is interposed as an operating agent between two parties who hold its shares does not prevent them from being joint adventurers. But, on the other hand, that mere fact does not make them joint adventurers. The elements of a joint adventure must be found in other matters. Here they do not so appear.

[4-6] But even if there were a joint adventure, it is not apparent how that fact would impose on Nipissing any liability for plaintiff's note or make its mortgage subject thereto. The note was executed long before the joint adventure, if any, was created, so that plaintiff can claim nothing on the theory of appearances, or estoppel by reason thereof to deny liability. There is nothing in the agreement out of which the joint adventure, if any, must be constructed, to suggest an assumption by either party of previous debts of the other. Certainly one who enters into a joint adventure with another does not by that fact alone become liable for previous debts of the other, even if they have been incurred in connection with the subject matter of the joint adventure; nor is he thereby disabled from lending money to his fellow adventurer, or taking from him a mortgage to secure such a loan; nor does the mere existence of the joint adventure afford any reason why debts of such a mortgagor, not in-

curred in connection with the joint adventure, should be placed ahead of the mortgage. Plaintiff points to the fact that after the mining property was paid for and the other advances made by Nipissing were repaid, as required in the agreement, there remained $65,000 of the proceeds of the loan in the treasury of the California company, which was used to improve and develop the mining property, and he insists that this should have been used to pay his note. This point is argued both under the head of joint adventure and that of fraud on plaintiff as a creditor. We cannot see its relevancy to the matter of joint adventure, for it has no tendency either to prove the existence of a joint adventure or, if one did exist, to impose liability on the parties thereto. Its bearing on the question of fraud will be considered later.

Coming now to the question of fraud on plaintiff as a creditor, it is to be noted that in his amended complaint plaintiff alleged only that the Ohio company made the various conveyances, assignments and transfers of its property to the California company "with the intent to hinder, delay and defraud plaintiff, as a creditor" of the Ohio company, "intending thereby to put the said property beyond the reach of plaintiff, as its creditor," and that the California company accepted them with the knowledge of that fraudulent intent, and with the intent to assist in the fraud. The findings are to the same effect. In neither complaint nor findings is there any statement that Nipissing knew of or in any way aided or participated in this fraudulent intent of the Ohio company and the California company, or that Nipissing itself had any such intent. Appellant contends that there was no evidence to support such a finding, had it been made. Respondent does not dispute this contention and we have noted nothing contrary thereto in the record; we therefore accept it as correct. It does appear, from complaint, findings and evidence that before Nipissing made the loan and received the mortgage, it was informed that plaintiff was a creditor of the Ohio company. Appellant contends also that the evidence does not support the finding of fraudulent intent on the part of the Ohio company, but we do not pass on this contention because, assuming such intent, it does not, in the circumstances of this case, support the judgment subjecting appellant's mortgage to payment of plaintiff's claim.

[7] At the time of the transaction in question it was subject to the provision of section 3439 of the Civil Code, as it stood before the 1939 amendment, that "Every transfer of property or charge thereon made * * * with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, * * *." In the application of this rule it is settled that "A conveyance made for a valuable consideration may not be attacked by the grantor's creditor, even though the transaction was entered into by the debtor with intent to delay or defraud his creditors, unless the grantee so intended or participated in or had knowledge of the fraudulent intent." Kuhlman v. Pacific States S. & L. Co., 1941, 17 Cal.2d 820, 821, 822, 112 P.2d 620, 621. The same rule is applicable to a mortgage or other incumbrance as to a conveyance.

[8, 9] Mere knowledge by Nipissing that plaintiff was a creditor of the Ohio company is not enough to show an intent on its part to defraud him or to charge it with notice of such intent, of any, entertained by the Ohio company. Kuhlman v. Pacific States S. & L. Co., supra. In this connection plaintiff places considerable emphasis on a provision of the contract between Nipissing and the Ohio company that the latter "shall obtain and deliver such consents or other agreements or take such steps or proceedings as may be necessary to effectively postpone all claims" of its creditors other than trade creditors "so that the title of the new company shall be clear of all claims of such creditors and the transfer * * * to such new company binding upon all such creditors." Nothing was done under this provision regarding plaintiff's claim, and appellant, we assume, is to be charged with notice of this fact. However, nothing was necessary to accomplish the result indicated by the language quoted. As a purely unsecured creditor plaintiff had no lien or claim on the property, and the transfer, if made for a valuable consideration, was binding upon him. He could be placed in a better position only if the transaction was made in fraud of creditors—a proposition which cannot be deduced from the terms of the contract itself and which, as we have already stated, is not, so far as knowledge or intent of Nipissing is controlling, either stated in the pleadings or findings or established by the evidence. This contract

was drawn by lawyers, and we see in this provision of it no more than a manifestation of that abundance of caution commonly displayed by the legal profession, in an effort to provide against possibilities and contingencies.

[10] The court found that after the contract between the Ohio company and Nipissing was made and the conveyances and mortgage provided for by it were executed and delivered, the Ohio company withdrew from the State of California, where it had previously been authorized to do business, and undertook to dissolve its corporate existence, and is now "a dormant corporation." We do not understand this to mean that the corporation was actually dissolved, and certainly the evidence does not go that far. As a part of a plan of reorganization the Ohio company undertook to organize a Nevada corporation to which its property was to be transferred. Stock of this Nevada corporation was to be issued to stockholders of the Ohio company and the latter was then to be dissolved. Plaintiff asserts that this plan made no provision for paying him, but this assertion is not accurate, for the plan did provide that the Nevada corporation would assume and pay all liabilities of the Ohio company. However, we do not regard these proceedings of the Ohio company as of any importance here, for two reasons: first, it does not appear that this plan of reorganization was ever carried to completion; and second, it does not appear that Nipissing in any way participated in this plan or was even informed of its existence. Whatever tendency the adoption of this plan by the Ohio company may have to show its intent to defraud plaintiff, certainly it cannot, in the absence of a showing that Nipissing knew of it, tend at all to show such intent on the part of Nipissing. Plaintiff contends that this action of the Ohio company was "done pursuant to the requirements of" Nipissing, the requirements referred to being the provision of the contract above discussed that the Ohio company would take such steps as were necessary to postpone the claims of its creditors to the transfer to the California company. We can see no connection between this term of the contract and the acts now under discussion. As already stated, plaintiff had no lien on the property and no such steps as these were necessary to the carrying out of the contract.

[11] Coming again to the failure to apply, in payment of plaintiff's note, the part of the proceeds of the loan which remained in the treasury of the California company, we note that the contract between the Ohio company and Nipissing did not contain any provision regarding the application of this remainder; but perhaps it may be said that Nipissing brought about the use of it already stated by virtue of its nomination of three directors of the California company and the functioning of its general manager as general manager of the California company. There is nothing in all this, however, which shows or tends to show any intent of Nipissing to defraud plaintiff. As lender of money Nipissing had a right to stipulate for the use of the money lent, and it might have gone so far as to insert in the contract a provision that it be used as it was used, without being subject to the imputation of fraud. Application of the money to improvement of the property was beneficial, rather than detrimental, to plaintiff. This money was not concealed, or suddenly removed from plaintiff's reach. If for any reason it was subject to his claim he could have taken effective proceedings to assert that claim against it before it was expended. He was informed of the general nature of the transaction about the time it was entered into, but took no steps to look into it for a long time.

[12-15] Plaintiff contends, however, that the Ohio company, by the transfer of its several contracts to the California company, divested itself of all its property, that it received no consideration for the transfer, and that by reason thereof it became insolvent. If such were the case, the transfer would be fraudulent and void as to plaintiff, an existing creditor, under the provision of section 3442, of the Civil Code, as it existed at the time of the transfer, that "any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." In such case, it would not be necessary for plaintiff to show fraudulent intent of the transferee, or its knowledge of any fraudulent intent of the transferor. Tobias v. Adams, 1927, 201 Cal. 689, 695, 258 P. 588. Indeed, where both insolvency or contemplation thereof on the part of the transferor and lack of a valuable consideration for the transfer appear, the trans-

fer is void under section 3442 without any showing of actual intent to defraud by either party. Lefrooth v. Prentice, 1927, 202 Cal. 215, 228, 229, 259 P. 947. The term "voluntarily," as used in section 3442, is synonymous with its companion phrase, "without a valuable consideration," and adds nothing to the section. Security Trust Co. v. Silverman, 1930, 210 Cal. 578, 292 P. 636. We do not agree that the transfer by the Ohio company to the California company was without consideration. By the terms of the agreement for the transfer the California company was to assume and agree to pay the balance due from the Ohio company for purchase of some machinery, amounting to $57,000, certain other debts of the Ohio company amounting to not over $25,000 and all further operating debts it might incur up to the transfer. Such an assumption of liability is a sufficient consideration to uphold a transfer against such an attack as we are now considering. Bacciocco v. Curtis, 1938, 12 Cal.2d 109, 114, 82 P.2d 385; Mix v. Yoakum, 1934, 138 Cal.App. 290, 294, 31 P.2d 1071; Hasenjeager v. Voth, 1928, 91 Cal.App. 394, 398, 267 P. 146; 12 Cal. Jur. 1015, 1021. Furthermore, the agreement provided that the Ohio company was to receive shares of stock of the California company for its transfer. If Nipissing does not exercise its option to buy part of the stock the Ohio company will receive all of it, and thus, in effect, it will own the same property it had before, but greatly improved and freed from conditions of payment formerly attached to it. If Nipissing does exercise its option, the Ohio company will receive only forty-nine percent of the stock, but Nipissing must pay the California company $333,000, either all in cash, or partly in cash and partly by cancelling its loan, and this would bring the value of the forty-nine percent of the stock received by the Ohio company nearly up to the value that all of it would have if the option were not exercised, on the valuations written into the contract and not disputed here. This is sufficient to comply with former section 3442 of the Civil Code, above quoted. One who transfers property to a corporation and in exchange for it receives all of the stock of the corporation, or even a substantial part of it where the corporation has other substantial assets, has received a valuable consideration for the property, within the meaning of section 3442.

[16] Plaintiff calls our attention to the fact that no stock of the California company, except the six directors' shares, has yet been issued, and contends that by reason thereof the Ohio company has received nothing for the property. Where a contract provides for consideration to a transferor for his transfer of property, the transfer does not become a voluntary one, within the meaning of the rule now under consideration, merely because the consideration is not received immediately or at the time fixed therefor. The contract provided that the stock other than directors' shares should be issued and held by a trustee until it was determined whether Nipissing would exercise its option, and this was not done. But this is a mere incident to the other provisions that the Ohio company shall have all of the stock if the option is not exercised, and forty-nine percent if it is exercised. It is true, the stock called for by the contract cannot be issued without a permit from the Commissioner of Corporations and that no permit therefor has yet been issued or applied for. If on application for such a permit he issues it, no doubt he will do so on such terms and conditions as will protect the rights of the Ohio company in the property it has transferred. If he should refuse a permit, or if the contract or this particular part of it should be held to violate the Corporate Securities Act, the Ohio company would not for that reason forfeit all interest in the property. The terms of the contract show that the transfer was not intended to be made without consideration, and if the consideration should fail for any reason, the Ohio company would undoubtedly have rights the exact nature and manner of assertion of which we need not consider, whereby it could maintain or reclaim an interest in the property transferred.

[17] Moreover, the loan of $200,000 by Nipissing and the use made of it cannot be ignored in considering the question of consideration. Had that loan been made directly to the Ohio company and a mortgage made by that company to Nipissing, the money loaned being used as it was here, to pay for and to improve the mortgaged property, no question could have been raised regarding the existence of a valuable consideration for the mortgage, nor would the facts in the case, if otherwise the same as they are, lend any countenance to the theory that the transaction was in fraud of plaintiff or any other un-

secured creditor of the mortgagor. The interposition of the California company between the Ohio company and the lender, Nipissing, does not alter the essential nature of the transaction in this respect, nor afford a basis for the charge of fraud.

[18] Plaintiff also cites Blanc v. Paymaster Mining Co., 1892, 95 Cal. 524, 533, 130 P. 765, 29 Am.St.Rep. 149, and other cases following the same rule, but those cases are not applicable here. In the Blanc case, it appeared that all the assets of a corporation which was indebted to plaintiff were transferred in a roundabout manner to another corporation which was organized for the purpose of holding them, and which paid no consideration therefor, the whole scheme being devised and carried out for the purpose of defrauding creditors of plaintiff's debtor. It was held that equity would regard the new corporation, against which the suit was brought, as being "a mere continuation of the former corporation under a different name" and hence the new corporation would be held liable to plaintiff for the debt of the old corporation, "at least to the extent of the value of the property which it received from it without consideration." An essential foundation of the rule so applied is the lack of consideration running from the new company to the old. Here, as we have already held, there is no such lack. But if the rule of these cases were applicable here, it would lead only to a judgment against the California company on the note. No such judgment was given, so the trial court could not have proceeded on this theory. Moreover, this rule, being based on the essential identity of the two corporations, would afford no greater reason for preferring plaintiff's claim over a mortgage executed by the second corporation than for giving it priority over one executed by his original debtor, which, as already stated, could not be done under the circumstances of this case.

Other matters advanced by plaintiff in support of the judgment have been considered but are not deemed to merit more detailed discussion. Plaintiff's attempt, throughout the case, is to appeal to rules of equity. We see no equity in a judgment which gives to a previously unsecured creditor of a moribund corporation, whose only asset is a conditional right to acquire property by the payment of money which it has no means of paying, a lien on that property after its acquisition by means of the proceeds of a loan, paramount to that of a mortgagee who in good faith makes that loan and takes as security a mortgage which attaches to the property at the very instant of its acquisition. Such is the judgment here.

The judgment is reversed as to the defendant, the Nipissing Mining Company, Limited, a corporation.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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56 Cal.App.2d 875

SELIG CAHN, Inc., v. ALSCHULER et al.

Civ. 13443.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1943.

1. Appeal and error 🔑931(1)

Findings should be liberally construed and a construction given to them, if possible, which will uphold rather than defeat judgment.

2. Appeal and error 🔑971(1)

A reviewing court may not attempt to reconcile irreconcilable findings.

3. Appeal and error 🔑1071(1)

Where one part of contradictory findings would support judgment and another part would necessarily upset it, the judgment must be reversed.

4. Appeal and error 🔑1071(1)

In an appeal on judgment roll alone, the appellate court may not disregard either of conflicting findings and judgment must be reversed.

5. Appeal and error 🔑1071(1)

Where plaintiff and defendant agreed to purchase two lots and construct houses thereon and equally divide profits, in action to dissolve joint adventure and for accounting, findings that plaintiff was entitled to recover from defendant $889.86 being one-half of profits advanced from sale of first parcel and that there was a total net loss on both properties of $1,679.-

25 were inconsistent requiring reversal of judgment for plaintiff, on appeal on judgment roll alone.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Selig Cahn, Inc., against Nathaniel W. Alschuler who filed a cross complaint against Yetta C. Cahn. From an adverse judgment Nathaniel W. Alschuler appeals.

Reversed.

Wm. J. McNichols, Homer C. Millsap, and Benjamin Elconin, all of Los Angeles, for appellant.

Arch R. Tuthill, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

After a nine-day trial in the superior court findings were made and judgment followed.

The judgment (a) dissolved a joint adventure between plaintiff and defendant for the purchase of two parcels of city property and the improvement of the same; (b) settled, allowed and approved an accounting of the joint enterprise; (c) declared that there were no assets or liabilities and that the joint adventure resulted in a loss; (d) settled and adjusted all claims, liabilities and other matters in connection with it; (e) adjusted a balance due from defendant to plaintiff, and (f) enjoined and restrained the further prosecution of a case pending in the municipal court between the plaintiff and defendant involving the same issues.

From this judgment the defendant appeals on the judgment roll alone.

The findings are lengthy, but to understand this case, it is necessary to refer to some of them. The plaintiff was a widow conducting her business affairs through a corporate alter ego. The defendant was an employee of plaintiff.

Plaintiff and defendant made an agreement to purchase two city lots, and to construct thereon houses to be sold. Plaintiff was to provide the capital, and defendant was to use his best endeavors to prosecute the enterprise, and the profits, if any, were to be equally divided.

The real estate was purchased and improved in accordance with the agreement. One of the properties was sold at a profit of $1,779.73, whereupon the plaintiff paid the defendant $889.86, or one-half of the profit upon the first sale.

Then the parties quarreled. The plaintiff discharged the defendant from his employment with the corporation, and in addition took over the completion of the agreement relative to the two lots. Thereafter, the remaining property was sold, at a loss of $3,458.98, or a total net loss on the purchase, improvement and sale of the two parcels of $1,679.25. (Finding XV.)

Upon litigating their differences, the court found that the plaintiff was entitled to recover from the defendant $889.96, being one-half of the profit from the sale of the first parcel. The court also found that there was a total net loss on the purchase and sale of both properties of $1,679.25. Respondent argues that, based upon the findings, the judgment should have followed for the plaintiff for one-half of the net loss of $1,679.25, or $839.62, plus the advance of $889.86.

[1-5] While findings should be liberally construed and a construction given to them if possible which will uphold rather than defeat the judgment (Ward v. Ward, 15 Cal.2d 234, 100 P.2d 773), a reviewing court may not attempt to reconcile irreconcilable findings. Randall v. Hunter, 66 Cal. 512, 6 P. 331. If one part of contradictory findings would support the judgment and another part would necessarily upset it, then the judgment must be reversed. Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11. In an appeal upon the judgment roll alone, the appellate court may not disregard either of conflicting findings, and the judgment must be reversed. Rich v. Moss Beach Realty Co., 43 Cal.App. 742, 185 P. 859. See, also, Meyer v. White, 54 Cal.App. 293, 201 P. 801; Hull v. Ray, 80 Cal.App. 284, 251 P. 810; Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 87 P.2d 830, and Austin v. Harry E. Jones, Inc., 30 Cal.App.2d 362, 86 P.2d 379.

The judgment is reversed.

YORK, P. J., and DORAN, J., concurred.

56 Cal.App.2d 941

SELIG CAHN, Inc. (a Corporation), Plaintiff and Appellant, v. Nathaniel W. ALSCHULER, Respondent; Yetta C. Cahn, Cross-defendant and Appellant.

Civ. 13453.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1943.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Arch R. Tuthill, of Los Angeles, for appellants.

Wm. J. McNichols, Homer C. Millsap, and Benjamin Elconin, all of Los Angeles, for respondent.

PER CURIAM.

For the reasons stated in Selig Cahn, Inc. v. Nathaniel W. Alschuler, Cal.App., 133 P.2d 671, this day decided, the judgment appealed from herein is reversed.

56 Cal.App.2d 940

GRAY v. METRO-GOLDWYN-MAYER CORPORATION et al.

Civ. 13976.

District Court of Appeal, Second District, Division 2, California

Jan. 27, 1943.

Appeal and error ⚷611

A motion to dismiss appeals on ground that appellant had failed to file a transcript as provided in court rule, supported by clerk's certificate and authorities cited, was granted. Rules of Judicial Council for the Supreme Court and District Courts of Appeal, rule 6.

◆

Appeals from Superior Court, Los Angeles County.

Action by Gilda Gray against the Metro-Goldwyn-Mayer Corporation and others. From an adverse judgment and adverse orders, plaintiff appeals. On motion to dismiss the appeals.

Motion granted.

Parker & Stanbury and White McGee, Jr., all of Los Angeles, for appellant.

Loeb & Loeb and Laurence M. Weinberg, all of Los Angeles, for respondents.

PER CURIAM.

Respondents having served and filed their motion to dismiss the appeals in the above-entitled matter on the ground that appellant has failed to file a transcript as provided in the Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, supported by a certificate of the clerk of the Superior Court setting forth the facts as required by rule VI, and it appearing that all of the grounds stated in the motion are supported by the certificate and the authorities cited.

It is ordered that the appeals from the judgment and orders be, and the same hereby are, dismissed.

56 Cal.App.2d 796

In re BLACK'S ESTATE.

MURPHY et al. v. HOUSMAN et al.

Civ. 12172.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1943.

Hearing Denied March 25, 1943.

1. Limitation of actions ⚷127(12)

Where document filed in probate court attacking jurisdiction of court to admit will to probate did not qualify as a "contest of will", amendment filed after running of six-month limitation on will contests by which it was sought to contest execution of will was a substitution of a new cause of action after probate had become conclusive and court was without jurisdiction to entertain it. Probate Code, §§ 371, 380, 384.

See Words and Phrases, Permanent Edition, for all other definitions of "Contest of Will".

2. Limitation of actions ⚿127(12)

Where proposed amendment to will contest pleaded different grounds of contest from any theretofore pleaded, petition to file such amendment more than six months after probate was properly denied. Probate Code, §§ 371, 380, 384.

3. Wills ⚿421

Recital in order admitting will to probate that notice of hearing had been duly given as required by law is conclusive against any collateral attack.

4. Wills ⚿278

Petition to revoke probate of will which failed to plead that heirs had in fact received no notice admitted finality of finding in order admitting will to probate that notice had been duly given. Probate Code, §§ 326, 328.

5. Wills ⚿278

Allegations, in petition to revoke probate of will, that there was no proof as to who the heirs were and no proof of service of notice on them, in absence of allegation that no notice was in fact received, were insufficient as a mere "collateral attack" on finding in order, admitting will to probate that notice was duly given. Probate Code, §§ 326, 328.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

6. Wills ⚿278

Petition to set aside probate of will which merely alleged that no proof was made as to who heirs were and that no proof was made that notice had been served but which failed to allege that petitioners had not in fact received notice failed to state a cause of action. Probate Code, §§ 326, 328.

7. Wills ⚿384

Where petition to set aside probate of will failed to state a cause of action, any error in procedure whereby motion to strike was interposed instead of demurrer and such motion was granted did not result in a "miscarriage of justice" as would require a reversal.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

8. Wills ⚿285

Where original petition to set aside probate of will constituted attack upon procedure, motion to file amendment to petition more than six months after probate of will which attempted to substitute a contest of execution of will was an attempt to substitute a new and different cause of action and was properly denied. Probate Code, §§ 371, 380, 384.

◆

Appeals from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceedings in the matter of the estate of Alma Elizabeth Black, deceased, by Edward M. Murphy and others against Nathan S. Housman and others to contest will and to revoke probate of will. From a judgment dismissing amended contest of will and petition for order revoking probate of will, plaintiffs appeal, and from judgment refusing permission to file amended contest and amended petition for order revoking probate, three plaintiffs appeal.

Judgments affirmed.

Tobin & Tobin and Francis W. Murphy, all of San Francisco, for appellants.

John J. Taaffe, Keyes & Erskine, J. Benton Tulley, and Howard E. Gawthrop, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

All the named plaintiffs appeal from a judgment striking from the files and dismissing amended contest of will and petition for order revoking probate of will, and three of the named plaintiffs appeal from a judgment denying their motion for an order permitting them to file an amended contest of the will, and a petition for an order revoking probate. Both appeals are presented on a single bill of exceptions.

Alma E. Black died testate on July 23, 1939. Nathan S. Housman, chief legatee and executor offered her last will for probate on August 4, 1939. Katherine Black and Frances Goepfert, surviving sisters of decedent's husband filed a contest before probate, but a compromise was effected with Housman whereby he renounced his right to serve as executor, and assigned his interest as a legatee. Katherine Black was appointed as administratrix when the will was admitted to probate on February 7, 1940. A purported contest of the will and a petition for an order revoking probate was filed by the plaintiffs on July 26, 1940. An amendment to this purported contest was filed by them on August 19, 1940. The order striking these two documents from the files is the subject of the first appeal. The second appeal relates to an order denying the application of three only of the named plaintiffs for leave to file a second amended contest and petition for the revocation of the probate of the will. This application, made November 19, 1940, was denied March 21, 1941.

The appellants concede that the first pleading by which they sought to contest the will was faulty, but they contend that the question went only to the running of the statute of limitations. If this were true it would end the controversy. But the pleading was more than faulty. It did not state any cause of action either as a contest of the will, or as a petition to revoke probate. The question in these proceedings is one going directly to the jurisdiction of the probate court to entertain a purported contest of a will which does not comply with statutory restrictions.

We will first consider the document as one to contest the will. It alleged that the only living relatives of the decedent were the plaintiffs who were described as three first cousins of the deceased, six first cousins once removed, and four others whose relationship could not be determined. Following the allegations relating to heirship the petition pleads an assignment to Housman executed by decedent about one month before her death, an agreement by Housman to give some unnamed persons some of this stock, and that Housman had kept the decedent under his domination for a period of ten years through the use of narcotics. It then pleaded that the court was without jurisdiction to admit the will to probate because "no proof was made or offered that said decedent did or did not leave her surviving heirs at law, and no proof was made or offered that notice of the time and place of the hearing of the petition for the probate of said will was given to the heirs of the testator."

[1] The statutory law covering proceedings to contest a will is clear. Section 380 of the Probate Code provides that an interested party may "at any time within six months after such probate, contest the same * * *." Section 384 of the same code provides that if no contest is made "within the time specified in this article, the probate of the will is conclusive * * *." Section 371 of the same code provides that "Any issue of fact involving the competency of the decedent to make a last will and testament, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by a jury * * *."

The document under discussion does not purport to come within the terms of this section. At most it attacks the jurisdiction of the court to admit the will to probate, and the prayer of the petition indicates that such was what the petitioners were really seeking to attack. But, as a contest of the execution of the will, it was nothing but a useless paper. Hence, the proposed amendment filed after the statute had run was not an amendment but a substitution of a new cause of action. This amendment having been filed after the probate had become conclusive (§ 384) the court was without jurisdiction to entertain it. In Pagett v. Indemnity Insurance Co., 54 Cal.App.2d 646, 649, 129 P. 2d 700, 702, this court cited the recent cases upon the subject of amendments of this type, saying: "It is well settled that a new and different cause of action may not be set up in an amended complaint and that the trial court should grant a motion to strike an amended complaint which sets up an entirely new and different cause of action. See Groom v. Bangs, 153 Cal. 456, 96 P. 503; Altpeter v. Postal Telegraph-Cable Co., 26 Cal.App. 705, 148 P. 241; Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 142 P. 910; 21 Cal. Jur. 199." Earlier cases relating particularly to probate proceedings are In re Estate of Ricks, 160 Cal. 467, 473, 117 P. 539; In re Estate of Sheppard, 149 Cal. 219, 221, 85 P. 312.

Summarizing the foregoing we conclude that the paper filed within the statutory period was confined to an attack upon the procedure relative to the probate of the will—it alleged no grounds for a contest of the execution of the will. The purported amendment stated a new cause of action, one to contest the will upon grounds not theretofore pleaded. Having been filed after the statutory period the court was without jurisdiction to entertain it because the probate of the will was then conclusive.

[2] These views dispose of the second appeal—from the order denying the petition of three of the plaintiffs to file an

amended contest. This proposed amendment pleaded different grounds of contest from any theretofore pleaded and, as said in Re Estate of Ricks, 160 Cal. 467, 473, 117 P. 539, such an amendment is not permissible unless filed within the statutory time allowed for a contest of the will.

[3-5] There remains to be considered the original petition to revoke the probate of the will upon alleged jurisdictional grounds. It will be noted that in the amended petition filed August 19, 1940, no effort was made to correct the defects of the original petition, but the appellants rested on their allegation that "no proof was made" of the surviving heirs, and that "no proof was made" that such heirs had been given the statutory notice of the petition to probate the will. Section 326 of the Probate Code provides that the petition for probate of will shall state the names of the heirs of the deceased "so far as known to the petitioner." Here the petitioner alleged that there were no heirs known to him. Section 328 of the same code provides that, before the hearing, notice thereof must be served upon the heirs of the testator and the devisees and legatees named in the will. The order admitting the will to probate recites that notice of the hearing had been duly given as required by law. This recital is conclusive against any collateral attack. The petition to revoke probate of the will did not attack this finding. By failing to plead that they had in fact received no notice the petitioners admitted the finality of the finding that such notice was duly given. To allege merely that no proof was made as to who the heirs were, and that no proof was made that notice had been served is but a collateral attack upon the finding.

This same controversy was so fully covered in the recent decision of the Supreme Court in Westphal v. Westphal, 20 Cal.2d 393, 398, 126 P.2d 105, that it would seem unnecessary to add anything here. In that case it was said at page 398 of 20 Cal.2d, at page 107 of 126 P.2d: "In the absence of an allegation that plaintiffs did not receive proper notice of the proceedings it must be presumed that they received such notice in accordance with the statutory requirements effective at that time. * * * So long as plaintiffs received notice, however, a failure to make proof of such notice would not deprive the court of jurisdiction or prevent the plaintiffs from presenting their case."

In Nicholson v. Leatham, 28 Cal.App. 597, 602, 153 P. 965, 968, 155 P. 98, in reference to the pleading that the heirs were unknown, the court said: "Where, however, the petition is silent as to the names and residences of heirs, they must be deemed by the clerk to be unknown to the petitioner, and hence he is not required to mail copies of the published notice; nor is any further proof than that of the publication of the notice necessary as a prerequisite to the making of the order. Since it appeared from the petition that the names and residences of heirs were unknown to the petitioner, no duty devolved upon the clerk to mail copies of the published notice to anyone, and the validity of the order made was unaffected by his failure so to do."

[6-8] For these reasons we conclude that the petition to set aside the probate of the will failed to state a cause of action. The proposed amendment to the contest of the will omitted all reference to the procedure leading to the probate, and no request was made for leave to amend in that particular. If a demurrer to the petition had been interposed, instead of a motion to strike, it must have been sustained. If there may have been an error in procedure in this respect, as appellants contend, it was not such an error as has resulted in a miscarriage of justice. The appellants concede by their pleadings that they had actual notice within due time, and seem to have abandoned their attack upon the procedure when they filed their proposed amendment to the petition. The denial of leave to file this proposed amendment is the meat of this appeal. It attempted to substitute a contest of the execution of the will for a contest of the procedure of the probate of the will. These proceedings are so different in both form and substance that the substitution of the one for the other is a substitution of a new and different cause of action.

The judgments are affirmed with costs to respondents.

SPENCE, J., concurred.

56 Cal.App.2d 857

KIM v. CHINN et al.

Civ. 11930.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1943.

1. Assault and battery ⚿39

In action against several persons for assault and battery, exemplary damages may be awarded only against such defendants as are proven to have acted maliciously.

2. Assault and battery ⚿35

Malice in fact, authorizing award of exemplary damages for assault and battery, is not presumed, but may be proved by either direct evidence of declarations or inferences from acts and conduct.

3. Damages ⚿92
Torts ⚿22

Compensatory damages may be awarded against all joint tort-feasors found culpable and punitive damages added against those found by jury to have been actuated by malice in fact.

4. Trial ⚿295(5)

In action for assault and battery, error, if any, in instruction as telling jury that mere doing of act complained of by one of defendants proved malice as matter of law, was cured by subsequent portion, stating that if jury found that either or both of defendants acted with malice, jury might assess punitive damages against such defendant or defendants.

5. Dismissal and nonsuit ⚿80

Dismissal of action for assault and battery as to defendants not served with process did not operate as dismissal of defendants who were served, in absence of showing that plaintiff received satisfaction from defendants not served.

6. Assault and battery ⚿35

In action for assault and battery, evidence of one defendant's return to scene of combat with plaintiff after departing therefrom and such defendant's actions following his return *held* sufficient to justify jury's finding that such defendant was guilty of malice in fact.

7. Appeal and error ⚿930(1)

On appeal from judgment on jury's verdict, all intendments are in favor of verdict and judgment.

8. Trial ⚿255(4)

In action for assault and battery, trial courts failure to instruct jury that evidence of one defendant's ownership of property should be considered only in assessing exemplary damages was not error, in absence of request for such instruction.

◆

Appeal from Superior Court, Santa Cruz County; Maurice T. Dooling, Jr., Judge.

Action by Edwin Kim against O. S. Chinn, Jack Chinn and others for assault and battery. From a judgment for plaintiff against named defendants, they appeal.

Affirmed.

A. B. Bianchi, of San Francisco, for appellant O. S. Chinn.

Manwell & Manwell, of Marysville, and John L. McCarthy, of Watsonville, for respondent.

WARD, Justice.

This action is one for damages for assault and battery brought against O. S. Chinn, Jack Chinn, Johnson Chinn, Chin Wai and two fictitious defendants. Judgment was entered in favor of the plaintiff upon a general verdict against the two defendants first named for the sum of $7,500, and against the first named defendant for an additional sum of $1,000 as exemplary or punitive damages. These two defendants appeal from the judgment.

The complaint contained eight counts. Counts 4, 5, 6 and 7 may be at once eliminated from consideration, since these charge the offense to have been committed either by defendants who were not served with process, or by fictitious defendants as to whom the complaint was dismissed.

The first count charges the assault and battery to have been perpetrated by Jack Chinn, acting alone, with malice and ill will; the second, that it was committed by all O. S. Chinn's codefendants acting under his direction and command and in his presence; the third, that it was committed by O. S. Chinn, and the eighth, that it was perpetrated by Jack Chinn, O. S. Chinn and the two fictitious defendants "with malice and ill will and with the intent and design of injuring and oppressing" plaintiff.

By their answer Jack and O. S. Chinn denied generally and specifically the allegations of counts 1 and 2 made against them respectively, and pleaded that they acted in self-defense; O. S. Chinn denies the allegations of count 3, pleads self-defense and avers that the plaintiff maliciously assaulted him; and both Jack and O. S. Chinn deny generally and specifically the allegations of count 8 and repeat their plea of self-defense.

In support of the appeal it is contended that no punitive damages may be awarded against a joint tort-feasor unless his co-tort-feasor is also charged with malice; and, second, that the judgment for compensatory damages against the two appellants is unsupported by the evidence and is also erroneous on other grounds.

The testimony, so far as the principals are concerned, is conflicting. It appears that plaintiff, who occupied living quarters belonging to O. S. Chinn, was in arrears in the payment of his rent. On the evening of April 9, 1939, the latter called upon his tenant, asked for the rent and, after some talk, was invited in. An altercation followed, during which O. S. Chinn threatened to put a padlock on the quarters if the rent was not paid that evening, and plaintiff stated that he would burn the place down if this was done. The two men then set to fighting, going through the door, off the porch and on to the gravel. Plaintiff, an ex-pugilist, thirty-eight years of age, denies that he knocked O. S. Chinn down, but admits that a lodger occupying another cabin warned him to stop fighting; and there is evidence that serious injuries were sustained by O. S. Chinn, a frail and older man, at this phase of the fight. During this activity someone telephoned to O. S. Chinn's place of business, a grocery store and market, in which defendant Jack Chinn had a small interest and was employed as clerk, that there was trouble at the lodgings, and, arming himself with a gun, he immediately left for the scene of the trouble. In the meantime, the two men having fought their way back into the cabin, O. S. Chinn departed, only to return almost immediately. Jack Chinn testified that he did not draw the gun until he had been knocked down several times by plaintiff; and there is testimony that the latter, with one arm around the neck of O. S. Chinn—who was endeavoring to keep the men apart—attempted with his other hand to grab the gun. In any event, the three men continued to fight in plaintiff's quarters and the gun was discharged, wounding him in the legs. Jack Chinn then left the scene, taking the gun with him, and leaving O. S. Chinn in the grip of plaintiff. At about this time, Johnson Chinn, a young college student and the son of O. S. Chinn, appeared on the scene and, in an effort to loosen plaintiff's hold on his father's neck, struck his assailant several times. A noncombatant witness for plaintiff testified that when he arrived plaintiff was on the floor, propped up against the bed; that at this time O. S. Chinn struck him again. The fight was finally broken up by the arrival of the police, and O. S. Chinn and plaintiff, who had both sustained serious injuries, were taken to a hospital.

[1] The first point presented by appellants is that no punitive damages may be awarded against any jointly charged tort-feasor in the absence of proof that each of the defendants so charged acted with malice, and that under the circumstances of this case the following instruction was erroneous: "In this case in addition to his plea for actual damages plaintiff is also praying for punitive damages. Punitive damages can only be allowed where it appears from the evidence that the defendant has been guilty of oppression, fraud or malice. The word 'malice' imports a wish to vex, annoy or injure another person, or an intent to do a wrongful act. If you find that either defendant or both defendants committed an assault and battery upon the plaintiff and that in so doing such defendant or defendants acted with malice, you may in your discretion, although you need not do so, assess against such defendant or defendants in addition to plaintiff's actual damages, an amount of punitive damages for the sake of example and by way of punishing such defendant or defendants. Punitive damages, if allowed against both defendants, should be assessed against them separately." The eighth count alleged malice against each appellant. Exemplary damages may only be awarded against such of them proven to have acted maliciously.

[2, 3] Malice in fact is not presumed but may be proved either by direct evidence of declarations or by inferences drawn from acts and conduct. Davis v. Hearst, 160 Cal. 143, 116 P. 530. In the Davis case, at pages 169, 170, of 160 Cal., 116 P. at page 542, the court said: "There is nothing in our system to prevent the award of compensatory damages against all joint tort-feasors who are found culpable, and to add a specific sum or sums, by way of punitive damages, against such of the tort-feasors as the jury shall find to have been actuated by malice in fact. Not only is this permissible, but it tends to simplicity and avoids the multiplicity of actions which otherwise

would become necessary." Thomson v. Catalina, 205 Cal. 402, 271 P. 198, 62 A.L.R. 236; Evans v. Gibson, 220 Cal. 476, 31 P.2d 389. The Davis case is a much later case and presents a sounder rule than Nightingale v. Scannell, 18 Cal. 315, cited by appellant, which contains some language indicating that damages must be estimated according to the guilt of the least culpable.

[4] Appellant argues that the above-quoted instruction was prejudicial, upon the theory that the mere doing of the act by O. S. Chinn proved malice as a matter of law. If such an interpretation could be placed upon the wording of the instruction it was cured by the latter portion thereof reading: "If you find that either defendant or both defendants committed an assault and battery upon the plaintiff and that in so doing such defendant or defendants acted with malice, you may in your discretion, although you need not do so, assess against such defendant or defendants in addition to plaintiff's actual damages, an amount of punitive damages for the sake of example and by way of punishing such defendant or defendants." Hardy v. Schirmer, 163 Cal. 272, 124 P. 993.

[5] It is further contended that the dismissal entered as to the two fictitious defendants operated as a dismissal of the appellants. The record does not disclose that the fictitious parties were served; hence no persons, so far as the judgment rendered is concerned, participated in the tort other than the parties who were served, and who consequently were the only ones as to whom an issue of fact or law was raised. It does not appear that the injured party received satisfaction from the fictitious defendants either by payment or agreement to pay. For this reason Bogardus v. O'Dea, 105 Cal.App. 189, 287 P. 149, is not in point. Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704; Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99; Burke v. W. R. Chamberlin & Co., 51 Cal.App.2d 419, 125 P.2d 120.

[6, 7] The return of O. S. Chinn to the scene of combat, and his actions as heretofore related, are sufficient to justify a jury in reaching the conclusion that he was guilty of malice as a matter of fact. On appeal the rule is that all intendments are in favor of the verdict and judgment.

[8] The evidence shows that O. S. Chinn was the owner of several parcels of real property, on one of which was conducted a grocery store and market; on another of which was a building subdivided into cabins or apartments. Evidence was also admitted relative to the ownership of property by Jack Chinn. There is substantial evidence of malice on the part of O. S. Chinn. The claim that the jury was unconsciously influenced to increase the amount of damages against O. S. Chinn is highly conjectural. The objection is also urged that the trial court did not specifically instruct the jury that evidence of ownership of property should be considered only in assessing exemplary damages. Our attention has not been called to any such requested instruction.

The judgment is affirmed.

PETERS, P. J., and GOODELL, J., pro tem., concurred.

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56 Cal.App.2d 869

PEOPLE v. SPALIS.

Cr. 2241.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1943.

Rehearing Denied Feb. 13, 1943.

Hearing Denied Feb. 25, 1943.

1. Indictment and Information 🔑114

Prior to August 14, 1931, which was the effective date of amendment of habitual criminal statute, it was not necessary to allege, prove or find that accused had served terms on the charged prior offenses in order to impose punishment as an habitual criminal. Pen.Code, § 644.

2. Criminal law 🔑1202(1)

Whether person is a habitual criminal is determined by the law as it existed at time of commencement of last offense and not at time of trial and conviction. Pen.Code, § 644.

3. Indictment and Information 🔑114

Fact that defendant charged with being habitual criminal was tried and convicted of the charge after amendment to habitual criminal act requiring the people to prove that person so accused had served terms on the prior convictions did not render adjudication that the person was an habitual criminal improper because of absence of allegations in information that defendant had served separate terms of imprisonment on the prior convictions, where the last offense had been committed, and the information containing the habitual criminal charge was filed, prior to the amendment. Pen.Code, § 644.

4. Indictment and Information ⚷202(1)

An information charging a person with being an habitual criminal, which fails to allege that separate terms of imprisonment were served on the prior convictions may be cured by evidence of the fact that such terms were served, or by defendant's admission of such fact. Pen.Code, § 644.

5. Criminal law ⚷1202(6)

On motion to set aside an adjudication determining that the moving party is an habitual criminal, burden was on movant to show that movant had not served terms on the prior convictions. Pen.Code, § 644.

6. Criminal law ⚷1202(6)

Where last offense of defendant adjudicated an habitual criminal was committed, and information charging defendant with being an habitual criminal was filed, prior to amendment to habitual criminal statute requiring the people to allege and prove that defendant served separate terms under the prior convictions, and no transcript of proceedings at trial on the information was available, and there was no showing that at such trial evidence of the service of such terms was not introduced and that defendant did not admit such service, motion to set aside the adjudication was properly denied, since presumption obtained that such evidence was introduced or that defendant admitted the service of time on the priors. Pen.Code, § 644.

7. Criminal law ⚷1023(12)

Ordinarily, a party who has a right to appeal cannot forego that right, move to vacate the judgment, and then appeal from the order denying the motion.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Edward Spalis was adjudged an habitual criminal, and he appeals from an order denying his motion to set aside the adjudication.

Affirmed.

Edward Spalis, in pro. per., for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant appeals from an order denying his motion to set aside an adjudication determining that he is an habitual criminal and sentencing him to life imprisonment. The motion was based on the ground that the trial court exceeded its jurisdiction in sentencing defendant under the habitual criminal statute (§ 644, Pen.Code), for the reason that there was no allegation in the information upon which the adjudication was predicated nor proof at the trial, as allegedly required by the statute, that defendant had served terms in a state or federal prison upon the three previous convictions charged in the information.

The information upon which the challenged adjudication was based was filed March 25, 1931. That information charged defendant with robbery, alleged to have been committed February 18, 1931. In addition, it charged that on November 10, 1916, defendant had been convicted in San Francisco of burglary; that on January 14, 1920, he had been convicted in San Francisco of burglary; and that on January 17, 1923, he had been convicted of assault with a deadly weapon. There were no allegations that defendant had served a prison term for any of the prior convictions.

Defendant pleaded not guilty to the robbery charge and denied the three prior convictions. In due course he was tried and convicted on the robbery charge, and the jury found that he had suffered the three priors as charged. On October 22, 1931, the trial court entered its judgment finding defendant to be an habitual criminal and sentencing him to life imprisonment without right to parole. No appeal was perfected and defendant was sent to the state's prison. The present motion to vacate the habitual criminal adjudication was filed in April, 1942, some ten and one-half years after the judgment became final.

It is the theory of defendant that the trial court had no jurisdiction to adjudicate him to be an habitual criminal in the absence of an allegation in the information that defendant had served separate terms of imprisonment on the prior convictions.

It is also pointed out that the judgment made no such finding.

The answer to defendant's contentions is that in February, 1931, when the robbery was committed, and in March, 1931, when the information was filed, under the law then in effect it was not necessary to allege, prove, or find, in order to adjudicate a defendant an habitual criminal under section 644 of the Penal Code, that he had served terms on the charged priors. The section was amended in 1927 (Stats. of 1927, chap. 634, p. 1066) and read, until August 14, 1931, so far as pertinent here: "Every person convicted in this state of any felony who shall have been previously three times convicted, either in this state or elsewhere, of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole." In February and March of 1931, section 969 of the Penal Code read as it had been amended to read in 1927 (Stats. of 1927, chap. 679, p. 1152) and as it now reads, and expressly provided the form in which previous convictions could be charged. No reference to service of terms was or is contained in that section. It was not until August of 1931 that section 644 was amended (Stats. of 1931, chap. 482, p. 1052) so as to require service of terms on the priors as a condition precedent to an adjudication that the defendant is an habitual criminal. That amendment became effective August 14, 1931.

[1] There can be no doubt that prior to August 14, 1931, it was not necessary to allege, prove, or find that the accused had served a term on the charged priors. The Supreme Court in Re McConnell, 5 Cal.2d 436, 55 P.2d 205, expressly so held. In that case the appellant had been charged with grand theft on December 31, 1928, and with two prior felony convictions. He pleaded guilty to the charge of grand theft and admitted the two priors, and was duly adjudicated an habitual criminal under section 644 of the Penal Code. Several years later, and after the amendment of section 644 in 1931, he instituted this proceeding in habeas corpus and certiorari for the purpose of voiding the habitual criminal adjudication. The court disposed of this contention with the following language (5 Cal.2d at page 437, 55 P.2d at page 205):

"Petitioner's theory is that proof of an essential element necessary to adjudge him an habitual criminal is lacking, namely, service of a term of imprisonment on each of the prior convictions. In re Fontino, 135 Cal.App. 466, 27 P.2d 413, is cited in this connection.

"Petitioner's contention is based upon the present wording of Penal Code, § 644, as amended in 1931. The amendment * * * added to the provision for two prior convictions the requirement that the accused have 'served a term therefor in any state prison and/or federal penitentiary.' But the section contained no such requirement in 1928, * * * when petitioner was convicted, and there is consequently no merit in the argument.

"Some confusion has been engendered by the failure of occasional decisions to take note of the date of the above-mentioned amendment, or to distinguish situations arising under section 667 of the Penal Code, which before 1931 contained the requirement of service of a term of imprisonment. * * * Thus, People v. Dawson, 210 Cal. 366, 292 P. 267, and In re Boatwright, 216 Cal. 677, 15 P.2d 755, were concerned with section 667. Reliance upon those decisions in cases coming within section 644 before the amendment of 1931 was manifestly improper, and In re Fontino, supra, insofar as it confuses the rules applicable at the time of the decision, must be disapproved."

[2] Defendant urges that the McConnell case, supra, is not conclusive because, in the instant case although the three charged priors and the main offense were all committed prior to the 1931 amendment to section 644, and the information was filed prior to such amendment, he was not tried and convicted until October of 1931, after the effective date of the amendment. He urges that the law in effect at the time of his trial and conviction controls. This contention is unsound. It was expressly repudiated in Spivey v. McGilvray, 29 Cal.App.2d 357, 84 P.2d 256, where it was held, in response to a similar contention that "the law as it existed at the time of the commencement of the offense is controlling."

[3] For these reasons it follows that it was not necessary to allege, prove, or find that defendant had served terms on the three charged priors.

[4-6] There is another reason why the present appeal is without merit, even if it be assumed that it was necessary to show service of separate terms on the prior convictions. The transcript on the present mo-

tion discloses that the reporter's shorthand notes of the main trial have never been transcribed; that subsequent to the trial the reporter died; that, although the notes were available, no one could be found who could read the shorthand notes of the deceased reporter. For this reason there is no way of ascertaining whether evidence was introduced relating to the service of terms on the prior convictions, or whether defendant during the trial admitted such service of terms. If it be assumed that since the 1931 amendment to section 644 of the Penal Code it is necessary to allege and prove that separate terms were served on the prior convictions, it is well settled that an information that is deficient in this respect can be cured by evidence of the fact, or by the admission of the defendant. People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748; In re Boatwright, 216 Cal. 677, 15 P.2d 755; People v. Nicholson, 34 Cal. App.2d 327, 93 P.2d 223. Although the reporter's transcript of the original trial was not produced, at the hearing on the present motion the district attorney read into the record a portion of the minutes of the main trial. Those minutes showed that the state had introduced into evidence three certified copies of commitments against defendant, together with his fingerprints, photographs, and Bertillon cards. Those commitments showed that defendant had served one term in San Quentin and two terms in Folsom. The record on the present appeal does not show any direct connection between those commitments and the priors charged in the information. Even if this evidence did not show service of terms on the priors, and assuming such proof was jurisdictional, it must be remembered that the burden of proof on the present motion was on defendant. Through no fault of his own, but equally through no fault of the prosecuting officials, he has been forced to appeal on a transcript of what amounts to a judgment roll. Under such circumstances, it is the law that in support of the judgment, and in the absence of a contrary showing, this court must presume that evidence was introduced or defendant admitted the service of time on the priors. People v. McGee, 24 Cal. App.2d 391, 75 P.2d 533.

[7] It follows that whether or not the 1931 amendment applies to this case, on its merits, the motion was properly denied. It should also be noted that there is some doubt as to whether the order appealed from is an appealable order. The grounds urged upon the motion to vacate were available to appellant upon an appeal taken from the judgment. Ordinarily a party who has a right to appeal cannot forego his right to appeal, move to vacate, and then appeal from the order denying his motion. People v. Scranton, 50 Cal.App. 2d 492, 123 P.2d 132; Koshaba v. Koshaba, 51 Cal.App.2d 602, 125 P.2d 535. There are, however, some exceptions to that rule. People v. Flohr, 30 Cal.App.2d 576, 86 P. 2d 862; People v. Zolotoff, 48 Cal.App.2d 360, 119 P.2d 745. In view of the fact that the motion was properly denied on its merits, we do not find it necessary to determine whether this case presents an exception to the general rule.

The order appealed from is affirmed.

KNIGHT, J., and BRAY, J. pro tem., concurred.

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57 Cal.App.2d 5

MUSSON v. FULLER et al.

Civ. 3207.

District Court of Appeal, Fourth District, California.

Feb. 1, 1943.

Hearing Denied April 2, 1943.

1. Trusts 🔑140(1)

Under trust providing that upon death of life beneficiary of certain percentage of corpus the percentage was to go to beneficiary's four children, share and share alike, or to survivor of them if they or any of them died without issue, but that if any of children left issue, proportion of percentage that would have been received by child should be paid to such issue, a child who survived life beneficiary and who thereafter died leaving issue took only a "life estate" in the corpus, and not an interest in fee therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Estate".

2. Appeal and error 🔑150(1)

Where trial court, in action by trustee for declaratory relief, awarded trustee's attorney a fee which was ordered to be paid out of accrued income of a certain portion of the trust, a party who had no interest in portion of trust out of which fee was ordered to be paid could not complain of the judgment.

3. Action ⚷6

Fees were properly awarded to trustee's attorney, in action by trustee for declaratory relief, where attorneys for all parties signed a stipulation that action was necessary by reason of adverse claims upon trustee.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by George T. Musson, as trustee, etc., against Charles Edward Fuller and Donald Edwin Huhn for declaratory relief construing terms of a declaration of trust. From judgment entered, the defendant Charles Edward Fuller alone appeals.

Affirmed.

Newby & Newby, of Los Angeles, for appellant.

J. L. Mack and Robert Mack Light, both of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal in an action for declaratory relief from a judgment construing the terms of a declaration of trust and decreeing that Donald Edwin Huhn owned a two and one-half per cent of the corpus of the trust and is entitled to the income therefrom.

Henry Fuller and Helen Day Fuller were husband and wife. Under date of March 31st, 1922, they established a trust with themselves as trustors and Charles Edward Fuller as trustee.

The entire net income of the trust was to be paid to Henry Fuller during his lifetime. After his death twenty-five per cent of the net income was to be paid to Helen Day Fuller and the balance to various other beneficiaries. The controversy before us arose under the following paragraph of the declaration of trust disposing of the net income after the death of Henry Fuller: "Ten (10%) per cent. thereof to May P. Fuller (widow of Harry Ephraim Fuller) during her natural life, and upon her death, to Josephine, Stella, Kenneth and Ruth Fuller, the four children of said May P. Fuller and Harry Ephraim Fuller, share and share alike, or to the survivor of them, if they or either of them die without issue, share and share alike; or if said children leave issue, to said issue shall be paid the proportion of said percentage that would have been received by the parent of said issue, if he or she had survived, share and share alike."

Under date of January 13th, 1923, the trustors modified the terms of the trust making its provisions disposing of the net income of the estate control the disposition of its corpus.

Henry Fuller and Helen Day Fuller died prior to 1926.

From a statement in one of the briefs it is probable that Henry Fuller predeceased his wife. May P. Fuller died in 1926, leaving surviving her four children, Josephine, Stella, Kenneth and Ruth Fuller. Stella Fuller (Huhn) died leaving surviving her, defendant and respondent Donald Edwin Huhn, her minor son.

On May 9, 1938, Charles Edward Fuller appointed plaintiff trustee of the trust estate. Plaintiff accepted the trust and since then has acted as such trustee.

Charles Edward Fuller purchased the interests of Josephine, Stella, Ruth and Kenneth Fuller in the trust estate, which interests they conveyed to him. The agreed statement of facts recites that they believed they had sold and he believed he had purchased a full ten per cent in fee of the corpus of the trust and not merely life estates; that he paid the full value of the ten per cent of the fee of the corpus of the trust.

The controversy between the parties arose over the proper distribution of two and one-half per cent of the net income of the trust estate. Charles Edward Fuller claims to be entitled to the ten per cent of the net income from that portion of the trust estate which he had purchased. Donald Edwin Huhn claims that his mother Stella Fuller Huhn had a life estate in two and one-half per cent of the corpus of the trust; that this estate terminated on her death and that he succeeded to it.

As conflicting claims were made on the trustee for this two and one-half per cent of the money to be distributed the trustee brought this action to secure an interpretation of the paragraph of the declaration of trust which we have quoted. The trial court held that Stella Fuller Huhn had a life estate in two and one-half per cent of the corpus of the trust which terminated on her death and descended to her son Donald Edwin Huhn.

If Stella Fuller Huhn had a life estate only, that is all she could sell and convey to Charles Edward Fuller whose right to receive the net income from the two and one-half per cent interest of the trust would terminate on her death. Therefore the important question presented for decision is the proper interpretation to be placed on the paragraph of the declaration of trust which we have quoted.

The construction contended for by Charles Edward Fuller would require the pertinent part of the paragraph to read: To the four children of May P. Fuller, "share and share alike, or to the survivor of them, if they or either of them die without issue *during the lifetime of May P. Fuller*," the italicized portion being added to the language used by the trustors.

The construction for which Donald Edwin Huhn contends would substitute "at any time" for the italicized words in the foregoing paragraph.

A similar question was presented to the courts of this state in Re Estate of Carothers, 161 Cal. 588, 119 P. 926, where the following clause of a will was interpreted: "I also give and bequeath to my wife and William P. Carothers my entire farm with all improvements thereon located in the county of Sacramento county, state of California, during the lifetime of my said wife, and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William P. Carothers, that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon."

The testator died on December 13, 1876, leaving surviving him, his wife Eleanor and three children, William P. Carothers, John Thomas Carothers and Elizabeth Witherspoon. Eleanor died on February 24, 1897, and on February 14, 1898, William P. Carothers conveyed a one-half interest in the farm, which included the property in litigation, to John Thomas Carothers. By mesne conveyances an undivided one-half interest in the property involved passed to Earl D. White. The question decided was whether Earl D. White or Elizabeth Witherspoon was entitled to distribution of this property. The decision of this question required a determination of the exact estate taken by William P. Carothers under the will.

In discussing the law applicable the court quoted the following from Underhill on Wills: "The general rule is that, in the absence of clear evidence of a contrary intention, a devise over in case of death without issue in the case of a remainder, as with an immediate estate or interest, means a death at any time, and not a death without issue during the life tenancy."

It was further said: "Applying the principles of interpretation above stated, we find little difficulty in ascertaining the testamentary intent. When the testator gave William the remainder after the death of Eleanor, and then proceeded to declare what should become of the property if William should die without issue, he must have had in mind the fact that William was a bachelor 42 years old and the possibility of his future marriage and the birth of children. It is more reasonable to suppose that he intended to preserve the estate to Elizabeth Witherspoon or her children, in case William left no issue, than that he merely desired to avoid a lapse if William died before Eleanor. If the former was his purpose, there can be no doubt that the qualifying clause was intended to limit the fee devised to William and referred to his death at any time."

The court reversed the portion of the decree of distribution which awarded the property to White. Three of the justices dissented.

The same question was again considered in Re Estate of Briggs, 186 Cal. 351, 199 P. 322, 323, in interpreting a paragraph of a will reading as follows: "The balance of my estate I bequeath to my two sons Charles T. Briggs of Corona and Fordyce W. Briggs of Santa Ana, to be equally divided between them—in the event my son Charles dies without issue I desire one-half his portion to revert to my son Fordyce W. Briggs and one-half to be equally divided between my great-grandchildren."

During the course of probate Charles T. Briggs petitioned to have half the property distributed to him in fee. The petition was granted and an appeal was taken from the decree. The question at issue was the exact estate bequeathed to Charles.

In holding that the paragraph of the will created a conditional limitation on the estate bequeathed to Charles, it was said:

"In our opinion, when the entire paragraph is considered together, it becomes plain that the intention of the testatrix was that Charles should take his share subject to the condition that if he died childless it should go to Fordyce and the other appellants. * * *

"The contention that the second clause is substitutive is based on section 1336 of the Civil Code, which declares: 'Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.' In [Re] Estate of Carothers, 161 Cal. 588, 595, 119 P. 926, it was held: 'It is important to notice that the rule as stated in the Civil Code applies only where there are words "referring to death or survivorship, simply." The will of Carothers does not refer to the death of William "simply." It refers to his death "without issue," a contingency which may never happen. We have no provision of our Code declaring what the rule should be where the words refer to death upon a contingency. * * * If there is nothing in the context or in the surrounding circumstances to indicate either [that the reference is to a death without issue before some particular time or event, or to a death at any time], then the ordinary meaning of the words is that the reference is to death at any time it may occur, and that the happening or not happening of the contingency is to determine the result.' The death of Charles, to effect the limitation of the estate, must be upon a contingency—he must die without issue. The same contingency was declared in [Re] Estate of Carothers, supra, not to be death, simply, within the meaning of the Civil Code. There is nothing in the context or the circumstances here to indicate a contrary intention on the part of the testatrix, so the words must be taken to refer to death at any time."

The decree of partial distribution awarding Charles one-half of the property in fee was reversed. Two of the justices dissented.

The same question was again considered under very similar provisions of a will in Re Estate of Zeiger, 21 Cal.App.2d 154, 68 P.2d 730. Of course the District Court of Appeal followed the two decisions of the Supreme Court from which we have just quoted. We must also follow those decisions.

[1] We therefore conclude that as Stella Fuller Huhn had a child she only took a life estate in two and one-half per cent of the corpus of the trust. Therefore she could convey to Charles Edward Fuller only a like life estate in that portion of the trust, which life estate terminated on her death. The estate then passed to Donald Edwin Huhn.

[2] The trial court awarded the attorney for the trustee a fee of $100, which, with the costs, was ordered to be paid out of the $176.57 accrued income on two and one-half per cent of the trust which was awarded to Donald Edwin Huhn. Charles Edward Fuller urges that this was error. As Fuller has no interest in this portion of the trust estate he is not injured by this portion of the judgment and cannot complain of it. The minor has not appealed.

[3] Furthermore, the agreed statement of fact signed by the attorneys for all parties contains the following stipulation:

"That by reason of such adverse claims, it has been necessary for the plaintiff to file this proceeding and submit the above-entitled matter to the decision of the Court for declaratory relief, incurring in that behalf the usual costs of such proceeding and the reasonable fees of his attorney, Robert Mack Light, Esq., in and about the prosecution and presentation of the same."

Under this stipulation the attorney's fees were properly awarded.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

56 Cal.App.2d 817

NANNY v. H. E. POGUE DISTILLERY CO. et al.

Civ. 13872.

District Court of Appeal, Second District, Division 1, California.

Jan. 27, 1943.

1. Attachment 🔑307

Whether assignee of account receivable had title to merchandise represented thereby when attachment was levied thereon by assignor's creditor was the main issue in determining assignee's right as third party claimant to purchase money deposited with marshal and fact that court incidentally found attachment to be invalid was immaterial and had no effect upon determination of the main issue. Code Civ.Proc. § 689.

2. Property 🔑5½

A "mutual, open and current account", like an ordinary account, is "property" consisting of a chose in action, which is the subject of transfer, sale, or assignment.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutual, Open, and Current Account" and "Property".

3. Assignments 🔑71

"Assignment of account", whether absolutely or for security, operates, as between the parties, to transfer account to assignee giving him a right to have moneys when collected applied to payment of his debt.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignment of Account".

4. Assignments 🔑57

Notice to the debtor is necessary to complete assignment of account as against him.

5. Garnishment 🔑209

Assignee of account receivable which was garnisheed by assignor's creditor was not in position to file third party claim to money payable on account until buyer of merchandise represented by account had paid garnisheed debt to marshal. Code Civ.Proc. § 689.

6. Garnishment 🔑108

Where account receivable was assigned as security for loan and preexisting indebtedness before assignor's creditor garnisheed indebtedness to assignor under account and attached merchandise represented by account, assignee was entitled to purchase money deposited with marshal in answer to writ of garnishment. Code Civ.Proc. § 689.

7. Evidence 🔑121(10)

In determining right as between assignee of account receivable and assignor's creditor under garnishment of indebtedness represented thereby to money deposited with marshal by garnishee, where garnishee was not a party to third party claim, letter of garnishee's attorney accompanying deposit stating that deposit of amount due on account was being made in answer to garnishment was admissible under exception to "hearsay" evidence rule to show garnishee's intention in making deposit.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

8. Evidence 🔑268, 269(1)

Where intention, feeling, belief, or other mental state of a person at particular time is material to issue under trial, evidence of such person's declarations at the time indicative of his then mental state are admissible under exception to "hearsay" evidence rule regardless of whether declaration was made in presence of adverse party to litigation.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by J. V. Nanny against H. E. Pogue Distillery Company, wherein an attachment was levied on defendant's interest in a carload of whisky and writ of garnishment served on consignee of whisky, and the City National Bank & Trust Company of Chicago (a national banking association) filed its third-party claim to money deposited by consignee with Marshal in answer to writ of garnishment. From judgment determining that City National Bank & Trust Company of Chicago is owner of money in custody of Marshal, plaintiff appeals.

Judgment affirmed.

Mason & Howard and Arthur Lasher, all of Los Angeles, for appellant.

Latham & Watkins, of Los Angeles, for third-party claimant and respondent.

YORK, Presiding Justice.

This is an appeal from a judgment rendered in a proceeding under section 689 of the Code of Civil Procedure determining that respondent, City National Bank and Trust Company of Chicago, is the owner of the sum of $8100 now in the possession and custody of the Marshal of the Municipal Court of the City of Los Angeles.

The factual background of the instant litigation is briefly as follows:

On October 27, 1941, Sawelson Wholesale Company, a copartnership composed of Samuel Sawelson and others, doing a wholesale liquor business in the city of Los Angeles, ordered from defendant Pogue Distillery Company of Marysville, Kentucky, a carload of whiskey. Said merchandise was invoiced at $13,785.25 payable in 30 days and was shipped f. o. b. Marysville on November 21, 1941 to said Samuel Sawelson. On the same day this account receivable was assigned and transferred to respondent City National Bank of Chicago in consideration of a loan made at that time by said respondent to defendant Distillery Company and as security for the repayment thereof as well as additional existing indebtedness.

By virtue of a writ of attachment issued on November 29, 1941, in an action by appellant Nanny, dba, etc., against defendant Pogue Distillery Company in the Superior Court of Los Angeles County, the Marshal of the Municipal Court of the City of Los Angeles on December 2, 1941 levied on defendant's interest in the carload of whiskey then in possession of the Pacific Electric Railway Company, and as well upon all other personal property belonging to defendant and then in the possession or under the control of Samuel Sawelson, and served a writ of garnishment upon said Sawelson. Neither at the time stated nor at any subsequent date did Samuel Sawelson have under his control any credits or personal property belonging to defendant, nor had he incurred any liability to defendant except for the carload of whiskey.

Sawelson on December 2, 1941, answered the garnishment proceeding as follows: "I am not indebted to said Judgment Debtor in the sum of —— Dollars as the merchandise in question was in transit and said merchandise has since been attached by Nanny."

On December 17, 1941, appellant released the carload of whiskey upon Sawelson's purported promise to pay to the marshal the sum of from $8,000 to $8,500 to cover appellant's claim against defendant Distillery Company, and thereafter, on December 22, 1941, Sawelson filed his amended answer in the garnishment proceeding, as follows: "That some time prior to said attachment, we purchased from the defendant a carload of whiskey, consisting of 782 cases, for the sum of $13,785.25, on an open book account, and thereafter we were notified that on November 22, 1941, said account was assigned and transferred to the City National Bank and Trust Company of Chicago, Illinois. Said account has not as yet been paid by the undersigned."

On May 5, 1942 Sawelson deposited with the marshal the sum of $8,100, whereupon respondent filed its third party claim with the said marshal to the $8,100 by virtue of the assignment made in its favor by defendant on November 21, 1941 of the account receivable, above referred to.

During the hearing on the third party claim a written partial stipulation of certain of the above recited facts was filed. Thereafter, on July 3, 1942, judgment was entered in favor of respondent, the third party claimant, by which it was adjudged:

"(1) That title to and the right to the possession of said carload of whiskey was on the date of the levy in Sawelson Wholesale Company and not in the defendant H. E. Pogue Distillery Company, and that the purported attachment thereof was invalid;

"(2) That title to and right to the possession of the property now in the possession of the marshal of the City of Los Angeles, to-wit: the sum of Eight Thousand One Hundred Dollars ($8,100.00), and taken into possession by said marshal on May 5, 1942 from the Sawelson Wholesale Company by virtue of a writ of attachment herein was on the date of the levy of said writ, December 2, 1941, (and) for some time prior thereto and ever since has been and now is in the third party claimant, City National Bank and Trust Company of Chicago, and that said writ of attachment was invalid; that the said marshal is hereby directed to deliver the said sum of money, to-wit: the sum of $8,100.00, forthwith to the said third party claimant, the City National Bank and Trust Company of Chicago;

"(3) That the third party claimant, the City National Bank and Trust Company of Chicago, have judgment against the plaintiff, J. V. Nanny in this proceeding. * * *"

Pursuant to a minute order of July 2, 1942, the following was added, nunc pro tunc, to the minutes of July 1, 1942: "Property was Sawelson's, not Pogue's; so attachment was invalid."

Appellant seeks a reversal of the judgment on the following grounds:

"I. The court tried the issue of the validity of plaintiff's attachment rather than Third Party Claimant's title to property attached at the time of the levy of attachment;

"II. Third Party Claimant did not meet the burden of proof as to its title as required by it under the provisions of C.C.P. 689, or in other words, the evidence does not support the judgment; and

"III. The court committed prejudicial error in admitting over objections hearsay letter of Sawelson's attorney, Sawelson not being a party to the action or proceeding on third party claim. * * *"

[1] Appellant's first point is without merit. The principal issue in the instant case is whether respondent (third party claimant) had title to the property in question as of the date of the levy under the writ of attachment of December 2, 1941 (Sec. 689, Code of Civ.Proc.), however, in considering said issue, the question of priorities as between the assignment and the attachment immediately arises. Therefore, if the court in determining the question of title incidentally found the attachment to be invalid, such finding was immaterial and had no effect upon the determination of the main issue.

[2-4] "A mutual, open and current account, like an ordinary account, is property consisting of a chose in action, which is the subject of transfer, sale or assignment. * * * And where an instrument was clearly intended as an assignment of the accounts, bills and debts mentioned—whether absolutely or as security is immaterial—as between the parties, it was held to operate so as to transfer them to the assignee and *give him a right to have the moneys when collected applied to the payment of his debt.* Kirk v. Roberts, 3 Cal.Unrep. 671, 31 P. 620. To complete the assignment of an account as against the debtor, it is universally conceded that the debtor must have notice, as otherwise his debt will be discharged by payment to the assignor." 1 Cal.Jur. 150, 151. (Emphasis added.)

That Sawelson had notice early in December, 1941, of the assignment of the account receivable by defendant Pogue Distillery Company to respondent is evidenced by Sawelson's amended return to the garnishment proceedings hereinbefore recited.

While the carload of whiskey was the subject of attachment and garnishment by appellant, it was not until sufficient of the purchase price of the whiskey to satisfy appellant's claim in the attachment suit had been paid to the levying officer by the debtor Sawelson, that the third party claim was filed by respondent assignee.

[5] Sawelson could not pay his indebtedness to respondent without assuming responsibility for the validity of the assignment to respondent, and until Sawelson paid the purportedly garnished debt to the marshal, respondent was not in position to file a third party claim thereto. Sunset Realty Co. v. Dadmun, 34 Cal. App.2d Supp. 733, 742, 88 P.2d 947. Meanwhile, appellant had released the whiskey from the attachment and the same had been delivered to Sawelson. Consequently, when Sawelson paid to the marshal the sum of $8,100, respondent was entitled to have the said sum applied to the payment of the assigned debt upon the filing with the marshal its third party claim thereto.

In connection with his second point, appellant urges that the only manner in which respondent third party claimant "can meet the burden of proof placed upon it by section 689, C.C.P., and show that title to the $8,100.00 is in Third Party Claimant is by showing that the $8,100.00 was paid in to discharge an obligation belonging to Third Party Claimant or by showing that said sum was substituted for property belonging to it."

This very fact was proved by the admission into evidence over appellant's objection of a letter written to Marshal Holt by Robert I. Kronick, attorney for Sawelson Wholesale Company, on behalf of Sawelson, to-wit:

"Benjamin & Kronick, 1425 Chapman Building, Los Angeles, California.

"Frank L. Holt, marshal, City of Los Angeles, Municipal Courts Building, Los

Angeles, California. In Re: J. V. Nanny, dba Merchants Wholesale vs. H. E. Pogue Distillery Company, et al, L. A. Superior No. 470502.

"Dear Sir: By virtue of a Writ of Attachment issued out of the State of California, in and for the County of Los Angeles in the above-entitled action, you did on December 2, 1941 levy upon and purport to attach all debts owed by the Sawelson Wholesale Co. to the defendant in the above-entitled action. The said Sawelson Wholesale Co. has been advised that its only debt to the said defendant was on November 21, 1941, prior to your levy, assigned in good faith and for a valuable consideration to the City National Bank and Trust Company of Chicago. It appears, therefore, that the defendant in the above action had no interest in said debt on the date of the levy.

"The Sawelson Wholesale Co. does not, however, wish to assume the responsibility of determining the validity of the levy, but prefers to deposit with you a sum sufficient to protect the interest, if any, of the plaintiff in the above action under said levy and to leave the respective claimants to said sum to whatever remedies that are provided by law.

"Accordingly, we hand you herewith the check of Sawelson Wholesale Co. in the amount of $8,100.00, *said sum being part of the debt purportedly levied on by you on December 2, 1941.* While said sum is paid to you under and pursuant to said levy, the payment thereof does not constitute an admission that said sum or any amount was on the date of your levy or subsequently owed by Sawelson Wholesale Co. to the H. E. Pogue Distillery Company, defendant in the above-entitled action.

"Benjamin & Kronick. By Robert I. Kronick, Attorneys for Sawelson Wholesale Co." (Emphasis added.)

This letter clearly identifies the sum of $8,100 as a part of the purchase price or indebtedness owing for the carload of whiskey.

Moreover, appellant in his petition for a hearing on the question of title under the provisions of section 689 of the Code of Civil Procedure, alleged that under the writ of attachment the marshal levied on the interest of the defendant Pogue "*in a carload of whiskey * * * and on an account payable of Sawelson Wholesale Co.* * * * That thereafter, Sawelson Wholesale Co. paid to Frank L. Holt * * * marshal, the sum of $8,100.00, *in answer to said Writ of Attachment.*" (Emphasis added.) This constituted an admission by appellant that the sum of $8,100 was deposited as a part of the purchase price of the whiskey, which had been validly assigned to respondent prior to the levy.

[6] Since the evidence establishes without conflict, as appellant concedes, that respondent had title to the account at that date of the levy, the trial court properly determined that respondent had title to the money in the custody of the marshal.

[7] With respect to appellant's contention that the court committed prejudicial error in admitting over his objection the letter of Sawelson's attorney, Sawelson not being a party to the action on third party claim, this letter was written at the time the $8,100 was delivered by Sawelson to the marshal, and even though it was hearsay, was properly received under a universally recognized exception to the hearsay evidence rule.

[8] As pointed out in Re Estate of Carson, 184 Cal. 437, 445, 194 P. 5, 9, 17 A.L.R. 239, "The rule is without exception so far as occurs to us at the moment, that whenever the intention, feeling, belief, or other mental state of a person at a particular time * * * is material to an issue under trial, evidence of such person's declarations at the time, indicative of his then mental state, are admissible in evidence. It is wholly immaterial whether such declarations were made in the presence of an adverse party to the litigation or not, or what the character of the litigation is. The sole tests are, Is the intention, belief, or other mental state of the declarant at the time material to the issues under trial, and does the declaration indicate what the declarant's intention, belief, or other mental state at the time was?"

The question here being whether by the deposit of $8,100 Sawelson intended to pay the sum to the marshal in answer to the writ of garnishment and as part of the account payable for the purchase price of the whiskey, under the foregoing exception to the hearsay rule, the letter showing his intention was clearly admissible.

The record shows substantial evidence supporting the findings and the judgment.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

TRIPLETT v. SUPERIOR COURT OF SANTA BARBARA COUNTY et al.

Civ. 13942.

District Court of Appeal, Second District, Division 2, California.
Jan. 27, 1943.

As Amended Feb. 4, 1943.
Rehearing Granted Feb. 18, 1943.
Subsequent Opinion March 5, 1943.

See 135 P.2d 4.

1. Executors and administrators 🔑32(2)

The court is without power to remove a special administrator appointed by ex parte order without a showing of cause therefor and without notice of motion to remove.

2. Executors and administrators 🔑32(1)

Although, in a proper case, an ex parte order appointing a special administrator may be vacated because of inadvertence, it may not be vacated because court thereafter concluded that a mistake had been made in appointing one as special administrator when another had a prior right to appointment.

3. Motions 🔑59(2)

The power of court to correct errors in its records and proceedings and to set aside orders which were inadvertently made does not permit vacation of an order made as result of exercise of judgment.

4. Motions 🔑59(2)

Where issue has been submitted to court after admission of testimony and an order made thereon, court is without power to set aside former order by ex parte order because upon re-examination of same matter it may have reached a different conclusion.

5. Motions 🔑59(1)

Judicial error does not constitute ground for setting aside order, but order is subject to review in manner provided by law.

6. Executors and administrators 🔑32(2)

In determining whether court was authorized to vacate appointment of special administrator by ex parte order, recital therein that order of appointment had been entered through inadvertence and mistake was not conclusive of the nature of the error.

7. Executors and administrators 🔑32(2)

Where order appointing special administrator stated that court had heard evidence, and affidavits of court clerk and person appointed stated that testimony had been given, error, if any, in making appointment was "judicial" rather than "clerical", and court was without power to set aside order of appointment by an ex parte order.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error" and "Judicial Error".

◆

Proceeding to review an order of the Superior Court of Santa Barbara County vacating an appointment of a special administrator, and an order appointing special administrators. Annulled.

Certiorari by Charles Elwood Triplett against the Superior Court of Santa Barbara County and others to review an order of the court vacating the appointment of a special administrator, and an order appointing special administrators.

Orders annulled.

Fred A. Shaeffer, of Santa Maria, for petitioner.

Griffith & Thornburgh, of Santa Barbara, for respondents.

W. J. WOOD, Justice.

The will of Susan K. Triplett was filed for probate and the hearing on the petition of Marion A. Smith and Ida Iliff, who had been named as executors in the will, for letters testamentary was set for hearing by respondent court for October 9, 1942, at 10:00 o'clock a.m. Before the time set for the hearing Charles Elwood Triplett, a grandson of decedent, filed a contest to the petition and the matter was continued to November 13, 1942, for further hearing. At about 12:00 m. on October 9, 1942, upon his ex parte application, Charles Elwood Triplett was appointed special administrator of the Triplett estate by written order signed by the judge, the order reciting that the court heard the evidence in support of the application and was satisfied that the circumstances of the estate required the immediate appointment of a personal representative. The court ordered that special letters issue upon the filing of a bond in the sum of $10,000 and the taking of the oath required by law. A bond in the sum of $10,000 was filed by petitioner, the oath taken and special letters of administration were issued to him on October 10, 1942.

Without notice to Charles Elwood Triplett and without the filing of a petition for his removal the court on October 14, 1942, signed and filed an order purporting to vacate the appointment theretofore made of the special administrator, the order reading as follows: "Good cause appearing therefor, It is ordered that the order heretofore made herein on the 9th day of October 1, 1942, appointing Charles Elwood Triplett as special administrator in the above entitled estate, be and the same is hereby vacated and set aside, upon the ground that said order was made and entered through inadvertence and mistake." On October 15, 1942, the court made an ex parte order in writing appointing Marion A. Smith and Ida Iliff special administrators of the Triplett estate.

Charles Elwood Triplett filed in this court on October 30, 1942, a petition for a writ of certiorari for the purpose of annulling the order made on October 14, vacating his appointment as special administrator. Thereupon this court issued its writ commanding respondent court to certify a complete transcript of the records and proceedings in the matter of the Triplett estate. In response thereto respondent has filed herein a transcript which shows, in addition to the matters above set forth, that the court on November 14, 1942, made an order "nunc pro tunc as of the 14th day of October, 1942," vacating the order made on October 9, 1942, whereby petitioner was appointed special administrator, and setting forth the reasons for the making of the nunc pro tunc order. It is set forth therein that numerous matters were set for hearing on the calendar on October 9, 1942; that at the close of the morning session the clerk of the court handed to the judge twelve orders to be signed; that the attorney for Charles Elwood Triplett had previously handed to Ira Altschul, clerk of the court, without consulting either the clerk or the Honorable Ernest D. Wagner, judge of said court, an order appointing a special administrator; that at no time did the attorney consult with, discuss or in any manner take up with the court or the judge thereof the question of appointing a special administrator in the matter. The order further sets forth that Charles Elwood Triplett had been left the sum of $1.00 only in the will, that under the provisions of the Probate Code preference must ordinarily be given to the person entitled to letters testamentary or administration; and that in signing the orders for matters duly and regularly heard for that day the court "inadvertently and by mistake" signed the order appointing a special administrator for the Triplett estate; and that had the court been advised in the premises the order would not have been signed.

It further appears from the transcript filed herein by respondent that on December 4, 1942, the clerk of respondent court, Ira D. Altschul, on duty on October 9, 1942, filed an affidavit in which he stated: "That Charles Elwood Triplett was sworn as a witness to testify in the matter of the application for special letters of administration in said estate and did testify in said matter. That after the said Charles Elwood Triplett had completed his testimony Fred. A. Shaeffer, attorney for said petitioner, handed to your affiant and your affiant handed to Ernest D. Wagner, Judge of said superior court, an order appointing said Charles Elwood Triplett as special administrator of said estate. That thereupon the said judge signed the said order appointing the said special administrator." An affidavit was filed by Charles Elwood Triplett on December 4, 1942, in which he stated that on October 9, 1942, he was sworn as a witness in the court room and that he testified among other things concerning the extent of the property left by decedent and that the estate consisted of several houses and a ranch which were being rented.

[1-5] A court does not have the power to remove a special administrator who has been appointed by ex parte order without a showing of cause therefor and, of course, notice of a motion to remove must be given. Although in a proper case such an order may be vacated because of inadvertence, it may not be vacated because the court after making the order came to the conclusion that a mistake had been made in appointing one as special administrator when another had a prior right to the ap-

pointment. Sheldon v. Superior Court, 42 Cal.App.2d 406, 108 P.2d 945. The power of the court to correct errors in its records and proceedings and to set aside orders which were made inadvertently does not extend so far as to permit the vacation of an order made as the result of the exercise of judgment. When an issue has been submitted to a court after the admission of testimony and an order made thereon, the court is without power to subsequently make an ex parte order setting aside the former order because upon a re-examination of the same matter it may have reached a different conclusion. If the first order should be found to be erroneous it would constitute a judicial error, subject to review in the manner provided by law. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988.

[6, 7] The uncontradicted evidence in the present proceedings shows that on October 9, 1942, the court considered the application for the appointment of a special administrator, received sworn testimony thereon, and thereafter made an order granting the petition, appointing the special administrator and fixing his bond. The court in its order specifically stated that it had "heard the evidence in support of the application" and was satisfied that the circumstances of the estate required the appointment. The order constituted a formal record representing the performance of a judicial act and the exercise of judicial discretion. The recital in the order made on October 14, 1942, that the order of October 9, 1942, had been entered "through inadvertence and mistake" is not conclusive of the nature of the error. In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89. Nothing appears in the narrative of facts in the nunc pro tunc order made on November 14, 1942, which is in substantial conflict with the statements made in the affidavits presented by petitioner. A statement is made in the order that the attorney for petitioner did not "consult with, discuss nor in any manner take up with the said court nor the judge thereof the question of appointing a special administrator in said matter." Petitioner does not claim that he consulted the court or discussed with the court the matter of the appointment. The statement that the attorney did not "in any manner take up" with the court the matter of the appointment is too indefinite to amount to a contradiction of the positive statements made in the two affidavits filed on behalf of petitioner. If error was made by the court on October 9, 1942, it was inherently judicial rather than clerical or inadvertent and the court had no power thereafter to set it aside by an ex parte order.

For the foregoing reasons the orders made on October 14, 1942, and the nunc pro tunc order made on November 14, 1942, are annulled. The order made on October 15, 1942, appointing Marion A. Smith and Ida Iliff special administrators is annulled. Petitioner shall recover his costs incurred by this proceeding, which shall be chargeable against the estate of Susan K. Triplett.

MOORE, P. J., and McCOMB, J., concurred.

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56 Cal.App.2d 699

DEPARTMENT OF SOCIAL WELFARE v. STAUFFER.

Civ. 12241.

District Court of Appeal, First District,
Division 1, California.

Jan. 19, 1943.

Rehearing Denied Feb. 18, 1943.
Hearing Denied March 18, 1943.

1. Executors and administrators 🔑225(1)
Limitation of actions 🔑35(1)

A right of recovery under Welfare Code from estate of deceased recipient of old age security when recipient was possessed of property or income in excess of amount allowed under law, is not based on any "express or implied contract", and hence action for penalty under the law is not barred by failure to present a claim against the estate within six months after first publication of notice to creditors, but one year statute relating to recovery of a penalty is applicable, in absence of fraud. Probate Code §§ 700, 707; Code Civ.Proc. §§ 338, 340; St.1937, p. 1093, § 2223.

See Words and Phrases, Permanent Edition, for all other definitions of "Express or Implied Contract".

2. Limitation of actions 🔑59(1), 95(1)

In an action brought under the Welfare Code against estate of deceased recipient of old age security when deceased was possessed of property or income in excess of amount allowed under the code, one year limitation statute begins to run from date of issue of letters of administration, and hence action filed two days after expiration of one year from issuance of letters was barred by statute, though governmental agency was unaware of existence of deceased's excess property until administratrix disclosed its existence by filing inventory more than eleven months after issuance of letters of administration. St.1937, p. 1093, § *2223*; Code Civ.Proc. § 340.

KNIGHT, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by the Department of Social Welfare of the State of California against Freda Stauffer, as administratrix of the Estate of John L. Brues, deceased, to recover double the amount of old age security paid the deceased in excess of that to which he was legally entitled. From a judgment in favor of defendant, the plaintiff appeals.

Judgment affirmed.

Rehearing denied; KNIGHT, J., dissenting.

Earl Warren, Atty. Gen., and Lawrence S. Fletcher, Deputy Atty. Gen., for appellant.

Hugh K. McKevitt and Joseph F. DeMartini, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment for defendant in an action against her as administratrix of the above entitled estate. The action is based upon her rejection of a claim filed against the estate under section *2223* of the Welfare and Institutions Code, St.1937, p. 1093.

On application by John L. Brues to the Board of Supervisors of the city and county of San Francisco, through the Department of Welfare of said city and county, he was granted old age security in the amount of $1,375, which covered a period commencing October 1, 1936, and ending February 15, 1940, the date of his death. He declared under oath at the time of making the application, and subsequently, that his assets were not in excess of approximately $80. During the above period, aid was temporarily discontinued for two months by reason of his ineligibility, and an amount of $350 was refunded by him when it was discovered by the authorities that for ten months he had been working and receiving income which rendered him ineligible for aid during that time. The total net amount received by him, therefore, was the sum of $1,025.

Upon the death of Brues, defendant was appointed and duly qualified as the administratrix of his estate, and notice to creditors was published, the first time of such publication being on March 21, 1940. In the inventory and appraisement filed on February 23, 1941, it appeared that decedent was the owner of certain shares of the common stock of the Commonwealth Edison Company of a value in excess of $946. On the 12th of March, 1941, plaintiff filed its verified preferred claim under section *2223* of the Welfare and Institutions Code in the sum of $2,050, being double the net amount of money so paid Brues during the period when his assets exceeded $500 in value. The claim was rejected, and this suit brought thereon. The judgment in defendant's favor was entered upon the conclusion of law that the claim filed "arises upon contract and is barred for not having been filed within the six months period after the first publication of notice to creditors of said estate," and it is upon this point that plaintiff appeals.

Under the Old Age Security Law (§ 2000 et seq. of the Welf. & Inst. Code, St. 1937, p. 1078 et seq.) a recipient of aid is entitled to have in his possession personal property of a value not to exceed $500 (§ 2163) and real property of an assessed value not to exceed $3,000 (§ 2164). The possession of assets in excess of the above amounts renders the recipient ineligible for such aid.

Section *2222* provides that if at any time during the continuance of aid the recipient becomes possessed of any property or income in excess of the amount allowed, he shall immediately notify the board of supervisors of the receipt and possession of such property or income. Any excess aid theretofore paid shall be recoverable as a debt by the state and county participating in the granting of such aid.

Section *2223* provides that "If, on the death of a recipient of aid under this chapter, it is found that he was possessed of property or income in excess of the amount allowed under the provisions of this chapter and that he has not disclosed the same to the board of supervisors, double the amount of the aid paid him in excess of that to which he was legally entitled may be recovered by the Department of Social Welfare as a preferred claim from his estate and upon recovery shall be paid in equal proportions into the treasury of the State and the treasury of the county participating in the granting of such aid."

Appellant contends that it was advised of the existence of assets in the Brues estate only after the inventory and appraisement therein had been filed, nearly a year after the first publication of notice to creditors. It further contends (1) that the above provisions of section 2223 create a statutory penalty; (2) that such penalty is not a contractual liability within the meaning of section 707 of the Probate Code and consequently need not be presented as a claim against an estate within the period of six months from the first publication of notice to creditors as required by section 700 of the Probate Code; (3) that the penalty provisions of the section do not create a liability within the lifetime of the decedent and for that reason also do not come within the purview of that section.

Respondent on the other hand contends that the obligation is in its nature contractual as between decedent and the State of California and the Board of Supervisors, but that if it is in the nature of a penalty or is statutory, for which no claim need be filed in the estate proceedings within the six months period, any right to recover is barred by the statute of limitations (§ 340, subds. 1 and 2, Code Civ.Proc) the action not having been filed until March 20, 1941, over one year from the date estate proceedings were commenced (March 4, 1940).

[1] The first question deserving consideration may be stated as follows: Is the right of recovery given by section 2223 of the Welfare and Institutions Code within the purview of the rule requiring certain claims against a decedent's estate to be filed within six months from the date of the first publication of notice to creditors or be forever barred. (Prob.Code, §§ 700, 707.) Probate Code section 707 applies in terms only to contractual claims, statutory liabilities not being included therein. People v. Hochwender, 20 Cal.2d 181, 124 P.2d 823; 11A Cal.Jur., p. 718. Section 2223 is of statutory origin and the right of recovery therein given cannot reasonably be said to be based upon any express or implied contract.

The right of the state, upon the death of a recipient of aid under the Old Age Security Law, to recover because of the recipient's failure to truthfully disclose in his application for aid the possession of property or income in excess of a given amount is penal in its nature. In construing a similar statute relating to orphans and other needy children (Stats.1937, p. 1005, chap. 369) as amended in 1939 (Stats.1939, chaps. 302, 1037, pp. 1574, 2840), the court in Los Angeles County v. Riley, 20 Cal.2d 652, 664, 128 P.2d 537, 543, denied a petition for rehearing, and modified the original opinion (Los Angeles County v. Riley, 20 Cal.2d 652, 128 P.2d 537) wherein it stated that "The obligation of the state * * * is an implied contract," to read: "The obligation of the state to reimburse counties for aid furnished by the latter to needy children is imposed by statute." In 21 R.C. L., p. 212, section 7, it is said: "It may be admitted that a penalty given by statute is technically a debt. It does not, however, arise on contract, but by operation of law. It is imposed as a quasi punishment for the violation of law, or the neglect or refusal to perform some duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are, either in morals or law, wrongdoers, and not simply unfortunate debtors unable to perform their pecuniary obligations." In Western Mortgage, etc., Co. v. Gray, 215 Cal. 191, 8 P.2d 1016, 80 A.L.R. 866, the distinction between a statute imposing a penalty, and one where the liability is contractual, is well set forth. In that case it was held that the statutory penalty abated at death, but under the present statute the penalty against the estate under section 2223 does not come into existence until after the death of its former owner. The citations submitted by respondent, of which People v. Osgood, 104 Cal.App. 133, 285 P. 753, is a fair example, are not in point. There the forfeited bail bond in a criminal case, upon which the claim was based, was a contract.

While Probate Code, section 707, is not applicable, the demurrer and answer raise other objections based on time limitation, including that of Code of Civil Procedure, section 340, relative to a right of action given to the state upon a statute for a penalty, which must be exercised within one year.

Respondent's contention is based upon the assumption that the claim arises immediately upon the death of the pensioner. This assumption is not, as will be noted hereafter, entirely correct. Appellant argues that the correct interpretation of section 2223 is that its effect should be confined to cases other than where fraud is present, and that the penalty here involved is a punishment for fraud; that by analogy to cases of fraud the accrual of a cause of action such as is here involved is at the time of the discovery of the fraud, and that only then does the statute of limitations commence to run. Appellant admits that not only fraud but nonfraud actions may be instituted under the provisions of section 2223. Assuming that in a fraud case the statute of limitations would not start until the discovery of the fraud, such a rule is not of benefit to appellant in the present action. It is conceivable that a pensioner in good faith might neglect to call attention to certain property in which he had an interest. Stock might stand in his name as trustee for the benefit of a relative, friend or business associate. In fact such a situation is claimed by respondent on appeal, although we fail to find evidence in substantiation thereof. However, the complaint fails to allege fraud. The complaint simply alleges: "That said decedent died on or about the 15th day of February, 1940, in the City and County of San Francisco, and at the time of his death it was found he was possessed of personal property in excess of the amount allowed a recipient under the provisions of the Old Age Security Law, during the periods alleged in paragraph II hereof, in violation of Section 2223, of the Welfare & Institutions Code * * *; that said defendant refused, failed and neglected to file said inventory and appraisement within the time allowed by law." In the absence of allegations of fraud, the one year period (Code Civ.Proc. § 340) is applicable; not section 338, which refers to an action upon a liability created by statute, other than a penalty. It is true that section 2223 provides for recovery if on the death of a pensioner it is "found that he was possessed of property * * * in excess of the amount * * * disclosed * * * to the board of supervisors," etc. In the absence of allegations of fraud, an action based upon the discovery of the additional property must be brought within the one year period. It may be a hardship on the Department of Social Welfare that an action may be barred before its discovery of undisclosed property. To remedy such a situation, it would be necessary to write into the statute of limitation a provision that the time shall not start to run until the department has knowledge, actual or constructive, that there is undisclosed property. The enactment of such a provision, if advisable, is entirely a legislative function and not a judicial one.

[2] In the present proceeding the filing of a claim was not necessary; but, assuming that it was, it was filed approximately a year after the first publication of notice to creditors. The pensioner died on February 15, 1940. The administratrix was appointed on March 18, 1940, and "thereupon duly qualified as administratrix." The rule in California is that the statute of limitations starts to run upon the issuance of letters and the qualification of the administratrix. Under the provisions of section 340, Code of Civil Procedure, the action brought March 20, 1941, was filed several days late.

The judgment is affirmed.

PETERS, P. J., concurred.

KNIGHT, Justice (dissenting).

I am unable to agree with the conclusion reached in the majority opinion that the action herein is barred by the statute of limitations.

As stated in said opinion, the Old Age Security Law declares that no aid shall be granted or paid to any person who owns personal property exceeding the value of $500 or real estate exceeding the value of $3,000; that if during the continuance of aid the recipient shall become possessed of property or income in excess of the amount allowed by said law he shall immediately notify the board of supervisors, which, with the approval of the state agency, may cancel or vary the amount of future aid, and that the excess aid theretofore paid shall be returned and is recoverable as a debt. (§§ 2163, 2164 and 2222, Welf. & Inst. Code.) And section 2223 of said code declares that "If, on the death of a recipient of aid under this chapter, it is found that he was possessed of property or income in excess of the amount allowed under the provisions of this chapter and that he has not disclosed the same to the board of supervisors, double the amount of the aid paid him in excess of that to which he was legally entitled may be recovered by the Department of Social Welfare as a preferred claim from his estate and upon recovery shall be repaid to the county, to the State, and to the United States Government in accordance with the provisions of section 2024."

The admitted facts of the present case are these: John L. Brues applied to the Board of Supervisors of the city and county of San Francisco for and received old age security amounting in all to $1,025. The periodical payments began on October 1, 1936, and continued up to the date of his death, which occurred on February 15, 1940. On March 18, 1940, letters of administration in the matter of his estate were issued to Freda Stauffer and the first publication of notice to creditors was given on March 21, 1940. Section 600 of the Probate Code directs that an administrator shall file his inventory and appraisement within three months after his appointment, unless the time be extended by court order. So far as the record shows, no extension was here granted, but the administratrix did not file the inventory until February 23, 1941, which was more than eleven months after her appointment and after the first publication of notice to creditors; and by said inventory it was revealed that the decedent was the owner of corporate stock of the Commonwealth Edison Company of the value of $1,300. On March 12, 1941, less than three weeks after the filing of the inventory, the state presented its claim against the decedent's estate for double the amount of aid paid to Brues up to the time of his death. On the following day, March 13, 1941, the claim was rejected, and a week later, to wit, on March 20, 1941, the complaint in the present action was filed. The trial court expressly found that during the period from October 1, 1936 (the date of the first payment of aid), to February 15, 1940 (the date of Brues' death), Brues was in possession of corporate stock of the Commonwealth Edison Company of the value of $946 and of a bank account ranging from $25 to $150; also that he "did not disclose to the Board of Supervisors of the City and County of San Francisco, State of California, or their duly authorized agents, the Department of Public Welfare of said City and County, the possession of said stock and bank account prior to and during the entire period said decedent received old age security, or at any other time," and "that the Board of Supervisors of the City and County of San Francisco, and their duly authorized agents, the Department of Public Welfare of said City and County, did not discover the possession of said stock and bank account as aforesaid until subsequent to the death of John L. Brues and after the filing of the inventory and appraisement by Freda Stauffer, the administratrix of said estate." Nevertheless the trial court gave judgment against the state based upon the following conclusion of law: "That the creditor's claim of the Department of Social Welfare of the State of California, filed against the Estate of John L. Brues, deceased, on March 12, 1941, *arises upon contract* and is barred for not having been filed within the six months period after the first publication of notice to creditors of said estate." (Prob.Code, §§ 700, 707; italics added.)

The majority opinion holds that this is an erroneous conclusion of law and that the judgment is not sustainable on the ground specified therein. In thus rejecting the legal theory upon which the trial court decided the case against the state, the majority opinion holds that the cause of action sued upon is statutory; that it is created by section 2223 of the Welfare and Institutions Code for the recovery of a penalty, and in no way involves any contractual relationship, express or implied; that therefore the action is not barred for failure to present a claim against the estate within six months after the first publication of the notice to creditors (Prob.Code, §§ 700, 707); that the controlling statute of limitations in actions arising under said section 2223 is the one year statute prescribed by section 340 of the Code of Civil Procedure for the recovery of a penalty. I am in full accord with those portions of the majority opinion. But it then goes on to hold that with respect to actions brought under the authority of said section 2223 the one year statute of limitations prescribed by said section 340 starts to run from the date of the issuance of letters of administration, regardless of the date on which "it is found" by the governmental agency that the recipient was possessed of the excess property; and that therefore, since the action herein was filed two days after the expiration of one year from the issuance of the letters, the action is barred by the provisions of said section 340, despite the express finding of the trial court that the governmental agency was unaware of the existence of the excess property until the administratrix disclosed its existence by filing the inventory, more than eleven months after the issuance of letters of administration.

The position taken in behalf of the state is that the one year statute starts to run when "it is found" by the governmental agency that the recipient was possessed of property in excess of the amount allowed by said law, and it is my conclusion that the plain wording of said section 2223 will admit of no other possible construction. To repeat, it reads: "If, on the death of a recipient of aid * * * *it is found* that he was possessed of property or income in excess of the amount allowed * * * and that he has not disclosed the same * * * double the amount * * * may be recovered * * *" etc. (Italics added.) Manifestly, in no case, in the absence of statutory direction to the contrary, does a statute of limitations start to run against the exercise of a remedy for the enforcement of a cause of action until the cause of action itself exists; and here, as will be seen, the statutory cause of action conferred on the state by said section 2223 does not come into being unless and until "it is found" by the governmental agency that the recipient was possessed of property in excess of the amount allowed by said law; necessarily, therefore, no suit for the enforcement of such cause of action could be instituted against the recipient's estate unless and until it was so found. In the present case, as above state, the trial court expressly determined as a fact that such discovery was not made until "after the filing of the inventory and appraisement" on February 23, 1941; and in less than a month thereafter the complaint herein was filed. In that state of the record it would seem that to hold that regardless of when it was found that the excess property existed, the one year statute of limitations began to run from the date of the issuance of the letters of administration, not only does violence to the provisions of said section 2223 and the trial court's finding, but judicially revises the section by eliminating therefrom the words "If * * * it is found," and incorporating therein a statute of limitations impracticable in its operation and never contemplated by the Legislature.

It is quite true that the general rule in this state is that as to actions against the estates of deceased persons a statute of limitations starts to run as soon as the representative of the estate is appointed and receives his letters; but in all cases where such general rule is controlling the cause of action against the estate, unlike the one here sued upon, exists at the time of the issuance of the letters.

Referring back to the question of the construction of said section 2223, it may be conceded that the existence of any facts or circumstances sufficient to charge the governmental agency with constructive knowledge that the recipient of aid had died possessed of property in excess of the amount allowed by said law would start the running against the state of the one year statute of limitations, even though the inventory in the estate had not yet been filed. For example, such constructive knowledge might be imparted by the facts alleged in the petition for letters of administration concerning the value and extent of the recipient's estate; or by the contents of a recipient's will which had been offered for probate; or even by recorded transactions had prior to the recipient's death. And obviously the application of the doctrine of constructive knowledge in determining cases based on said section 2223 is entirely consistent with its present provisions, without the necessity of adding any words thereto, because clearly the language employed in framing the opening clause, to wit: "If, on the death of a recipient * * * *it is found* that he was possessed of property or income in excess of the amount allowed * * *" (italics added) is amply broad enough in its scope to support the conclusion that it was intended that the section should be so construed. However, in any event, the question of constructive knowledge is in no way involved on this appeal, because the appeal having been taken on the judgment roll, no part of the evidence is set forth in the record; and the trial court expressly found that the governmental agency did not discover the excess property until after the inventory was filed. It is beyond the power of this court, therefore, to infer, presume or find to the contrary.

Reference is made in the majority opinion to the absence of allegations of fraud; but it is to be noted that said section 2223 declares without any qualifying language whatever that if on the death of the recipient it is found that he was possessed of excess property "and that he has not disclosed the same to the board of supervisors" etc., the governmental agency may recover double the amount paid him in excess of that which he was entitled to receive. Consequently, in order to invoke or grant the relief provided by said section it is not necessary for the state to allege or prove, nor for the trial court to find, the existence of fraud.

It is my conclusion, therefore, that since under the trial court's findings of fact plaintiff is entitled to a judgment for the recovery of the penalty provided for by said section 2223, the judgment appealed from should be reversed with directions to the trial court to revise its conclusion of law and thereupon to enter judgment in favor of plaintiff in conformity with the provisions of said section.

56 Cal.App.2d 804

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12258.

District Court of Appeal, First District,
Division 2, California

Jan. 26, 1943.

Hearing Denied March 25, 1943.

1. Workmen's compensation 🔑338

Generally, specialized or professional services, rendered by another than one engaged for fixed hours at fixed recompense, are not within Workmen's Compensation Act. St.1937, p. 265 et seq., § 3201 et seq.

2. Workmen's compensation 🔑305

Generally, circumstances showing person to be "independent contractor", rather than "employee" within Workmen's Compensation Act, are independent nature of his business, existence of contract for his performance of specified piece of work, agreement to pay fixed price therefor, his employment of assistants under his control, furnishing of necessary materials by him, and his right to control work while in progress, except as to results. St.1937, p. 265 et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

3. Workmen's compensation 🔑338

A lawyer, retained by express company to render specified legal services and opinions on business matters, employing assistants under his control, furnishing his own materials, and having right to control work while in progress, was "independent contractor", not "employee" within Workmen's Compensation Act. St.1937, p. 265 et seq., § 3201 et seq.

4. Workmen's compensation 🔑259

An attorney at law, rendering services as such, is not an "employee" within Workmen's Compensation Act, though certain of such services could be performed by a layman. St.1937, p. 265 et seq., § 3201 et seq.

5. Attorney and client 🔑63

A "general retainer" of attorney at law merely gives client right to expect professional service by such attorney when requested, but none which is not requested.

See Words and Phrases, Permanent Edition, for all other definitions of "General Retainer".

6. Workmen's compensation 🔑338

Services or opinions rendered by attorney at law to client in business matters are incidental to legal services called for by "general retainer" and do not convert professional relationship into one of "employer and employee" within Workmen's Compensation Act. St.1937, p. 265 et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee".

◆

Proceeding by the Associated Indemnity Corporation to review an order of the Industrial Accident Commission awarding medical expenses to DeLancey C. Smith, as an employee of petitioner, under the Workmen's Compensation Act.

Award annulled.

Purvis, Jakobsen & Smith, Daniel W. Burbank, and Burbank & Laumeister, all of San Francisco, for petitioner.

W. N. Mullen, of San Francisco, amicus curiae on behalf of petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner seeks to annul an award of the respondent commission in favor of respondent Smith upon the ground that the evidence is insufficient to support the finding that Smith was an employee.

There is no substantial conflict in the evidence. The sole question presented is whether it can be said as a matter of law that an attorney who is employed under a general retainer is not an employee despite the fact that certain of the services he renders are of a general business nature rather than strictly legal.

The respondent DeLancey C. Smith is a duly admitted attorney at law. He maintained a private office in San Francisco where he employed assistants whose compensation was paid by him as were other office expenses. He engaged in a general practice. For a number of years he had been employed or retained by the Pacific Intermountain Express Co. as an "attorney and consultant." He rendered various services, some of a strictly legal nature, such as drawing legal documents and defending suits. Other services were consultations on matters of business policy such as selection of terminal locations and facilities, personnel and general operational problems. For certain additional work he was paid additional compensation. The amount of this extra compensation was not determined in advance. At the conclusion of the particular work a bill was sent to the company for an amount fixed by Mr. Smith. Most of this additional work was outside of San Francisco. In those cases he generally received $100 a day and all travelling expenses. At times Mr. Smith paid all his expenses and was later reimbursed, at other times a sum was advanced by the company, and on still other occasions certain items, particularly those for transportation, were charged directly to the company. There is no evidence of any agreement that services for the company should be performed by Smith personally, and it is not disputed that certain of the work was done by his office assistants, though the nature of the work they did is not disclosed. It appeared that about one-third of the applicant's time was spent on the Express Company business, though there was no agreement to devote any fixed amount of time to the work. There is no evidence that Mr. Smith was carried on the payroll as an employee or that reports were made or taxes paid under the Social Security Act, 42 U.S.C.A. § 301 et seq.

The award was made for medical expenses incurred because the applicant had contracted pneumonia while travelling on work of the Express Company. It appeared that the primary work was to appear before the Interstate Commerce Commission at Pocatello, Idaho, on an application for a certificate of convenience and necessity in connection with a sale of certain of the Express Company's properties. Mr. Smith went first to Salt Lake City where he conferred with employees of the company in the preparation of data to be presented to the commission. He then went to Pocatello where he appeared for the Express Company. Respondents assert that his function was principally to supply information to the commission because the matter involved a sale wherein the Express Company was the seller and that the burden of proof was on the buyers who were separately represented. At this hearing Mr. Smith testified. This testimony was to have been given by a Mr. Savage, not an attorney but the president of the Express Company, who was to have accompanied Mr. Smith on the trip but who at the last moment was unable to go. On other occasions the company had been represented by a regular full time employee who was not an attorney, but generally after consultation with Mr. Smith. At the conclusion of the hearing Mr. Smith returned to Salt Lake City, where he conferred for one day with employees of the company on general business affairs. Transportation on the trip was by plane, automobile, and train. Plane accommodations were procured on the company's vouchers, use of which was restricted to "Officer, Director, and Employees, Etc." By use of the voucher a discount is obtained. On the voucher Mr. Smith was described as "attorney for Pacific Intermountain Express." The automobile used belonged to the company. After his return to San Francisco, Mr. Smith was confined to his bed with pneumonia until January 14, 1942, a period of over three months. During this time he was paid the regular sum of $250 per month though the work that was done was performed by his assistants.

No question is raised as to the sufficiency of the evidence to support the finding that the sickness arose out of and in the course of the employment, if there was employment.

[1-3] Both petitioner and respondents in their points and authorities have proceeded upon the assumption that if certain of the services performed by Mr. Smith were not done in his capacity as attorney at law, or, as respondents contend, were not purely incidental thereto, they were necessarily performed as an employee. This assumption is a violent one. Generally, any specialized or professional services rendered other than by one engaged for

fixed hours at a fixed recompense are not within the compensation act. 1 Schneider, Workmen's Compensation Law, 2d Ed., 198. In distinguishing between a contract of employment and one creating the relation of independent contractor a number of factors are to be considered. In 39 C.J. 1315, 1316, the rule is stated as follows: "Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results. All these matters are to be taken into consideration in determining whether or not a party is an independent contractor." This statement of the rule is approved in Casselman v. Hartford A. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539, upon which respondents rely. In the instant case each of these factors was present. Mr. Smith was engaged to do specified pieces of work rather than to devote any fixed time to such work as his alleged employer might specify. He was engaged in an independent calling. It is true that respondents insist that such is not entirely true because he was consulted on business problems but it appears that on such occasions he was merely called on to render an opinion because of his particular abilities. At most it might be said that Mr. Smith was a specialist in two fields and was retained for his abilities in both. Admittedly Mr. Smith employed assistants who were under his exclusive control, and he furnished his own materials. These assistants were either trained lawyers or aides of Mr. Smith in his legal practice. From the very nature of the services rendered he had the "right to control the work while it is (was) in progress." The last mentioned factor has received the greatest emphasis in the authorities in this jurisdiction. (13 Cal.Jur. 1019.) The respondent Smith was an independent contractor and not an employee. It follows, of course, that he was not within the terms of the Workmen's Compensation Act, St.1937, p. 265 et seq., § 3201 et seq.

[4] There is another ground upon which the award must be annulled. If the services rendered were those of an attorney at law as such the respondent Smith certainly was not an employee. In Coleng v. Ramsdell, 19 Cal.App.2d 376, 65 P.2d 365, in holding an accountant engaged on a monthly fee to be an independent contractor the court, at page 381 of 19 Cal.App.2d, at page 367 of 65 P.2d, said: "Ramsdell was as much engaged in business for himself, in performing the work called for in his contract with the appellant, as is a lawyer who engages to do certain work for a client upon a regular monthly retainer." Seeking to avoid this rule respondents point to the fact that certain of the services performed by Mr. Smith could have been performed by a layman but this is not the test. Laymen may appear before the respondent commission but could anyone reasonably contend that when an attorney does so he is not practicing law? As stated by the Committee on Professional Ethics and Grievances of the American Bar Association in its opinion 57: "The fact that a layman can lawfully render certain services does not necessarily mean that it would not be professional services when rendered by a lawyer."

In Re Soale, 31 Cal.App. 144, 159 P. 1065, it was held that an attorney acting for his client in arranging for transfers and sales of real property was none the less acting in his capacity as an attorney at law. At pages 152, 153 of 31 Cal.App., at page 1069 of 159 P. the court says: "It is our opinion, however, that in these transactions Mrs. Jenkins reposed confidence in Mr. Soale as a counselor at law. The evidence does not indicate that he was engaged in business as an agent or broker, or maintained his office for any purpose other than in the course of his profession as an attorney and counselor. She went to him in that office and called upon him for advice and assistance in the conduct of her business affairs, without any notice or suggestion that in accepting the employment he was representing her in any way other than in his professional capacity. The occupation of a lawyer is not confined to appearances for parties in actions in courts of justice. A very large part of the professional work done by them consists in advice given to clients for the general purpose of aiding them in the conduct of their business affairs. At the time of these transactions Mrs. Jenkins was consulting Mr. Soale concerning a proposed action at law, and it appears that she consulted him about her other business affairs indiscriminately and without any attempted classification of the transactions as being partly within and partly without the scope of his professional business. She was entitled to believe that she was under his care as a counselor employed by her. The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired. We conclude, therefore, that she did repose confidence in him as her counselor at law, and the only remaining question is as to whether or not he maintained inviolate that confidence."

[5, 6] Here Mr. Smith was engaged under a general retainer. Such a retainer is defined in Rhode Island Exchange Bank v. Hawkins, 6 R.I. 198, 206: "A general retainer merely gives a right to expect *professional service* when requested, but none which is not requested." (Emphasis ours.) Just as "The value of an attorney's services is a matter with which a judge must necessarily be familiar" (3 Cal.Jur. 714) so too "a judge must necessarily be familiar" with the fact that practically without exception every attorney who is retained by a corporation is called upon at times to render opinions on matters of business and that the same is frequently true of attorneys engaged by individuals. Such services or opinions are necessarily incidental to the legal services called for by a general retainer. As a matter of law they do not convert the professional relationship to one of employer and employee.

In Casselman v. Hartford A. & I. Co., previously referred to, an attorney was engaged to investigate an accident. He was to go from San Francisco to Stockton. At Stockton he was to contact an employee of the company who would give him his "leads and contacts." It is this fact that is emphasized by the court in holding that there was sufficient evidence of control to support the jury's finding. As is stated above the Casselman case quotes with approval from 39 C.J. 1315, 1316, which we have quoted. What has already been said with respect to the application here of the rule there set forth is sufficient to distinguish the Casselman case.

Respondents rely primarily upon Industrial Commission v. Moynihan, 94 Colo. 438, 32 P.2d 802, and O. P. Skaggs Co. v. Nixon, 97 Colo. 314, 50 P.2d 55. The latter of these cases was decided in department and merely cites and follows the earlier decision. We do not agree with the majority opinion in the Moynihan case. That case was heard in bank but it does not appear how many justices participated in the decision. We are in accord with the dissenting opinion wherein the dissenting justice states (32 P.2d at page 804): "The majority opinion seems to go beyond all bounds of logic and authority."

In this ruling we do not hold that the relationship of employer and employee cannot exist when an attorney is employed to perform professional services for his employer, and when the employer reserves the right to control the work of the attorney, as in the case of the employment of an attorney for fixed hours at a fixed compensation. But, under the undisputed facts of this case, where such control was not retained and where there was present each of the three factors determining the independent contractor relationship, we must hold that the attorney was not an employee entitled to compensation under the act.

The award is annulled.

STURTEVANT and SPENCE, JJ., concurred.

Hearing denied; CARTER, J., dissenting.

21 Cal.2d 534

DANT & RUSSELL, Inc., v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

L. A. No. 18517.

Supreme Court of California.

Feb. 8, 1943.

Rehearing Denied March 8, 1943.

1. Commerce 🔑77

The word "imports", as used in federal constitutional provision prohibiting the states from laying imposts or duties on imports without the consent of Congress, refers exclusively to goods shipped from a foreign country. U.S.C.A.Const. art. 1, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Imports".

2. Commerce 🔑77

Lumber which was shipped from the Philippine Islands to California, where it was stored in a warehouse yard, was not "imports" within federal constitutional provision forbidding the states from laying imposts or duties on imports without the consent of Congress, since the Philippine Islands are not a "foreign country". U.S.C.A.Const. art. 1, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Foreign Country".

3. Commerce 🔑72

Under commerce clause of the Federal Constitution, lumber shipped in individual pieces from Philippine Islands to California, where it was piled in a warehouse yard, was protected from state or local taxation while it was in transit, and from discriminatory state taxation because of its out of state origin after the transit ended, but was not protected from nondiscriminatory ad valorem property taxation by a California county while it was at rest in the county. U.S.C.A.Const. art. 1, § 8, cl. 3.

4. Taxation 🔑72

Where lumber was shipped from the Philippine Islands to California, where it was piled in a warehouse yard, and the lumber was held in California at petitioner's pleasure, or for shipment elsewhere as petitioner's interest dictated, the lumber was a part of the general mass of "property" in the state and was subject to county ad valorem property taxation, where such taxes were not contended to be discriminatory.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Dant & Russell, Inc., for writ of mandate to compel the Board of Supervisors of the County of Los Angeles and others to cancel tax assessments on imported lumber. Judgment for defendants, and petitioner appeals.

Affirmed.

For prior opinion, see 128 P.2d 389.

Henry C. Rohr and Stanton & Stanton, both of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., as amici curiae on behalf of respondents.

TRAYNOR, Justice.

At various times during the years 1937 to 1940, inclusive, mahogany lumber was shipped from the Philippine Islands to Long Beach, California, where it was stored in piles in the yard of a warehouse. It was not packed in bundles but shipped in individual pieces. None of it was sold in this state, and no orders were received or solicited here for sales outside the state. Pieces were sold from time to time on orders received at petitioner's office in Portland, Oregon, and were delivered by the warehousemen to carriers for shipment to their destination outside of California. The county of Los Angeles levied ad valorem property taxes on the lumber remaining in the yard at Long Beach on the first Monday in March, 1938, and on the first Monday in March, 1939. Petitioner appeals from a judgment entered upon an order sustaining without leave to amend respondents' demurrer to the petition for a writ of mandate to compel cancellation of the assessments.

[1-4] Petitioner contends that the taxes are invalid on the ground that they were imposed on imports in violation of the provisions of article I, section 10, of the Constitution of the United States that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on

Imports or Exports * * *." The word "imports," however, as used in this section refers exclusively to goods shipped from a foreign country (Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095; Dooley v. United States, 183 U.S. 151, 22 S.Ct. 62, 46 L.Ed. 128; E. J. McLean & Co. v. Denver & Rio Grande R. Co., 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78; Patapsco Guano Co. v. Board of Agriculture, 171 U.S. 345, 350, 18 S.Ct. 862, 43 L.Ed. 191; Woodruff v. Parham, 8 Wall. 123, 19 L.Ed. 382), and it has long been settled that the Philippine Islands are not a foreign country but an unincorporated territory of the United States. De Lima v. Bidwell, 182 U.S. 1, 21 S.Ct. 743, 45 L.Ed. 1041; Downes v. Bidwell, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088; Fourteen Diamond Rings v. United States, 183 U.S. 176, 22 S.Ct. 59, 46 L.Ed. 138; Gonzales v. Williams, 192 U.S. 1, 24 S.Ct. 177, 48 L.Ed. 317; Cincinnati Soap Co. v. United States, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122; The Alta, 9 Cir., 136 F. 513, 69 C.C.A. 289; Faber v. United States, 2 Cir., 157 F. 140. It follows that the lumber in question does not constitute imports, and it is immaterial whether it can be regarded as having been in original packages unsold at the time the taxes were levied. The commerce clause of the United States Constitution, article 1, § 8, cl. 3 (see Hanley v. Kansas City S. R. Co., 187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333; Stoutenburgh v. Hennick, 129 U.S. 141, 9 S.Ct. 256, 32 L.Ed. 637; E. J. McLean & Co. v. Denver & Rio Grande R. Co., 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78; Inter-Island Steam Nav. Co. v. Hawaii, 9 Cir., 96 F.2d 412, affirmed 305 U.S. 306, 59 S.Ct. 202, 83 L.Ed. 189; Pacific Coast Dairy, Inc., v. Department of Agriculture, 19 Cal.2d 818, 827, 123 P.2d 442) protects the lumber from state and local taxation while in transit (Coe v. Town of Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715; Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626; Kelley v. Rhoads, 188 U.S. 1, 23 S.Ct. 259, 47 L.Ed. 359; Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359) and from discriminatory state legislation because of its out-of-state origin after the transit ends. Welton v. Missouri, 91 U.S. 275, 23 L.Ed. 347; Walling v. Michigan, 116 U.S. 446, 6 S.Ct. 454, 29 L.Ed. 691; I. M. Darnell Co. & Son v. Memphis, 208 U.S. 113, 28 S.Ct. 247, 52 L.Ed. 413. There is no contention here, however, that the taxes in question were discriminatory, and since the lumber had come to rest in this state and was held here at petitioner's pleasure or for shipment elsewhere as petitioner's interest dictated, it was a part of the general mass of property in the state and therefore subject to taxation. Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131; Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095; Whitfield v. Ohio, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778; American Steel & Wire Co. v. Speed, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, EDMONDS, and CARTER, JJ., and PETERS, Justice pro tem., concurred.

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56 Cal.App.2d 732

PEOPLE v. WEAVER.

Cr. 3605.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1943.

Hearing Denied Feb. 18, 1943.

1. Criminal law 🔑27

Section of the Penal Code, providing that a crime shall be deemed a misdemeanor for all purposes after judgment imposing other punishment than imprisonment in state prison, is prospective and not retrospective in operation, and "after a judgment" means that crime should be regarded as a misdemeanor only for purposes subsequent to judgment. Pen.Code, § 17.

2. Criminal law 🔑147

Prosecutions for offenses designated felonies by statute were not barred by one-year statute applicable to misdemeanors, on theory that imposition of fines made the offenses misdemeanors only under section 17 of the Penal Code. Pen.Code, §§ 17, 801.

3. Criminal law 🔑633(2)

The provision in section of Penal Code for omission of reference to previous conviction in reading indictment or information to jury was intended to keep from jurors all knowledge that accused had been previously convicted, where such prior conviction is admitted, unless defendant becomes a witness in his own behalf and is interrogated about previous conviction by way of impeachment, or where evidence of such conviction is material to an issue. Pen.Code, § 1093, subd. 1.

4. Criminal law ⚷1037(1)

Where deputy district attorney by manifest inadvertence read part of question referring to defendant's prior conviction from transcript in prior civil action but withdrew the question and defendant did not object or ask court to admonish jury though defendant knew or had reasonable opportunity to familiarize himself with contents, there was no basis for reversal when objection was made for first time on appeal. Pen.Code, § 1093, subd. 1.

5. Criminal law ⚷703

Where district attorney in opening statement informed jury that prosecution would try case on theory that joint defendants acted in concert, and theory of conspiracy was constantly raised by evidence that defendants combined in presenting false insurance claims, instructing on conspiracy was not error.

6. Conspiracy ⚷43(12)

An information need not specifically charge conspiracy to render evidence of conspiracy admissible.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Darrington Weaver and Bernice Wilson were convicted of presenting false insurance claims, and Darrington Weaver was convicted of perjury and subornation of perjury, and defendant Weaver appeals from the judgments and from an order denying new trial.

Affirmed.

Lloyd C. Griffith and M. H. Broyles, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information numbered 84904 and containing thirty-three counts defendant Darrington Weaver was accused in counts 1, 2, 4, 6, 7, 8, 10, 12, 20, 21, 22, 23, 24, 28, 30, 31, 32 and 33 of the crime of violation of section 556 of the Insurance Code of this state, St.1935, p. 511, which section denounces as a crime the preparation or presentation of any false or fraudulent claim for the payment of a loss under a contract of insurance. In counts 3, 5, 9 and 11 the same defendant was charged with the crime of forgery; counts 27 and 29 accused him of forgery of fictitious names; charges of violating section 132 of the Penal Code were contained in counts 13, 14, 15 and 16 alleging the offering of false evidence; violation of section 134 of the Penal Code alleging the preparation of false evidence formed the basis of counts 17 and 18; in count 26 said defendant was charged with the crime of perjury while counts 19 and 25 alleged the commission by defendant Weaver of the crime of subornation of perjury.

In another information bearing number 84905 and containing eight counts defendant Weaver and one Bernice Wilson were jointly charged with the presentation of false or fraudulent insurance claims in contravention of section 556 of the Insurance Code. In each of the aforesaid informations defendant Weaver was charged with a prior conviction of a felony for which he served a term of imprisonment in the state prison.

Defendant Weaver pleaded not guilty to all counts contained in both informations; the causes were regularly consolidated for trial, and prior to such trial defendant Weaver admitted the prior conviction charged against him.

Trial by jury resulted in the conviction of defendant Weaver under information numbered 84904 of counts 20, 21, 22, 23, 24 and 28 charging violations of section 556 of the Insurance Code and he was sentenced to pay a fine of $100 on each of these counts; count 27 charging forgery of fictitious name was dismissed on motion of the district attorney and the jury was unable to agree upon verdicts as to counts 1 to 19 and 30 to 33 in information numbered 84904 and these counts were thereafter dismissed by the court. Guilty verdicts were also returned on counts 25 and 26 charging perjury and subornation of perjury respectively and upon such convictions defendant was sentenced to concurrent terms in the state prison. The conviction under count 29 resulted in defendant Weaver being sentenced to serve one year in the Los Angeles County Jail such sentence to run concurrently with the state prison sentences.

As to information numbered 84905 defendant Weaver and his co-defendant, Bernice Wilson, were convicted on all eight counts charging violation of section 556 of the Insurance Code. A new trial was granted as to count 8 of this information but as to each of the remaining seven counts defendant Weaver was sentenced to pay a fine of $100.

From the judgments of conviction and from orders denying a new trial as to each of the counts contained in both informations upon which he was convicted, defendant Weaver prosecutes this appeal.

Appellant does not challenge the sufficiency of the evidence to sustain the convictions herein but as grounds for his appeal urges (1) that certain of the judgments are null and void; (2) that the district attorney during the course of the trial was guilty of prejudicial misconduct that prevented the appellant from having a fair and impartial trial; and (3) that the court erred in the giving of certain instructions.

Although the sufficiency of the evidence is conceded it will facilitate the consideration of at least one of the grounds of this appeal to briefly summarize the factual background surrounding this prosecution. The record reveals that appellant acting in concert with one Bernice Jackson who was his secretary advanced the premium for a policy of insurance which he procured fo Miss Jackson. The latter then prepared a claim for a supposed accident at the direction of appellant. No such accident had occurred and Miss Jackson testified at the trial that she suffered no injury of any kind, while the claim forms sent to the insurance company alleged that Miss Jackson had suffered a complete fracture of the distal end of the left ulna. At the trial, however, Miss Jackson testified that she never had a broken arm in her life. It appears that the information furnished the insurance company in the aforesaid claim was dictated to Miss Jackson by appellant who obtained the claim blank and stated to Miss Jackson that he was going to obtain some money on her policy. On the claim form or proof of damage appellant directed Miss Jackson to fill out her portion thereof in longhand and then, being a physician, he dictated the medical report in typewriting. The foregoing constitutes some of the evidence in support of counts 20 to 24 of information numbered 84904.

The evidence further shows that Miss Jackson sued the insurance company upon the aforesaid claim in the municipal court, that appellant advised her to commence the action and offered to pay one-half of the filing fee thereof. Miss Jackson refused to pay any part of the filing fee but the complaint was ultimately filed. According to Miss Jackson she never saw the attorney who filed the complaint until the case came to trial. On the last mentioned day appellant showed Miss Jackson an X-ray which he stated to her was an X-ray of her arm although she testified she had never had an X-ray taken up to that time. According to Miss Jackson she testified at the trial against the insurance company in accordance with instructions appellant had given her as to what she was to say. As a result of the trial Miss Jackson obtained a judgment for $150 against the insurance company and a check for this amount was made out to her and the attorney. After being endorsed by the payees it was turned over to appellant who gave the attorney $25 as his fee, presented Miss Jackson with $50 and appropriated the balance for himself. This evidence is part of that offered in support of count 25 charging subornation of perjury upon which appellant was convicted and sentenced to state prison.

In connection with the municipal court case above referred to against the insurance company, the record in the instant case shows that appellant Weaver testified at that trial. He gave testimony that he treated Bernice Jackson for a complete fracture of the left ulna on the same date the accident occurred and that he took an X-ray of the arm which X-ray was introduced as an exhibit in the civil action. Two X-rays of the arms of Bernice Jackson taken before the trial of appellant in the case now before us were compared with the X-ray offered as an exhibit in the municipal court action, and two X-ray specialists testified that they were not an X-ray of the same person. This comprises a portion of the evidence supporting count 26 wherein defendant was charged with perjury upon conviction of which he was sentenced to state prison.

In support of counts 28 and 29 charging presentation of a false insurance claim and a charge of forgery of a fictitious name, it was shown that appellant signed the name "Myrtle Roberts" to an application for insurance and procured Miss Jackson to write a letter in longhand to the insurance company and sign the name "Myrtle Roberts" to the letter. A claim adjuster for the Mutual Benefit Health and Accident Association identified the letter to the company and the application for the policy of insurance as records of said company. At the instigation of appellant his co-defendant Bernice Wilson in information numbered 84905 represented herself to the insurance company's representative as the beneficiary under the policy "Myrtle Roberts."

In support of the seven convictions upon charges of presenting false insurance claims as charged in information 84905 against appellant and his co-defendant Bernice Wilson it was shown in evidence that the co-defendant Wilson had several policies of insurance and that she took out more than one policy at appellant's suggestion and when claims were made under the policy and not paid appellant urged Miss Wilson to sue. Some of the money she received on her claims she gave to appellant. When she made several claims for injuries allegedly sustained when she slipped on a bar of soap and fell in the bath tub she made out the forms and claims at appellant's direction and in each of them falsely stated that she had no other insurance. The record indicates that was done by Miss Wilson upon agreement with appellant. On these claims appellant also filled out the medical reports. In making claims to three different companies for the same injury Miss Wilson and appellant gave different information on each of the forms. Bernice Wilson, appellant's co-defendant, made one of the several claims for the same accident in the name of "Rosalie Stewart" and had taken out a policy in that name at a time when she already had two other policies, the existence of which she denied in her application. At the trial it was shown that this type of insurance is prorated if there is other insurance and that this information is required and for this reason information as to the existence of other policies is required when such claims are presented.

[1, 2] Appellant bases his claim that the judgments upon which he was sentenced to pay fines are null and void because of the provisions of sections 17 and 801 of the Penal Code. The applicable portion of section 17 provides that when a crime punishable by imprisonment in the state prison is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison; while section 801 directs that an indictment, information or complaint for any misdemeanor must be filed within one year after its commission. Because more than one year elapsed between the date when the crimes charged were committed and the filing of the complaint or information herein, it is urged that, being made misdemeanors through imposition of fines, the prosecution of such offenses was barred by the statute of limitations. Doble v. Superior Court, 197 Cal. 556, 576, 241 P. 852, furnishes a complete answer adverse to appellant's claim. In that case it was held that the provision of Penal Code, section 17 upon which appellant relies had a prospective operation; that by the words "after a judgment" it was meant that the crime should be regarded as a misdemeanor only for purposes subsequent to judgment if a fine or county jail sentence be imposed; and that the judgment by which the crime was made a misdemeanor was not to have a retroactive effect so far as the statute of limitations is concerned. The rule enunciated in the Doble case was considered and approved in People v. Lippner, 219 Cal. 395, 404, 26 P.2d 457; People v. Cowan, 38 Cal.App.2d 231, 244, 245, 101 P.2d 125, 135; In re Miller, 218 Cal. 698, 700, 24 P. 2d 766. The cases of People v. Angelo, 24 Cal.App.2d 626, 75 P.2d 614, and People v. Picetti, 124 Cal. 361, 57 P. 156, are easily and readily distinguishable in their factual background from the case at bar. In both of the last cited cases the defendant was charged with grand larceny or grand theft and found guilty of petty larceny in the one and petty theft in the other. In both cases the evidence clearly showed that the defendant stole less than the amount of money necessary to constitute such theft a felony. It was therefore a misdemeanor ab initio and the application of section 801 was justifiable and proper. But that is not the case here. The acts committed by appellant constituting the particular offenses for which he was tried are designated in the statute as a felony. The crimes remained felonies until the court had completed a rendition of judgments therein. Therefore, as heretofore pointed out the provision of section 17 being prospective and not retrospective in operation, the judgments pronounced thereon are immune from the attack made by appellant upon their validity.

Appellant's second ground for reversal is based upon the claimed prejudicial misconduct of the district attorney in referring to the previous conviction of appellant when such conviction had theretofore been admitted by him outside the presence of the jury. In this connection it appears that as part of the proof in support of the counts in the information charging perjury and subornation of perjury upon which appellant was convicted there was introduced at his trial reporters' transcripts of testimony taken at the hereinbefore referred to civil trial had in the Municipal Court of the City of Los Angeles on August 20, 1940. It was at such municipal court trial that appellant testified that he had treated the insured, Bernice Jackson, for a broken arm and at the same trial he produced an X-ray in support of such claim. It was shown, however, at the criminal trial of appellant with which we are here concerned that all of such testimony was false and that the X-ray was one of a different person. In connection with the introduction of the municipal court transcripts it appears that rather than require the reporters of that court to remain in attendance at appellant's trial in the superior court it was stipulated that if called as witnesses such reporters would testify that the transcripts correctly reflected the testimony given at the trial of the civil case. During appellant's superior court trial and some two weeks after the foregoing stipulation was entered into the deputy district attorney offered to read into evidence "pursuant to the stipulations previously entered between counsel as to the testimony of the court reporter" the transcript of testimony given at the aforesaid municipal court trial. No objection whatever was made to reading the testimony of appellant although some two weeks had elapsed between the time when it was stipulated the transcript might be read instead of requiring the presence of the reporter, thereby affording appellant ample opportunity to examine the transcript to discover what if any portions thereof were objectionable. The record discloses that in reading the cross examination of appellant at the municipal court trial as contained in the transcript the deputy district attorney read therefrom the following questions:

"Q. You don't follow that procedure? A. No.

"Q. Have you ever been convicted * * * withdraw that.

"Q. Did you ever know Bernice Jackson by any other name other than that name?"

[3, 4] It is now urged by appellant that the uncompleted question "Have you ever been convicted * * *" as read from the municipal court transcript implanted in the minds of the jurors at least a suspicion if not a fixed belief that appellant had suffered a prior felony conviction and militated so seriously against his right to a fair and impartial trial as to require a reversal of all the judgments rendered against him. We do not think so. It is at once apparent that the action of the deputy district attorney in reading the quoted portion of the question was inadvertent and not wilful because it is evident that as soon as he caught the import of the interrogatory and before a completion of its reading he withdrew it at once, thereby manifesting his fairness. This is quite different from a situation where from the record it may be definitely determined that a prosecuting officer has deliberately framed a question in such a manner as to make it appear that it is a proper question, but in truth it is designed to elicit an answer which the prosecuting officer well knows would place before the jury inadmissible evidence. This court has on more than one occasion reiterated the principle that Penal Code, section 1093, subdivision 1, was intended to keep from the jurors all knowledge that the accused had been previously convicted of an offense where such prior conviction is admitted unless the defendant becomes a witness in his own behalf and is interrogated as to such prior conviction by way of impeachment or where evidence of such prior conviction is relevant or material to an issue in the case. (People v. Duvernay, 43 Cal.App.2d 823, 825, 111 P.2d 659; People v. Jeffries, 47 Cal.App.2d 801, 804, 119 P.2d 190); but under the circumstances here presented where appellant knew or had reasonable opportunity to familiarize himself with the contents of the transcript and neither objected to any portion of it being read into evidence and did not ask the court to admonish the jury after the manifest inadvertence on the part of the deputy district attorney in partially reading an objectionable question from the transcript we cannot hold that a reversal is either required or proper. Furthermore we are not persuaded that enough of the question was read to arouse in the minds of the jurors any fixed belief or well-grounded suspicion that appellant had suf-

fered a prior conviction. He having agreed to a reading of the transcript in question to the jury; the prosecutor having attempted to protect appellant as best he could after only partially reading the question and then withdrawing it, there is no basis for a reversal when objection is made for the first time on appeal.

[5, 6] Finally appellant contends that the court erred in giving to the jury instructions on the law of conspiracy when no conspiracy was charged and according to appellant the case was not tried on the theory that a conspiracy existed between him and his co-defendant. However these claims upon the part of appellant are not borne out by the record. In his opening statement made at the outset of the trial the district attorney informed the jury that the prosecution would try the case in which the defendants were jointly charged, upon the theory that both defendants acted in concert and aided and abetted each other in the commission of the offenses therein alleged. Throughout the course of the trial the theory of conspiracy was constantly before the jury through the introduction of both direct and circumstantial evidence. It was shown that both defendants met together, consulted together and combined together to commit the unlawful acts charged against them in presenting falsified claims to various insurance companies for one and the same injury. The fraudulent representations made to the insurers were made by each defendant acting in conjunction with the other. It is of course firmly established in the law of this state that it is not necessary for the information to specifically charge a conspiracy to render evidence of a conspiracy admissible, People v. Gregory, 12 Cal.App.2d 7, 15, 54 P.2d 770, and cases therein cited. The factual situation in the case at bar is therefore clearly distinguishable from the case of People v. Sheffield, 108 Cal.App. 721, 293 P. 72, 77, relied upon by appellant and wherein it was repeatedly stated and constantly urged that no conspiracy existed. In view of the foregoing principles, coupled with the fact that the instant case was tried upon the theory of an unlawful combination and conspiracy between the defendants insofar as the offenses charged against them in information numbered 84905 is concerned, it follows that the giving of admittedly correct instructions upon the subject of conspiracy did not constitute error.

For the foregoing reasons the judgments and the order denying defendant's motion for a new trial are and each of them is affirmed.

YORK, P. J., and DORAN, J., concurred.

57 Cal.App.2d 21

ATCHLEY et al. v. FINLEY et al.

Civ. 12243.

District Court of Appeal, First District, Division 2, California.

Feb. 3, 1943.

Rehearing Denied March 5, 1943.

Hearing Denied April 1, 1943.

1. Automobiles 🔑244(11)

In action to recover for injuries sustained in automobile collision as plaintiffs made a left turn at intersection and were struck by defendants' automobile approaching from opposite direction, evidence was sufficient to sustain implied finding in plaintiffs' favor.

2. Appeal and error 🔑1060(1)

In action to recover for injuries sustained in automobile collision, where there was some confusion in record as to claims of defendant driver with respect to lawful speed in the zone in question, statements of plaintiffs' counsel in argument to jury that he thought defendants first contended it was a 25-mile an hour zone, later that it was a 45-mile an hour zone, and that now it did not seem it was true, were not prejudicial "misconduct" where it did not appear that they were made in bad faith to confuse jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

3. Appeal and error 🔑1068(4)

In action by husband and wife for injuries, where there was no evidence of any general damage sustained by husband, error, if any, in authorizing a verdict embodying general damages sustained by husband and wife, was not prejudicial where wife suffered severe injuries and it was not claimed that the amount awarded was excessive.

4. Appeal and error ⚿218(1)

Where no objection was made to form of verdict at time it was submitted to jury, when returned or upon hearing of motion for new trial, and it was not claimed that verdict was excessive, defendants could not claim on appeal that verdict was fatally defective in that it did not segregate the interests of plaintiffs.

5. Appeal and error ⚿1050(1)

In action by husband and wife to recover for injuries, admission of testimony by husband that he had been employed at $8 per day and that he had lost four days' work was not prejudicial error even though special damage had not been alleged, where there did not appear to be any likelihood that verdict would have been different without such testimony.

6. Evidence ⚿474(8)

Where plaintiff driver testified that he first saw defendants' automobile when 300 feet from intersection and that he again saw defendants' automobile when 50 feet away, permitting plaintiff to estimate speed of defendants' automobile at time of collision was not error.

7. Appeal and error ⚿1078(4)

The District Court of Appeal need not discuss assignments of error with respect to admission of evidence where no argument was presented or authorities cited thereon.

8. Appeal and error ⚿302(2)

Where no assignment of error with respect to admission of evidence was urged upon the hearing of motion for new trial, the District Court of Appeal need not discuss such assignment of error.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by E. E. Atchley and wife against James B. Finley and wife to recover for personal injuries sustained in an automobile collision. Trial was by jury, and, from judgment in favor of plaintiffs, defendants appeal.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco, J. E. McCurdy, of San Mateo, and A. Dal. Thomson, of San Francisco, for appellants.

J. A. Branson, Hugh F. Mullin, Jr., and Francis N. Foley, all of San Mateo, for respondents.

SPENCE, Justice.

Plaintiffs, who are husband and wife, brought this action to recover damages which were alleged to have been caused by the negligent operation of defendants' automobile. Upon a trial by jury, plaintiffs had judgment against defendants for $3,000 and from said judgment, defendants appeal.

The accident occurred on El Camino Real at the intersection thereof with Hobart Street in the city of San Mateo. Plaintiffs had been travelling in a northerly direction on El Camino Real and were making a left turn into Hobart Street when the automobile of defendants, which was travelling in a southerly direction, struck the right rear side of plaintiffs' car with such force that the latter was turned around and came to rest facing east at the southwest corner of the intersection.

[1] It is conceded that the evidence was conflicting. Defendants claim that the evidence preponderated in their favor while plaintiffs claim that the evidence preponderated in their favor. We believe that a reading of the record tends to sustain plaintiffs' claim in this regard but, in any event, there was abundant evidence to sustain the implied findings in plaintiffs' favor.

The accident happened at about 8 o'clock on a clear night. The lights on both cars were lighted. El Camino Real is a wide, heavily travelled highway and the traffic at the Hobart Street intersection is controlled by mechanical signals. When plaintiffs arrived at a point near the Hobart Street intersection, the traffic signal was against them. They stopped their car behind other cars and awaited the change of the signal. The north bound traffic was heavy but there was but little south bound traffic. After the signal changed they pulled into the intersection in low gear, awaited a break in the south bound traffic and then turned left. Plaintiffs had first seen defendants' car when it was some distance away but it struck the rear right side of plaintiffs' car before the latter cleared the intersection.

The conflict in the testimony related mainly to the speed of defendants' car, its course upon the highway and the course of plaintiffs' car. Plaintiffs claimed that defendants' car was negligently driven into their car while defendants' car was proceeding at about 50 miles per hour in the lane next to the westerly curb and while plaintiffs' car was being operated in a careful manner in making the left turn after proceeding beyond the center of the intersection. Defendants claimed that their car was proceeding at 25 miles per hour in the middle lane used by south bound traffic, and that plaintiffs negligently cut the corner and ran into the path of defendants' car in such manner that the accident could not have been avoided by defendants. It is not contended that plaintiffs' car travelled at a rapid rate of speed at any point near the intersection.

In the opening brief, defendants contended that the "most serious error" occurred in the refusal of the trial court to give certain requested instructions relating to the duties of a driver in making a left turn. It appears however from the instructions quoted in plaintiffs' brief that this subject was fully covered by the trial court in the instructions given. Defendants state in their reply brief that, upon further examination of the record, they are satisfied that such was the case and they therefore abandon this contention.

[2] Defendants contend that counsel for plaintiffs was guilty of prejudicial misconduct in his argument to the jury. This contention is based upon an incident which occurred in the closing argument to the jury. Counsel for plaintiffs then said "I thought they contended it was a 25 mile an hour zone but now we find he contends it is a 45 mile an hour zone." Counsel for defendants immediately denied that defendants were making any such contention and counsel for plaintiffs said "I understand he contends it is a 45 mile an hour zone but now it seems it is not true. We will pass on as I do not want to waste any time on the matter." Defendants argue that this statement by plaintiffs' counsel regarding defendants' contention was not made in good faith and that it was made for the purpose of confusing the jury and prejudicing the jury against the defendants.

When the defendant driver was being examined by his own counsel he testified as follows:

"Q. About what speed were you travelling when you got on El Camino Real and started south? A. Well, south of Third Avenue is a 45 mile an hour zone.

"Mr. Foley: I ask that that be stricken as a conclusion of the witness on a matter of law. It happens to be in error too.

"The Court: Yes, I think we had better have that from someone who is familiar with it.

"Mr. Hoge: I didn't ask for that. It is merely voluntary, your Honor."

On cross-examination, the defendant driver testified as follows:

"Q. You were familiar with the El Camino highway running down through San Mateo for the full length down to and including the intersection where the accident happened and on down to Bay Meadows, is that right? A. Yes.

"Q. You knew that that entire section clear down to where this accident happened and down to Bay Meadows, was in the City of San Mateo, didn't you? A. Yes, sir.

"Q. It is true is it not, that it is your habit to drive 45 miles an hour in the City of San Mateo from Third Avenue down to the portion you mentioned?

"Mr. Hoge: We object to the question as unfair cross-examination. Your Honor will remember that he would not let this young man testify to the particular zone along there whether, it was 45 miles an hour.

"The Court: The objection is overruled. A. The zone is 45 miles an hour.

"Mr. Foley: No, I am asking a question. Will you pay attention to it and answer it. I will ask the reporter to read it. (Question read.)

"Mr. Hoge: I object to that question as calling for habit, as incompetent, irrelevant and immaterial.

"The Court: Overruled. A. If it is within the speed limit, I will drive that fast.

"Mr. Foley: I didn't ask you that.

"Q. Will you answer the question I asked you? A. Will you read the question? (Pending question read.) A. Yes.

"Q. And you were driving 45 miles an hour on this day, along there? A. Yes, in the 45 mile zone.

"Q. What you say was the 45 mile an hour zone. A. Well, whatever the sign says.

"Q. Yes, and there is no sign there at all saying 45 miles an hour, is there, Mr. Finley? A. I believe there is.

"Q. Where is it? A. I can't say accurately."

Defendants call attention to the fact that the defendant driver also testified that he was travelling 25 miles per hour, that he admitted that he had observed a 25 miles an hour sign as he approached the intersection and that defendants' instructions were based upon the theory that the zone was a 25 miles an hour zone. It is nevertheless apparent that there was at least some confusion in the record as to claims of the defendant driver with respect to the lawful speed in the zone in question. Under such circumstances, we cannot say that the challenged statement of plaintiffs' counsel was not made in good faith. Defendants claim that "The defendant's conception of the nature of any surrounding zone was utterly immaterial" but we are of the view that it was entirely legitimate for plaintiffs' counsel to comment upon the defendant driver's apparent conception of the nature of that zone as shown by the record in an endeavor to convince the jury that it was probable that he had travelled in that zone at a higher speed than 25 miles per hour. We therefore find no misconduct in the making of the challenged statement.

[3] Defendants further contend that the trial court erred in "authorizing a verdict embodying alleged general damages sustained by the plaintiff husband." The instructions were in general terms setting forth the items allowable as damages to "plaintiffs" in the event that the verdict was in their favor. This contention is based upon the claim that the pleadings were insufficient to warrant such instructions insofar as the plaintiff husband was concerned. The complaint was in two counts. The first count was one seeking a recovery by the plaintiff husband for the damages which he had sustained by reason of his own injuries and also for the consequential damages which he had sustained by reason of the injuries to his wife. The second count was one seeking a recovery by the plaintiff wife for the actual damages which she had sustained by reason of her own injuries. The attack is directed at the claimed insufficiency of the first count to warrant the instructions given. In that count, the nature of the injuries to the plaintiff husband was alleged but there was no allegation of general damages in terms of money by reason of such injuries. It was also alleged in the first count that the plaintiff wife had received injuries and that the plaintiff husband "is now and will be for sometime in the future deprived of the services of his wife, Florine Atchley, to his further damage in a sum unknown to said plaintiff; that plaintiff, E. E. Atchley, asks leave to amend this complaint when the amount of said damage is ascertained and insert the same herein." No amendment to the complaint was thereafter made, and defendants state that "There was no evidence of any general damage at all sustained by plaintiff husband." Assuming that it was error under the circumstances to instruct the jury as above indicated, defendants have wholly failed to show that such error was prejudicial. We cannot assume that the jury awarded general damages to the plaintiff husband if there was no evidence of any such general damages. Furthermore it appears that the plaintiff wife suffered serious injuries and it is not claimed that $3,000, the entire amount awarded, was an excessive amount to be awarded for such injuries.

[4] Defendants further contend that, "The verdict is fatally defective in that it does not segregate the interests of the two plaintiffs." Two verdict forms only were handed to the jury, which forms were read to the jury during the giving of the instructions. The first read, "We, the jury in the above entitled cause, find for the plaintiffs and against the defendants in the sum of $———." The second read, "We, the jury in the above entitled cause, find for the defendants." The jury returned the first form with the figure "3000" inserted in the blank space. No objection was made to the form of the verdict at the time it was submitted to the jury, at the time it was returned by the jury or upon the hearing of the motion for new trial. Furthermore it was not claimed in the trial court and it is not claimed now that the verdict was excessive. Under these circumstances defendants may not now complain of the alleged error in the form of said verdict. Hopping v. City of Redwood City, 14 Cal. App.2d 360, 58 P.2d 379; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017.

[5] Defendants finally contend that the trial court erred in the admission of certain evidence. The first assignment of error relates to the admission of the testimony of the plaintiff husband to the effect that he had been employed at $8 per day and

that he lost four days work as a result of the accident. Assuming that it was error to admit this testimony in the absence of allegations of special damage relating thereto, there does not appear to be any likelihood that the verdict would have been different in the event that the trial court had excluded such testimony.

[6] The second assignment of error in the admission of evidence relates to the admission of the testimony of the plaintiff driver concerning the speed of defendants' car. The witness testified that he first saw defendants' car when it was about 300 feet north of the intersection and that the witness then started to make the turn to the left. He later testified that he again saw defendants' car when it was about 50 feet from him. He then testified:

"Q. Were you able to judge the speed of that car when you saw it at that time? A. Well, yes. Of course I had to judge the speed of the car by the distance he covered from the time I first seen him until I seen him the second time.

"Q. From what you saw of the car moving, until you saw it the second time, could you judge the speed of the car? A. Yes.

"Q. What did you judge the speed of the car to be there when you saw it?

"Mr. Hoge: I object to the question. He said he didn't estimate it. He is simply figuring out what the speed must have been from the distance it covered.

"The Court: He said he estimated the speed. The objection is overruled. A. I estimated the speed at about 50 miles an hour."

In support of this assignment, defendants cite and rely upon Shimoda v. Bundy, 24 Cal.App. 675, 142 P. 109, and Shropshire v. Pickwick Stages, 85 Cal.App. 216, 258 P. 1107. A reading of those authorities shows, however, that they sustain the action of the trial court in admitting the witness' estimate of speed and that defendants' argument goes to the weight rather than to the admissibility of testimony.

[7, 8] On the two remaining assignments of error with respect to the admission of evidence, defendants present no argument and cite no authority. It is not the duty of this court to discuss assignments so presented. Furthermore, no assignment of error with respect to the admission of any evidence was urged upon the hearing of the motion for new trial. Our reading of the record leads us to the conclusion that there was no prejudicial error shown by the record either with respect to the admission of evidence or otherwise.

The judgment is affirmed.

NOURSE, P. J., concurred.

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56 Cal.App.2d 851

DAUGHERTY, Commissioner of Corporations, etc., v. SUPERIOR COURT OF IMPERIAL COUNTY et al.

Civ. 3219.

District Court of Appeal, Fourth District, California.

Jan. 28, 1943.

1. Banks and banking 🔑311

The purpose of provision of Industrial Loan Act that every corporation organized thereunder should be subject to supervision of corporation commissioner was to protect interests of shareholders, creditors, and others interested in or affected by business of corporation. Gen.Laws 1937, Act 3603, § 4.

2. Banks and banking 🔑310

The provision of Industrial Loan Act that corporations organized thereunder should be subject to supervision of corporation commissioner subjected such corporations to commissioner's supervision not only while exercising special powers enumerated therein, but also while exercising general powers under provision stating that such corporations should have general powers conferred upon corporations by the Civil Code. Gen.Laws 1937, Act 3603, § 4; Civ.Code, §§ 341(12), 399–403d.

3. Banks and banking 🔑310

The limitation contained in provision of Industrial Loan Act that corporations organized thereunder should have general powers conferred upon corporations by Civil Code, "except as herein otherwise provided", relates to powers which may be exercised by corporations organized under act, and not to matter of control or supervision over manner in which powers are to be exercised. Gen.Laws 1937, Act 3603, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Except as Herein Otherwise Provided".

4. Banks and banking ⚿317

Under provision of Industrial Loan Act that corporation organized thereunder should have power, subject to supervision of corporation commissioner, to do certain specified things, and that in addition such corporation should have general powers conferred upon corporations by Civil Code, "except as herein otherwise provided", the reference to Civil Code authorized Superior Court's supervision of loan company's voluntary dissolution, and corporation commissioner, although having right of supervision in connection with such dissolution, was not given exclusive control thereof. Gen.Laws 1937, Act 3603, § 4; Civ.Code §§ 341(12), 403.

◆

Prohibition proceeding by Edwin M. Daugherty, as Commissioner of Corporations, etc., against the Superior Court of Imperial County and Roy D. McPherrin, Judge thereof, to restrain and prohibit the respondents from taking any further action in liquidation proceeding pending before the respondent court except to dismiss the proceeding.

Writ denied.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for petitioner.

D. B. Roberts and Lee Nuffer, both of El Centro, and Wright, Thomas & Dorman, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is a proceeding in prohibition, through which the petitioner seeks to restrain and prohibit the respondents from taking any further action in a matter pending before the respondent court, save and except to dismiss the same. The matter in question is a proceeding in aid of voluntary dissolution brought under section 403 of the Civil Code.

The Peoples Finance & Thrift Company of Imperial Valley, which will be referred to as the "corporation," was organized in 1925 as an industrial loan company pursuant to the provisions of the Industrial Loan Act (Stats.1917, chap. 522, p. 658, Deering's Gen.Laws 1937, Act 3603), as amended. For convenience, this will be referred to as the "loan act." The corporation, having elected to voluntarily wind up its affairs and dissolve, pursuant to the provisions of section 399 et seq. of the Civil Code, on May 13, 1942, filed a petition under section 403 of that code praying for court supervision over the winding up of its affairs. On the same day the court made an order authorizing the corporation to proceed with the liquidation of its affairs as provided by law and as the court might from time to time direct. An audit of the corporation's books, commenced by the petitioner on May 13, 1942, disclosed that all certificate holders and all creditors of the corporation had been paid in full except a claim of the Department of Corporations for $236.05, the cost of the audit. While the corporation has disputed this claim it has offered to pay any amount adjudged to be due.

On June 12, 1942, the petitioner filed a petition in the respondent court praying that it terminate the proceeding instituted by the corporation. An answer was filed and a hearing had and, on September 28, 1942, the court entered a judgment denying this petition, holding that it had jurisdiction to supervise the dissolution and winding-up of this corporation and directing a continuance of the dissolution proceeding. On September 29, 1942, the corporation filed with the respondent court its first account and a petition for partial distribution to the stockholders, requesting that the same be settled and that the court direct a partial distribution to the shareholders of $65 per share. The court set the matter for hearing on October 9, 1942, and before that date the present proceeding in prohibition was commenced.

The petitioner, for the purposes of this proceeding, concedes that the corporation is solvent and that it has complied in all respects with the provisions of the loan act, except as to the matter here in controversy. His only contention is that although the loan act does not expressly provide for the liquidation of solvent and law-abiding industrial loan companies its provisions, properly interpreted, leave the voluntary liquidation of such companies under the sole supervision and control of the corporation commissioner and deprive the superior court of any jurisdiction in connection with such a dissolution.

Section 4 of the loan act provides that every corporation organized thereunder shall have power *"Subject to the supervision and control of the Corporation Commissioner"* to do certain things. After enumerating certain powers under the headings "First" to "Fifth," inclusive, the final paragraph of section 4, which is not numbered, reads: "In addition to powers herein enumerated, every corporation, under the provisions of this act, shall have the general powers conferred upon corporations by Chapter III, Title I, Part IV, Division First of the Civil Code, *except as herein otherwise provided."* (All italics ours.) The first section of that chapter of the Civil Code (§ 341) authorizes every corporation to do certain things including "(12) To do any act authorized under this title." The power thus given by subdivision 12 of section 341 of the Civil Code would seem to include the provisions for voluntary dissolution contained in chapter XV of that title of the Civil Code, being set forth in sections 399 to 403d, inclusive. This includes section 403, the applicability of which is here in question.

The respondents argue, in brief, that the provision for supervision and control by the Corporation Commissioner, set forth in the opening paragraph of section 4 of the loan act, applies only to the powers specially enumerated under the headings "First" to "Fifth," inclusive, which follow that provision, and that it was not intended by the Legislature to make the general powers, given by the final paragraph of section 4, subject to such supervision and control. On the other hand, the petitioner contends that the right of supervision and control thus given to him applies not only to the enumerated special powers but also to the general powers given by reference. It is then contended that this final paragraph of section 4 gives such a corporation only such general powers as relate to matters which are not "otherwise provided" for in the loan act itself; that while this grant of general powers includes the right of voluntary dissolution given by section 400 of the Civil Code it does not include the right of invoking the assistance of the superior court over a voluntary dissolution given by section 403 of the Civil Code, since it is "otherwise provided" in the first paragraph of section 4 of the loan act that the Corporation Commissioner shall have supervision and control over all powers given the corporation; that the latter provision includes supervision over the dissolution of such a corporation as well as over its other business affairs; that the power of supervision thus given to the commissioner is entirely inconsistent with any supervision of the superior court under section 403 of the Civil Code; and that it follows that this corporation had no right to seek the aid of the court under section 403 of the Civil Code and the respondent court was without jurisdiction to act under that section.

While the petitioner concedes that this corporation had a right to dissolve and wind up its affairs he argues that for the reasons above stated he has the sole supervision and control over this liquidation. His position, briefly stated, is that under the general powers thus given such companies are entitled to voluntarily dissolve and liquidate under the provisions of section 400 of the Civil Code, which is not inconsistent with anything in the loan act; that under section 400 of the Civil Code the officers and directors of the corporation are the liquidating agents and remain in possession of the assets of the corporation and in charge of its affairs; that while they are so doing the commissioner retains supervision and control over their activities, although he may not interfere so long as the liquidation is conducted in a proper manner; that should the commissioner later find there was a danger of insolvency or that a situation had arisen making section 11 of the loan act applicable, he would then take charge of the affairs of the corporation and become the liquidating agent; that if the commissioner should thus take over the affairs of the corporation section 11 of the loan act would apply and the superior court would then have control over the commissioner's acts as the liquidating agent; that until and unless the commissioner thus takes over the liquidation remains subject to the supervision and control of the commissioner; and that during such time section 403 of the Civil Code cannot apply, as such a supervision by the court would be inconsistent with the commissioner's supervision and control as authorized by the loan act.

[1, 2] We are unable to entirely agree with the contentions of either party. Section 4 of the loan act provides that every such corporation shall have power to do certain enumerated things and shall also have the general powers conferred by the designated portions of the Civil Code, except as otherwise provided. The language and punctuation used in the first clause of section 4 naturally indicate that the phrase "Subject to the supervision and control of the Corporation Commissioner" was intended to apply to all the powers which are given to such a corporation by that section, including both the enumerated special powers and the general powers given by reference. These general powers include many which materially affect the manner in which the business of such a corporation may lawfully be conducted. The purpose of the loan act, undoubtedly, was to protect the interests of shareholders, creditors, and all others interested in or affected by the business of the corporation. In view of that purpose it is hardly reasonable to believe that the Legislature intended to limit the prescribed supervision and control to matters arising from the special powers given, and to exclude therefrom all control over the many general powers which would also affect the conduct of the business which the act was designed to regulate. Such a limitation might well interfere with or entirely defeat the end sought to be accomplished. We, therefore, hold that the grant of general powers under the last paragraph of section 4 is governed by the first clause of that section, and that such corporations are given those general powers "Subject to the supervision and control of the Corporation Commissioner."

[3] On the other hand, it does not follow that the limitation "except as herein otherwise provided," which is attached to this general grant of powers was intended to exclude the power to invoke the assistance of a court in the event of a voluntary dissolution, as provided by section 403 of the Civil Code, merely because a form of supervision and control was given to the commissioner under the first clause of section 4. A number of the general powers which may be exercised by an ordinary corporation, as provided in the sections of the Civil Code to which reference is made, may not be exercised by such a loan company because of the provisions and limitations of the special grant of powers in section 4 of the loan act. Undoubtedly, the phrase "except as herein otherwise provided" was intended to refer to this difference between the powers that might be exercised by such a loan company and the powers that might be exercised by a general corporation, and to provide that the general powers given by the Civil Code should not apply where different or more limited powers are provided in the loan act itself. That exception is a part of a grant of powers, and must have been intended to relate to what powers might be exercised by such a corporation and not to the matter of control or supervision over the manner in which such powers were to be exercised.

[4] The petitioner concedes that section 4 of the loan act adopts, by reference, the provisions of the general law permitting the voluntary liquidation of a corporation but contends that the matters of procedure in carrying out such a voluntary liquidation, provided by section 403 of the Civil Code, have not been adopted by reference because this involves "supervision" by a court, which is inconsistent with the fact that supervision and control has been given to the commissioner. We can see no inconsistency between the powers given, respectively, to the commissioner by the loan act and to the court by section 403 of the Civil Code. The latter section gives to a superior court power to order and adjudge as to any and all matters in connection with the winding up of a corporation, including many specified matters which involve the adjudication of disputes which may arise between any of the interested parties. Assuming that the commissioner has the right to supervise the voluntary liquidation of such a corporation, as well as the conduct of its general business, this very supervision may raise disputes between the commissioner and the corporation which must be determined. The fact that the commissioner has such a right of supervision does not do away with the fact that other disputes and questions may arise between interested parties, in the course of the liquidation, which call for settlement and adjudication. The loan act itself does not contain any other provisions for the handling of such matters, or establish a procedure by which the liquidation may be carried out. The right to supervise any such liquidation does not include the right to prevent such a liquidation. While the right and power to voluntarily liquidate may be subject to the supervision and con-

trol of the commissioner, the right to carry out that liquidation still exists provided it is done in a proper manner. The right of supervision given to the commissioner would undoubtedly justify his calling to the attention of the court any matters affecting the fairness or validity of the manner in which the liquidation was being carried out. But there is and can be no inconsistency between the powers given to the court and the power of supervision which is given to the commissioner by the terms of the loan act. Under the plain provisions of that act, as we view it, the powers of the commissioner insofar as material here, are to be exercised, when exercised at all, as a part of the process of voluntarily winding up the affairs of the corporation and the entire matter, including the acts of the commissioner in this connection, are made subject to the supervision of the superior court by the last paragraph of section 4 of the loan act. We conclude, therefore, that nothing in that section deprives the respondent court of jurisdiction to proceed with the matter in question.

For the reasons given, the petition is denied and the alternative writ is discharged.

MARKS and GRIFFIN, JJ., concurred.

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56 Cal.App.2d 791

In re PETERSON.

PITZER v. PETERSON.

Civ. 3079.

District Court of Appeal, Fourth District, California.

Jan. 25, 1943.

Hearing Denied March 25, 1943.

1. Appeal and error 🔑994(3), 1012(1)

It is province of trial judge to pass on weight to be given evidence and credibility of witnesses.

2. Infants 🔑16

Evidence that father had failed to provide for one of children of whom custody had been awarded to him in divorce decree for more than one year, and that father had failed to communicate with child or persons to whom custody of child was given with express consent of mother and implied consent of father for about thirteen months, supported finding that child was an "abandoned child", within meaning of Welfare and Institutions Code, so as to authorize juvenile court to declare child free from parental custody and control. St. 1937, p. 1032, § 701.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned Child".

3. Infants 🔑16

Even if an investigation by county probation officer were a necessary prerequisite to filing of petition to have a child declared free from parental custody and control, indorsement on petition by county probation officer approving the petition would create presumption that investigation had been held, in absence of evidence to contrary. St.1937, pp. 1032, 1034, §§ 701, 721; Code Civ.Proc. § 1963, subd. 15.

4. Infants 🔑16

The statute providing that, prior to filing of petition to have a child declared an abandoned child and free from parental custody and control, county probation officer shall make such investigation as is deemed necessary, and that no petition shall be filed without approval of probation officer except by order of juvenile court, is not "mandatory", and does not require probation officer to make an investigation in every case before petition is filed. St. 1937, pp. 1032, 1034, §§ 701, 721.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Statute".

5. Infants 🔑16

The section of Welfare and Institutions Code requiring findings in order to authorize a ward of juvenile court to be taken from custody of parent or legal guardian without consent of parent or guardian had no application to a proceeding under statute to have child declared to be an abandoned child and free from parental custody and control. St.1937, pp. 1032, 1038, §§ 701, 739.

6. Infants 🔑16

A proceeding to have a child declared to be an abandoned child and free from parental custody and control was a "special proceeding" created by statute, in which findings were not necessary in absence of provision in statute under which proceeding was had requiring findings. St.1937, p. 1032, § 701.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding".

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of Kathleen Norma Peterson, a minor, wherein Earl V. Pitzer filed a petition to have minor declared free from custody and control of her parents, which petition was opposed by Leo R. Peterson. From a judgment decreeing minor had been abandoned by her parents and declaring her free from parental custody and control, Leo R. Peterson appeals.

Affirmed.

Brittan & Mack and Roland S. Woodruff, all of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment of the Juvenile Department of the Superior Court of Kern County decreeing that Kathleen Norma Peterson, a minor, had been abandoned by her parents, and declaring her free from parental custody and control.

Kathleen was the daughter of Leo R. and Flora Peterson who separated in September, 1937, and were subsequently divorced. There were three children the issue of this marriage. At the time of the separation Marion was four, Charlotte was two and one-half years and Kathleen about two months old. Counsel for Peterson states that the divorce decree awarded the custody of Marion to the mother and the custody of Charlotte and Kathleen to the father.

In November, 1938, Kathleen was given into the custody of Mr. and Mrs. Pitzer with the express consent of her mother and the implied consent of her father.

On March 18, 1942, Earl V. Pitzer filed his petition to have Kathleen declared free from the custody and control of her parents. An order to show cause was issued and served on both parents. Flora Peterson, who had remarried and was then Flora Starks, did not appear. Leo R. Peterson appeared and contested the petition.

The trial court entered the following judgment: "* * * It is hereby by the Court ordered that Kathleen Norma Peterson, a minor of the age of four (4) years, is now and for more than a year prior to the filing of this petition, has been within the above-named county of Kern, State of California, and that said minor has been abandoned by her parents, and that said minor is therefore declared free from the custody and control of her parents as provided in the Welfare and Institutions Code of the State of California."

Section 701 of the Welfare and Institutions Code, St.1937, p. 1032, under which this proceeding was brought contains the following:

"The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of his parents. The words 'person who should be declared free from the custody and control of his parents' include any person under the age of twenty-one years who comes within any of the following descriptions:

"(a) Who has been left by his parents in the care and custody of another without any provision for his support, or without communication from either parent, for the period of one year with the intent to abandon such person. Such failure to provide, or such failure to communicate for the period of one year shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called an abandoned person."

Appellant maintains that the evidence fails to support the conclusion, evidently drawn by the trial court, that Kathleen was an abandoned child as defined in the foregoing section and fails to show that he had any intention to abandon her.

The evidence shows that nothing was said about the support of the child when she was given to Mr. and Mrs. Pitzer. Appellant testified that in the fall of 1939 he wrote Mrs. Pitzer a letter enclosing "a little money," he did not recall how much. He admitted that this was the extent of his contribution of money for the support of his daughter. Mr. and Mrs. Pitzer both testified that they had received no money from him or anyone else for Kathleen's support.

Appellant testified that he had made arrangements with his mother to provide necessaries for his daughter. The mother testified that she had sent dresses, underwear, stockings and hair ribbons for Kathleen; that she sent articles of clothing whenever Mrs. Pitzer asked for them. No money was sent and there is no estimate of the value or amount of clothing furnished. Mrs. Pitzer testified that the only clothing she ever asked for was a pair of sleepers which she received shortly after she took Kathleen; that the clothing was sent at Christmas and before Kathleen's birthday; with one dress at Easter; that they were marked "From Grandmother" and were packed as gifts.

Mrs. Pitzer testified that Leo R. Peterson had been to see his child only three or four times from November, 1938, to the time of trial on April 17, 1942; that he saw her one other time when the parties were attending a wedding; that he visited her in December, 1940, and did not see her thereafter; that he wrote asking for the child in January, 1941, and did not again communicate with Mr. or Mrs. Pitzer until February, 1942. Some of this testimony was denied by Peterson although he admitted that he did not see or communicate with the child after December, 1940, and did not communicate with Mr. or Mrs. Pitzer between his letters of January, 1941, and February, 1942.

[1, 2] It is the province of the trial judge to pass on the weight to be given the evidence and the credibility of the witnesses. Therefore, he was privileged to accept the testimony of Mr. and Mrs. Pitzer as true. Under this evidence he evidently concluded that Peterson had failed to provide for Kathleen for much more than one year and had failed to communicate with her or Mr. and Mrs. Pitzer for about thirteen months. This evidence supports the conclusion that Kathleen was an abandoned child as that term is used and defined in section 701 of the Welfare and Institutions Code.

Section 721 of the Welfare and Institutions Code, St.1937, p. 1034, contains the following: "Prior to the filing of such petition the probation officer of such county shall make such investigation as he deems necessary, and no petition shall be filed without the approval of the probation officer except by order of the juvenile court."

Peterson maintains that an investigation by the probation officer is a necessary prerequisite to the filing of the petition in this case; that as there is no evidence that such an investigation was made the court was without authority to hear the petition.

[3] The petition bears the endorsement: "Approved for filing Mar. 17, 1942. A. W. Brink, Probation Officer Kern County." This is evidence that the petition was submitted to the probation officer prior to filing. If an investigation be considered necessary before the petition was filed and a duty to be performed by the probation officer as appellant maintains, there is the presumption "That official duty has been regularly performed." Subd. 15, § 1963, Code Civ.Proc. This presumption is a form of evidence and stands until overcome by competent evidence. There was no evidence offered to the contrary.

[4] However, we cannot construe the language of the section as mandatory and as placing the duty of making an investigation on the probation officer. He is required to make only "such investigation as he deems necessary," which vests a discretion in him to make or not to make an investigation in certain cases. If he failed to make an investigation in this case, we must presume that he was exercising the discretion given him under the statute. We cannot hold that the section is mandatory and requires the probation officer to make an investigation in every case before the petition is filed.

[5] The trial court made no separate findings in this case. Appellant argues that section 739 of the Welfare and Institutions Code, St.1937, p. 1038, required findings in this case.

That section provides that "no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of the parent or guardian, unless the court finds one of the following facts: * * *."

Kathleen was not a ward of the juvenile court and this was not a proceeding to have her declared a ward of that court. Clearly, the quoted portion of the section cannot be construed to apply to this case. We are cited to no other provision of the law requiring findings in a proceeding of this kind.

[6] There can be no question that this is a special proceeding created by statute. See Moch v. Superior Court, 39 Cal.App. 471, 179 P. 440.

A similar contention was made in Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, at page 327, 74 P.2d 761, at page 773, where it was said:

"Another complete answer to the present contention is that the proceeding here involved is a special proceeding in which findings are not required. Section 22 of the Code of Civil Procedure defines an 'action' as 'an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Section 23 provides that 'every other remedy is a special proceeding.' * * *

"Once it is determined that the proceeding is a special proceeding, it follows that, since the provisions of the Insurance Code in question do not require findings, none are required by sections 632 and 633 of the Code of Civil Procedure. Findings are required and necessary only where a statute so provides. Matter of Danford, 157 Cal. 425, 108 P. 322."

We therefore conclude that findings of fact were not necessary in this proceeding.

It might not be out of place to observe that the following was incorporated in the judgment: "That said minor has been abandoned by her parents." Were it necessary to do so, we might have little difficulty in concluding that this constitutes a sufficient finding here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

Hearing denied; CARTER, J., dissenting.

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56 Cal.App.2d 743

PEOPLE v. PARRISH.

Cr. 1815.

District Court of Appeal, Third District, California.

Jan. 21, 1943.

Homicide ⚷250

Evidence sustained conviction of manslaughter.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Walter W. Parrish was convicted of manslaughter, and he appeals from the conviction and from an order denying a new trial.

Affirmed.

George E. Foote and E. R. Vaughn, both of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appeal from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial.

Defendant was charged with the murder of Frank Lore. The jury found him guilty of manslaughter. A motion for a new trial was denied. Defendant's appeal is based solely upon the ground that the evidence was insufficient to justify the verdict, it being contended that although defendant struck deceased he did so in defense of his wife, and while Lore was engaged in an unlawful act amounting to a felony, to wit, rape.

At the time of the commission of the crime defendant lived with his wife in a small house at the rear of a residence at 1624 37 street, Sacramento, which he rented from Lore. The latter lived in a shack less than 40 feet distant, a grape arbor with a concrete floor intervening.

Defendant, who was a salesman and collector by occupation, 43 years old, testified that on July 29, 1942, he arose as usual at 7 o'clock and proceeded with his daily work; that about 9:30 a.m. he began to feel ill, so decided to take the day off, and believing that some stimulation might be helpful had six ginger ale whiskey highballs and then returned to his home; that he parked his car in the alley adjoining the house and saw Mr. Lore in the grape arbor; that as the latter had frequently asked him to take a drink he told him that he would have one that day, whereupon Lore brought out a bottle of wine and two glasses; that while the two were drinking together Mrs. Parrish came out and joined them; that about 1 o'clock he decided to go to bed; that he arose between 6 and 7 o'clock in the evening, and while awaiting preparation of dinner by Mrs. Parrish, went out into the grape arbor; that Lore then brought out more wine; that he (Parrish) did not drink any more but that Mrs. Parrish came out, and he discovered that she had been drinking; that the two of them returned to their house and there had an altercation about her drinking, and, becoming incensed, he decided to leave; that he took some of his clothes and departed in his car intending to go to Grass Valley, but on the way he stopped at McKinley Park and after thinking the matter over decided to return home; that he drove into the alley and stopped his car some 150 feet away from the house; that as he approached the grape arbor he heard voices and discovered Lore and his wife drinking together; that he heard Mrs. Parrish state that she had better go to bed, but when she attempted to arise she was unable to do so and Lore assisted her into the house; that he (Parrish) went around the house and looked into the bedroom window; that he saw Mrs. Parrish's head hit the pillow and not hearing anything from her he decided that she had gone to sleep; that he went around to the front of the house and stepped to the bedroom door where he saw Lore and Mrs. Parrish in a compromising position; that thereupon he grabbed Lore by the back of the neck, pulled him up and hit him in the eye, at the same time giving him a shove so that he fell back and crashed into the bedroom wall, then slumped down into a sitting position; that he tried to awaken Mrs. Parrish but was unable to do so, so slapped her several times; that she finally arose, and, seeing Lore, asked what had happened, and when Parrish stated that he had hit him, exclaimed that she was afraid that Lore would have Parrish arrested for beating him; that thereupon Parrish asked Lore if he would sign a papar stating what he had done, and when Lore agreed he (Parrish) wrote out in unprintable language, an admission of misconduct which Lore signed; that he then told Mrs. Parrish to sign it as a witness, which she attempted to do, and he then told Lore to get out of the house and never to come back again; that Lore left and he then attempted to quiet Mrs. Parrish but she kept demanding another drink; and called to Lore to come and help her; that she kept insisting that she could see a light in Lore's house and that he was probably waiting for the police, so Parrish went over to Lore's house and found him sitting in front of the door apparently thinking over what had happened; that he asked Lore if he was all right, and Lore invited him in, whereupon he sat down beside Lore and told him that he was sorry that he had hit him; that he noticed a swelling in the corner of Lore's left eye where he had struck him; that shortly thereafter he returned home about 11 o'clock, and that he did not see Lore again. On cross-examination he said that the light was on in Lore's house when he went there and when he left.

The foregoing testimony is not in accord with that of witnesses for the prosecution. Mrs. Josephine Zetz stated that she lived next door to the residence at 1624 37 Street, but that she and her husband had made a room out of the garage in the rear and were sleeping there on the night of July 29; that from the rear window of this garage she was able to see the bedroom of the Parrish house, and that about 12:30 o'clock, after returning from a show and going to bed, she heard Mrs. Parrish scream and say, "Mr. Lore, come and help me—can somebody held me—look at my throat"; that on looking out of the window she saw a light in the Parrish bedroom; that the following day, not having seen Lore around the premises, she and her sister-in-law, Anna Zetz, went over to Lore's shack and found him dead in a sort of store room with his head shoved under a low bench or shelf. She thereupon notified the police, who arrived about 4:30 p.m.

The autopsy revealed that Lore's death had resulted from a subdural hemmorhage caused by a blow. His eyes were blackened, there were abrasions on his face, his lips were swollen, and two teeth were knocked out. He was a little frail man, about 73 years of age.

Anna Zetz, who resided at 1624 37 Street, testifying for the People, stated that on the night of July 29 she looked out of her back door, saw a light in Lore's shack and in the yard, and saw Lore come out of his door; that she heard Mrs. Parrish call to Lore to come and help her, and that Lore came to where she was standing in the yard crying; that she heard Lore say "You forget it this time"; that Parrish was present and she heard arguments between him and Mrs. Parrish; that about 12:30 she heard Mrs. Parrish crying and saying, "Oh, my face," and that she heard Parrish say to someone, "You mind your own business or I will make it a point to kill you"; that about 4 a.m. the light was still on in the yard and she heard someone walking around there. She also stated that she went to Lore's shack with Mrs. Josephine Zetz when they found Lore dead, and that the lights were not on there. The police also testified that the lights were not on when they arrived.

The note or purported confession written by Parrish and signed by Lore was introduced in evidence. It recited Lore's misconduct as occurring at 11:30 p.m. July 29, and contained an agreement not to press any charge against Parrish. It was exacted of Lore when in fear of his life, for Parrish testified that when he handed the pen to Lore the latter asked, "Are you going to kill me, Mr. Parrish?" Whereupon Parrish states that he laughed and said "Why, no Mr. Lore, certainly not—I hit you in the eye that is all, I am not going to hurt you."

The foregoing is substantially all of the evidence in the case. The jury saw and heard the witnesses, and were at liberty to disbelieve defendant's story that he struck Lore in defense of his wife. No questions of law are raised on this appeal, and we cannot say that there was insufficient evidence to justify the verdict of the jury.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concurred.

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56 Cal.App.2d 924

MILSTEIN v. SARTAIN et al.

Civ. 6750.

District Court of Appeal, Third District, California.

Jan. 30, 1943.

1. Pleading 🔑302

A verification of answer by defendants' attorney, who stated therein that he was unable to obtain defendants' verification because they were not in town wherein he maintained office and that contents of answer were true of his own knowledge, was sufficient, though it failed to aver defendants' absence from county wherein attorney maintained office. Code Civ.Proc. § 446.

2. Appeal and error 🔑102, 103, 870(5)

An appeal does not ordinarily lie from order sustaining or overruling a demurrer or striking a pleading from record, but such rulings are reviewable only on appeal from judgment.

3. Bills and notes 🔑470

In action for balance due on notes, complaint was bad on demurrer, in absence of allegation that notes were not fully paid or were due and unpaid or that plaintiff's alleged demands for payment of sum due were wrongfully denied or refused.

4. Contracts 🔑337(1)

A complaint based on breach of contract or obligation to pay stated sum of money must allege non-payment of money in order to state cause of action.

5. Appeal and error 🔑1040(10)

In action for balance due on notes, where answer, denying that any sum was due plaintiff was stricken from record and default entered against defendants, error in overruling defendants' demurrer to complaint for failure to allege that any sum was due or unpaid was prejudicial to defendants, though evidence was subsequently adduced that alleged debt was actually due and unpaid.

6. Judgments 🔑384

The statutory provisions for setting aside judgments and orders on notice contemplate actual presentation of motions for such relief to trial judge in open court, and mere filing and service of notice of intention to make such motions is insufficient to give court jurisdiction to consider and determine them. Code Civ. Proc. § 437c.

7. Judgment 🔑384

Plaintiff's attorney's mere writing to trial judge of letter stating that his notice of intention to file motion to strike answer from files and motion for judgment "be considered as submitted to the court" was not compliance with statutory requirement that motion be actually made in open court. Code Civ.Proc. § 437c.

8. Partnership 🔑49

An alleged partner's admissions out of other partners' presence that partnership existed, that she signed certain notes on partnership's behalf, and that balance of obligation thereof is unpaid, are not competent to bind other partners until after prima facie showing of partnership's existence.

9. Partnership ⚷44, 46

The burden is on one asserting existence of partnership to prove it by competent evidence.

10. Partnership ⚷49

A partner may not be charged as such by his declarations until prima facie showing of partnership's existence is made. Code Civ.Proc. § 1870, subd. 5.

11. Pleading ⚷354(2)

In action against alleged partners for balance due on notes executed by one of defendants in partnership name, court was not justified in striking out answer denying that defendants were partners, that one who executed notes was authorized to or did sign them as agent of partnership or other defendant, and that any amount was due thereon, in absence of competent evidence of such facts.

12. Judgment ⚷111

A defendant's default has effect of confessing all material facts alleged in complaint, and he may not thereafter complain of any relief to which complaint shows plaintiff to be entitled.

13. Pleading ⚷258(1)

The right to file amended answer, as of course, is limited to time within which plaintiff is permitted to demur to original answer, whether such demurrer is actually filed or not. Code Civ.Proc. § 472.

◆

Appeal from Superior Court, Colusa County; Ben. R. Ragain, Judge.

Action by M. M. Milstein against Anna Sartain and others, as copartners, doing business under the firm name of Terrill & Sartain, for the balance due on certain notes. From an order striking out defendants' original answer and from a default judgment against them, they appeal.

Reversed.

E. Vayne Miller, of Sacramento, for appellants.

Joe Wapner, of Los Angeles, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment by default, which was rendered against them in a suit in assumpsit, after their answer had been stricken from the files on the theory that it was sham and not properly verified as required by section 446 of the Code of Civil Procedure. The respondent has filed no brief on appeal.

The proceedings, resulting in striking defendants' answer from the files and rendering judgment by default against them, are presented on this appeal by means of a settled bill of exceptions.

The complaint is couched in five counts and alleges that the individual defendants are engaged in business as co-partners under the firm name of Terrill & Sartain; that the Colusa County Bank was insolvent and in the process of liquidation, in charge of the State Superintendent of Banks; that on August 16, 1937, the defendants executed and delivered to the said bank five separate written acknowledgments of their indebtedness to that bank of unpaid portions of five different promissory notes previously executed by "Terrill & Sartain, by Anna B. Sartain" at various dates and for different amounts ranging from $410 to $8,000. Each document specifies a sum which is acknowledged to be due and unpaid to the bank on account of the particular note therein described on August 16, 1937, which is the date of said instruments. Each agreement sets out verbatim the note upon which it is founded. The specified aggregate unpaid sum of said notes at the time of execution of said acknowledgments was $4,806.61. The aggregate sum for which the notes were originally executed is $15,910. Three of the notes were dated in 1930. Two of them were executed in 1932. Each note bears 8 per cent interest and provides for 10 per cent of the amount of indebtedness as attorney's fees in the event of the necessity of bringing suit. The notes matured one day after the date of their execution. It is alleged that, for a valuable consideration, the State Superintendent of Banks assigned and transferred to the plaintiff "the claim herein sued upon."

The complaint fails to allege that said notes represent indebtedness of the partnership, Terrill & Sartain; it fails to allege by what authority, if any, Anna B. Sartain signed either the notes or the written acknowledgments of indebtedness. The complaint further fails to allege that said indebtedness was due or unpaid at the time of the commencement of this action on May 6, 1940.

[1] The defendants filed a general and special demurrer to the complaint upon the grounds, among others, that the complaint fails to state facts sufficient to constitute a

cause of action; that it cannot be ascertained therefrom by what authority, if any, Anna B. Sartain signed the promissory notes or the written acknowledgments of indebtedness, and that it cannot be determined from said complaint what amount of indebtedness, if any, is due or unpaid to the holder of said promissory notes. The demurrer was overruled. The defendants filed their answer denying the material allegations of the complaint. It specifically denied that the defendants were engaged in business as a copartnership; that Anna B. Sartain was authorized to or did sign said promissory notes or agreements acknowledging their indebtedness as the agent of either a co-partnership or of the other named defendants, and denied that any amount was due or unpaid upon any of said notes or written acknowledgments of indebtedness. This answer was verified by the defendants' attorney, under the provisions of section 446 of the Code of Civil Procedure, by stating that he did so because his clients were "not at that time present within the Town of Colusa," where he maintained his office, and that he was therefore unable to obtain their verification. The attorney then stated in his verification that: "He has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information and belief and as to such matters he believes the same to be true."

The verification of the original answer sufficiently complies with section 446 of the Code of Civil Procedure. The attorney avers that he knows the contents of the answer and that "the same is true *of his own knowledge.*" It is true that the verification is defective with respect to one ground since it is averred that the defendants were merely absent from the *town* of Colusa, and not from the county, as the statute requires. The section, however, authorizes the attorney to verify a pleading under any one of three contingencies, namely: (1) When the client is absent from the county where he maintains his office, (2) when, for some cause, the client is unable to verify the pleading, and (3) when "the facts are within the knowledge of his attorney." Brown v. Sandell, 79 Cal.App. 313, 316, 249 P. 209. In the present case the verification complies with the last-mentioned contingency, and the court was not authorized to strike the answer from the files on that account.

The plaintiff served upon the defendants a notice of intention to move the court on October 7, 1940, under section 437c of the Code of Civil Procedure, to strike the original answer from the files as sham and because it lacked a valid verification. That notice also informed the defendants that plaintiff would then move the court for judgment as prayed for. The notice was accompanied by affidavits of the plaintiff and his attorney. A counteraffidavit was filed by the defendants.

On the 7th day of October, prior to the time set for the hearing of said motions, out of precaution and for fear the verification to their answer might be defective, the defendants filed and served an amended answer under the provisions of section 472 of the Code of Civil Procedure duly verified by three of the defendants in person. The amended answer is an exact duplicate of the original answer, except for the verification thereof. The amended answer has not been stricken from the files but still remains of record.

Thereafter the defendants' attorney appeared in court at the time and place set for the hearing of said motions. Neither the plaintiff nor his attorney appeared at that time or at all, to present said motions to the court. They were never orally presented to the court. It is true the plaintiff's attorney previously wrote a letter to the judge saying that plaintiff would not be present, but that he would submit the motions on the records on file. Over objection by the defendants the court proceeded to consider the motions. The plaintiff's affidavits merely aver that he and his attorney interviewed Anna B. Sartain on May 24, 1940, and that she then admitted the existence of the copartnership consisting of the individual defendants, except that Charles M. Terrill had subsequently died. It was also averred that she also admitted the partners then owed the amounts of money specified in the written acknowledgments described in the complaint. No further evidence was adduced at that hearing. The court thereupon took the purported motions under submission.

Without further hearing or evidence, on October 28, 1940, the court made its order granting plaintiff's motion striking defendants' original answer from the files and directing the entry of defendants' default for failure to answer the complaint. Thereupon judgment was rendered against the defendants by default for the aggregate sum of $4,806.61, together with the further sum of $728.99 as attorney's fees.

From that judgment and from the order striking the original answer from the files and entering the default of the defendants they have appealed.

The appellants contend that the court erred in overruling their demurrer to the complaint; that the court erred in considering and granting plaintiff's motions to strike the answer from the files, to enter the default of the defendants, and to render judgment against them by default, without the actual presentation of said motions in open court and without competent evidence adduced.

The notice of appeal is from the order made by the court on October 14, 1940, striking the answer from the files, and also from the judgment which was rendered and entered by default against the defendants on October 28, 1940.

[2] It has been uniformly held an appeal does not ordinarily lie from an order sustaining or overruling a demurrer, or from an order striking a pleading from the record. Such rulings are reviewable only on appeal from the judgment. Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 P. 868; Bryant v. Kelly, 203 Cal. 721, 265 P. 817; Harmon v. De Turk, 176 Cal. 758, 169 P. 680; 2 Cal.Jur. 156, § 26. The purported appeal from the order striking the answer from the files is therefore dismissed. That order and the order overruling defendants' demurrer to the complaint will however be reviewed on the appeal from the judgment.

[3] The court erred in overruling defendants' demurrer to the complaint. The complaint contains no allegation that the promissory notes and the written acknowledgments of indebtedness which were made on August 16, 1937, were not thereafter fully paid, or that they were due and unpaid. There is no statement in the pleading that any sum whatever was due or unpaid at the time of the filing of the complaint. The only allegation which the complaint contains in that regard is found in paragraph IX, which reads: "That prior to the institution of suit plaintiff demanded of defendants the payment of the sum in the within cause of action sued upon, but defendants failed, neglected and refused to pay same, and still fail, neglect and refuse so to do."

It is apparent that the failure to pay plaintiff's demands may have been properly refused because the obligations were previously fully paid and that they were not then due or owing. It will be observed the complaint does not even allege that the demands were wrongfully denied or refused. The demurrer was both general and special. It asserts that the complaint fails to state facts sufficient to constitute a cause of action, and that "it can not be ascertained what amount, *if any*, is due and owing from defendants."

[4] It has been frequently held that a complaint based upon a breach of contract or an obligation to pay a stated sum of money must necessarily allege nonpayment of the money in order to state a cause of action. Poetker v. Lowry, 25 Cal.App. 616, 144 P. 981; Dunham v. McDonald, 34 Cal.App. 744, 749, 168 P. 1063, 1065; 18 Cal.Jur. 374, § 635. In the Poetker case, supra, the complaint merely alleged, in the identical language employed in the present case, "that defendant has refused, and still refuses, to pay the same." The judgment in that case was reversed for error in overruling the demurrer. The court said: "That a party suing upon a contract to pay money must allege a breach thereof—that is, nonpayment of the money which he seeks to recover—otherwise his complaint is subject to general demurrer for failure to state a cause of action, is fundamental, and must be conceded."

In the Dunham case, supra, it is said in that regard: "It seems too clear for argument that it was necessary also to show by appropriate allegation in the cross-complaint that the money claimed by the defendant of the plaintiff had not been paid—in other words, that there was an existing debt."

In 18 California Jurisprudence, at page 374, it is said with respect to a complaint to foreclose a mortgage given to secure a promissory note: "If the obligation secured is a note or debt, the plaintiff must allege nonpayment."

[5] In the present case it may not be said the erroneous ruling on defendants' demurrer was not prejudicial on account of evidence subsequently adduced at the trial to the effect that the alleged debt was actually due and unpaid, because the answer of defendants, which specifically denied there was any sum due or owing to plain-

tiff on said obligations, was stricken from the record. Default was then entered against them. The defendants were never afforded an opportunity to adduce evidence on that issue. They were not given their day in court. The ruling on the demurrer was therefore prejudicial.

[6] We are of the opinion the court also erred in hearing and determining plaintiff's purported motion to strike the answer from the files, for the reason that no motion for such relief was ever actually made to the court. It is apparent that section 437c of the Code of Civil Procedure, and other similar provisions to set aside judgments and orders upon notice, contemplates the actual presenting of the motions to the judge in open court and that the court is without jurisdiction to consider or determine them in the absence of an actual presentation of the motion. The mere filing and serving of a notice of intention to make such motions at a time and place designated is not sufficient to give the court jurisdiction to consider and determine them. In re Estate of Hunter, 99 Cal.App. 191, 196, 278 P. 485; In re Morehouse, 176 Cal. 634, 169 P. 365; Jones v. Superior Court, 78 Cal.App. 163, 248 P. 292; Spencer v. Branham, 109 Cal. 336, 340, 41 P. 1095; Herrlich v. McDonald, 80 Cal. 472, 22 P. 299; People v. Ah Sam, 41 Cal. 645, 650; Richert v. Benson Lumber Co., 139 Cal.App. 671, 676, 34 P.2d 840; Colthurst v. Harris, 97 Cal.App. 430, 433, 275 P. 868. In Re Estate of Hunter, supra, it is said: "In construing the meaning of said section [473, C.C.P.] it has been held that the filing and service of the pleading to set aside the judgment, order, or other proceeding is not the making of the application therefor; * * *. In applying the foregoing rule in the case of Jones v. Superior Court, 78 Cal.App. 163, 248 P. 292, the court said: 'To make an application is to make a motion. (Code Civ.Proc., § 1003.) To appear in court and announce one's readiness to make a motion is not the making of the motion any more than would be the service of notice that one will make a motion. That the latter procedure is insufficient is well established. [Citing authorities.] The only provision of law under which respondent Bryant might proceed is explicit in its requirement that one who would avail himself of its aid shall not merely direct the court's attention to his presence in court in the proceeding in which he is interested, *but shall move for the particular relief desired, that is, orally request that the court take action as indicated in his notice.*" (Italics added.) [99 Cal.App. 191, 278 P. 487.]

[7] In the present case neither the plaintiff nor his attorney was present in court. The contemplated motions were never actually made to the court orally or in writing. The mere writing of a private letter to the judge, without the knowledge or consent of the opposing party or his attorney, stating, with relation to a notice of intention, as distinguished from the proceeding on hearing thereof that, "the same be considered as submitted to the court," is not a compliance with the requirement to actually make the motion in open court. The court was without jurisdiction to consider or determine said motions under the circumstances of this case.

[8] There is no competent evidence in this case against any of the defendants, except Anna B. Sartain, that they were engaged in business as copartners, that Anna B. Sartain acted as their agent in executing the promissory notes or agreements of indebtedness, or that the obligations were unpaid, even for the purpose of striking the original answer from the files. The only evidence which was adduced was the affidavits of plaintiff and his attorney to the effect that they interviewed Anna B. Sartain on May 24, 1940, and that she then admitted the existence of the copartnership, that she signed the notes "on behalf of the copartnership," and that the balance of the obligation was unpaid. These admissions of one alleged partner, made out of the presence of the other alleged partners, are not competent to bind the others until after a prima facie showing of the partnership has been first established. Swanson v. Siem, 124 Cal. App. 519, 523, 12 P.2d 1053; Vanderhurst, Sanborn & Co. v. De Witt, 95 Cal. 57, 62, 30 P. 94, 20 L.R.A. 595; Salinas City Bank v. De Witt, 97 Cal. 78, 31 P. 744; 31 C. J.S., Evidence, p. 1144, § 365. In the Salinas City Bank case, supra, the judgment was reversed because several witnesses were permitted to testify to declarations of George W. De Witt, one of the alleged partners, out of the presence of William De Witt, the other alleged partner, that a copartnership existed between them, and that he was authorized to act as the agent of William in overdrawing a certain bank account. The court said:

"The admissibility of such evidence was before this court in an action against the same defendants * * * and it was there held to be a settled rule of law that such evidence is incompetent to establish the fact of partnership."

In the Vanderhurst case, to which reference is made in the preceding quotation, the court said: "But upon the trial the court * * * admitted evidence of the declarations of the defendant George W. De Witt, not made in the presence of the appellant, to the effect that he and the appellant were such partners. There was error in the admission of this evidence. It is well settled that upon such an issue the declaration of an alleged partner, made in the absence of the other, cannot, as against the absent one, be used to establish the fact of partnership. [Citing authorities.]" [95 Cal. 57, 30 P. 95, 20 L.R.A. 595.]

[9, 10] The burden is upon the one asserting the existence of a copartnership to prove it by competent evidence. Before a partner may be charged, as such, by his declarations, a prima facie showing of the existence of the partnership must be first established. (§ 1870, subd. 5, Code Civ. Proc.; 2 Jones Commentaries on Evidence, 1726, § 935; Swanson v. Siem, supra; 31 C.J.S., Evidence, 1144, § 365, subsecs. a and b.)

[11] For the reason previously stated, there was a total lack of competent evidence to justify the court in striking from the files the original answer, even if it be assumed the motion was properly submitted for consideration and determination. The answer was improperly stricken from the record.

[12] It is true that the default of a defendant has the effect of confessing all material facts alleged in the complaint, and that he may not thereafter complain of any relief to which the complaint shows the plaintiff to be entitled. Christerson v. French, 180 Cal. 523, 182 P. 27; Title Ins. & Trust Co. v. King Land & Imp. Co., 162 Cal. 44, 120 P. 1066; 14 Cal.Jur. 887, § 19.

[13] In the present case the defendants filed an amended answer pursuant to section 472 of the Code of Civil Procedure, without having first procured leave from the court to do so. The amended answer was filed before the time set for hearing of plaintiff's motion to strike out the original answer. The original answer was filed August 29, 1940. The amended answer was not filed until October 7, 1940. It has been held the right to file an amended answer, as of course, is limited to the time within which the plaintiff is permitted to demur to the original answer, whether such demurrer is actually filed or not. Bank of America v. Goldstein, 25 Cal.App.2d 37, 45, 76 P.2d 545; 21 Cal.Jur. 176, § 121. No objection to the delayed filing of the amended answer in this case was made. That answer remains in the files of this case unchallenged.

For the reasons that the demurrer to the complaint was erroneously overruled, the motion to strike out the original answer was improperly granted and the default of the defendants was not authorized under the circumstances of this case, it becomes necessary to reverse the judgment.

The judgment is reversed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.

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57 Cal.App.2d 17

MASON v. SAN DIEGO ELECTRIC RY. CO. et al.

Civ. 2875.

District Court of Appeal, Fourth District, California.

Feb. 2, 1943.

Rehearing Denied March 1, 1943.

Hearing Denied April 1, 1943.

1. Automobiles 🔑**245(14)**

In action for damages resulting from collision of automobile and bus at intersection, evidence presented jury question as to whether bus driver complied with statute requiring driver of vehicle stopped at entrance to through highway to yield right of way to vehicles which had entered intersection or were approaching so closely on through highway as to constitute an immediate hazard. Vehicle Code, § 552, St.1935, p. 187.

2. Automobiles 🔑**244(11)**

In action to recover for damages resulting from collision between automobile and bus at intersection, evidence sustained finding of negligence on part of bus driver in entering through highway and making a left turn in front of approaching traffic. Vehicle Code, § 552, St.1935, p. 187.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Cora Mason against the San Diego Electric Railway Company and another to recover damages for injuries in an automobile collision. Judgment for plaintiff and defendants appeal.

Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, V. F. Bennett, of San Diego, and Boice Gross, of San Francisco, for appellants.

Clarence Harden and Dwight E. Stanford, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages, the plaintiff having been injured in a collision between an automobile in which she was riding and a 30-foot bus owned by the corporate defendant and driven by the individual defendant. The collision occurred on a clear dry day in May, 1939, at the intersection of 48th Street and El Cajon Boulevard in San Diego. 48th Street runs north and south, and El Cajon Boulevard east and west. El Cajon is 66 feet wide from curb to curb and is marked for two lanes of travel on each side of the center. On the south half of that street it is 16 feet from the property line to the south curb, 22 feet from that curb to the first white line and 12 feet from that line to the double center line. 48th Street is 36 feet wide with boulevard-stop signs at its intersection with El-Cajon. At the time in question the defendants' bus had proceeded north on 48th Street and was making a left turn in order to proceed west on El Cajon when it collided with the car in which the plaintiff was riding, which was proceeding east on El Cajon in the northerly of the two south lanes. That car was being driven by a Mrs. Keeney.

This action was tried by the court without a jury and the defendants have appealed from a judgment in favor of the plaintiff. Their sole contention is that the evidence is not sufficient to support a finding of negligence on the part of the driver of the bus. It is argued that the bus driver had the right of way since he entered the intersection first and since he stopped and yielded the right of way to other vehicles approaching so closely as to constitute an immediate hazard, as required by section 552 of the Vehicle Code, St.1935, p. 187, and that the only inference which may reasonably be drawn is that the driver of the bus was not negligent.

The driver of the bus testified that as he approached this intersection from the south he stopped the bus with its left side just east of the center line of 48th Street and with its front end just south of the south property line of El Cajon; that he raised his signal arm for a left turn, and starting up slowly proceeded 21 or 22 feet and again stopped with the front end of the bus 5 or 6 feet out from the south curb line of El Cajon; that he did this so that the bus would be visible to other traffic and also to get a better vision of approaching traffic; that "there was a stream of cars proceeding east on El Cajon"; that he waited a few seconds and a few cars went by; that "I saw a slight opening, that is, a distance between cars there, so I started the bus up slowly to indicate that I wanted to start up"; that as he did this two cars which were traveling east on the southerly of the two south lanes of El Cajon came to a stop; that when he was about 2 feet north of the first line south of the double center line he saw the Keeney car approaching; that this car was about 40 feet from the prolongation of the west property line of 48th Street and was coming toward him at from 20 to 27 miles an hour with no indication that it was going to stop; and that he applied his brakes and brought the bus to a stop with the left front corner approximately at the center line of El Cajon and just east of the west property line of 48th Street. He further testified that during all of this time there was nothing to obstruct the vision between the bus and the Keeney car; that "I started the bus up slowly to indicate that I was going to go through, and this first car saw that I wanted to come through and he stopped for me and gave me the right of way, and the second car also stopped behind him, and by doing that of course I figured I had the right of way and I started the bus up to proceed on through"; that from his last stop to the point of collision he traveled around 23 or 24 feet; that when he first noticed the Keeney car it was coming around the two cars which had stopped for him; and that when he stopped the bus the Keeney car was 15 to 20 feet away and running 20 to 25 miles an hour.

Another witness testified that the Keeney car was traveling in the lane immediately south of the center line of El Cajon and that he did not see that car "vere to its left or its right or run around the other cars that were east bound and in the lane of traffic to the south of it."

The respondent testified that she first saw the bus when it was stopped near the south property line of El Cajon, that at that time, as near as she could tell, the automobile in which she was riding was as far from the bus as "that corner of the room to the post you are touching now." This distance was identified as 32 feet and 11 inches. She further testified that when she saw the bus begin to move "I thought we won't have to wait for the bus to go by us, because we will be through"; that she looked away and then looked back, and that when she looked back "I knew we were very close—we were nearly in front of the drug store, if not quite" (the drug store was on the corner of the intersection); and that "he came out straight from the sidewalk, of course, across the sidewalk and then turned when he got just across the first line of traffic—and he turned short like that." The driver of the bus testified: "When I started up after I had stopped in the street I had to start a rather abrupt turn there to make the turn possible."

[1, 2] While the driver of the bus stopped at this intersection it cannot be said, as a matter of law, that there were no vehicles "approaching so closely on the through highway as to constitute an immediate hazard," and a question of fact was presented as to whether he complied with the requirements of section 552 of the Vehicle Code. If, as this driver says, there was no obstruction to the view between the two vehicles no good reason appears why he did not see the other car until after he had entered the northerly of the two south traffic lanes. Although he started forward when the front of his bus was only 16 feet from the lane in which the Keeney car was traveling, according to his own testimony, he did not see the Keeney car until the front end of the bus had reached that lane. When he reached that point the Keeney car was actually so close that he was not able to get across that lane in front of it. The margin of time and space was very narrow, at best, and it cannot be said as a matter of law that the situation which actually existed could not, with reasonable care, have been observed before the bus entered the lane in which the other car was traveling. While the bus driver testified that when he arrived at that lane the other car was some 40 feet west of the west property line of 48th Street, a portion of the respondent's testimony indicates that the Keeney car was closer than that when the bus driver started up from his position of safety. It appears that this stream of cars proceeding east on El Cajon had just been released by the changing of the "stop" and "go" signals a block west of 48th Street, and the bus driver knew that the changing of those signals would clear traffic from that direction within a few seconds. Notwithstanding this fact he chose to move into this traffic when he saw a "slight opening" and it would appear from his own testimony that when the cars in the first line of traffic stopped he "figured I had the right of way" and entered the second lane of traffic when it was impossible, at the speed he was going, to get the bus across that lane in time to avoid a collision with the car traveling thereon, in which the respondent was riding. It may even be that the fact that the driver of the bus stopped a second time a few feet out from the line of the curb deceived the driver of the car in which the respondent was riding, and led her to believe that the bus driver intended to wait until the oncoming traffic had passed. This is not a case where it appears beyond question that the bus driver had the right of way, or where only one inference may be drawn from the evidence. The entire question was not only one for the trial court, but the evidence sufficiently sustains the finding made.

The judgment is affirmed.

MARKS, and GRIFFIN, JJ., concurred.

56 Cal.App.2d 846

TARVIN et al. v. DAVEY et al.

Civ. 2960.

District Court of Appeal, Fourth District, California.

Jan. 28, 1943.

1. Appeal and error ⚿770(1)

Where appellees filed no brief, appellate court was entitled to accept facts as stated in appellants' brief and was not required to seek out points of law in support of judgment. Rules of Supreme Court and District Courts of Appeal, rule 5, § 1.

2. Appeal and error ⚿770(1)

The failure to file brief on appeal in support of judgment imposes unfair and improper burden on appellate court, and such practice should be condemned. Rules of Supreme Court and District Courts of Appeal, rule 5, § 1.

3. Appeal and error ⚿544(3), 616(1)

Where appeal was on judgment roll alone, and clerk's transcript contained copies of documents not properly in record, and there was no certificate by trial judge, only portions of transcript which could be considered were the pleadings, findings, the judgment and notice of appeal.

4. Appeal and error ⚿768

Where principal grounds relied upon for reversal depended upon consideration of evidence not in record, appellate court in its discretion would consider case on its merits as presented by judgment roll and not accept statement of facts in opening brief as true. Rules of Supreme Court and District Courts of Appeal, rule 5, § 1.

5. Appeal and error ⚿907(3)

When appeal is taken on judgment roll alone, appellate court must presume that evidence supported the findings.

6. Quieting title ⚿34(5)

A complaint alleging that vendors agreed to sell realty under conditional sales contract of which time was the essence, that purchasers in default were dispossessed by justice's court, and that vendors were put in possession, stated cause of action to quiet title.

7. Quieting title ⚿47(2)

Findings that time was the essence of conditional sales contract for sale of realty, that purchasers were in default and were dispossessed by justice's court and vendors put in possession, supported judgment quieting vendors' title to realty involved.

8. Action ⚿62
Vendor and purchaser ⚿95(2)

Where purchasers' note was not given and accepted in payment of delinquent installments under conditional sales contract of which time was the essence, and neither the note nor installments were paid, only effect of note was to extend time of payment of installments, and other defaults having occurred after due date of note, action to quiet title brought after such due date was not premature.

9. Appeal and error ⚿713(1)

The appellate court would not consider correctness of judgment of justice's court dispossessing purchasers of property purchased under conditional sales contract where consideration of such question would require consideration of documents, not properly before appellate court.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by William C. Tarvin and others against K. R. Davey and others to quiet title to real property, wherein defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal.

Affirmed.

See, also, 51 Cal.App.2d 296, 124 P.2d 624.

Richard J. Welch, Jr., of Riverside, for appellants.

Alphonse E. Ganahl, of Corona, for respondents.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiffs' title to real property in the city of Corona, in Riverside County, and refusing defendants relief on their cross-complaint.

Counsel appearing for defendants in this court is not the counsel who tried the case, prepared the record on appeal and filed appellants' opening brief.

[1, 2] This case was on the November 17, 1942, calendar of this court. Counsel for plaintiffs had filed no brief but he appeared and made a very short argument.

In response to a suggestion by the court that a brief should be filed in behalf of his clients, he asked for and was granted twenty days in which to file a typewritten brief. Although that time expired on December 7, 1942, nothing further has been heard from him and no brief has been filed. What was said in Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118, 119, is appropriate here: "Under such circumstances, we are entitled to accept the facts as stated in appellant's brief (Rule V, § 1, of the Rules of the Supreme Court and District Courts of Appeal; Pendergrass v. Axx, 111 Cal.App. 478, 295 P. 896; Frank Graves S., etc., Co. v. Orange County Bond & Mtg. Corp., 111 Cal.App. 475, 295 P. 859), and are under no duty to seek out points of law in support of the judgment. * * * This shirking of responsibility on the part of respondent and his counsel should be strongly condemned, imposing as it does an unfair and improper burden on the court. Mosher v. Johnson 51 Cal.App. 114, 196 P. 84; Lapique v. Walsh, 51 Cal.App. 191, 196 P. 512."

[3] This appeal is on the judgment roll alone. In addition to the judgment roll, the clerk's transcript contains copies of numerous documents which form no proper part of such a record. They were probably introduced in evidence at the trial. There is no certificate by the trial judge. Under these circumstances the only portions of the clerk's transcript which we may consider are the pleadings, the findings, the judgment and the notice of appeal. Stoltenberg v. Harveston, 219 Cal. 406, 26 P.2d 833; Kwon v. Kwon, 39 Cal.App.2d 232, 102 P.2d 808.

[4] A study of appellants' brief shows that the principal grounds relied upon for a reversal of the judgment depend upon a consideration of the evidence, and this is not before us. Consequently we have decided to exercise the discretion given us under section 1 of rule V of the Rules of the Supreme Court and the District Courts of Appeal, and consider the case on its merits as presented by the judgment roll and not accept the statement of facts in the opening brief as true.

The complaint contains two counts. The first is in the usual form found in an action to quiet title. The second count, after repeating most of the allegations of the first cause of action, alleges that on October 14, 1938, the parties executed a written contract whereby plaintiffs agreed to sell to defendants certain real property for $1,700, payable, $150 in cash, the balance in monthly instalments of $16, the first being payable on December 1, 1938, and the remaining instalments on the first day of each month thereafter. The unpaid balance was to draw interest at the rate of 7 per cent per annum. Accrued interest was to be deducted from each monthly payment and the balance credited on the principal.

Time was the essence of the contract and it was agreed that upon default by the buyers the sellers should be relieved of all liability under the contract and the buyers would forfeit all interest therein and to the property and to all moneys paid; that on default the sellers would be entitled to immediate possession of the property.

It was further alleged that the buyers made default in payments commencing with the one falling due September 1, 1939; that on March 1, 1940, the sellers, in writing, demanded possession of the property because of defaults; that the buyers refused to surrender possession and on March 7, 1940, recorded the conditional sales contract and also a declaration of homestead on the property; that in proceedings in the Justice's Court of Temescal Township of Riverside County, defendants were dispossessed and plaintiffs put in possession of the property.

The answer set up the claim of defendants under the conditional sales contract. It was admitted that defendants had failed to make the payments commencing with the one due on September 1, 1939. It was alleged that on January 24, 1940, defendant Davey gave plaintiff a promissory note for $112, due March 1, 1940, and that plaintiffs recovered judgment in the justice's court for $112, plus interest and costs. It was alleged that payments on the contract, including the payment due August 1, 1939, were made by defendants and accepted by plaintiffs after the respective due dates specified in the contract, which led defendants to believe that punctuality in making payments had been waived.

Defendants filed a cross-complaint. The contract was pleaded and the payments under it were alleged, together with the facts upon which waiver of punctuality of payments was claimed. The justice's court judgments were alleged as were payments alleged to have been made in improving the property. Judgment was asked against plaintiffs in the sum of $439.77.

It was found that the allegations of the complaint were true and that defendants had no interest in the property; that defendants had been evicted and that plaintiffs had possession of the property and had recovered judgment for $112; that the promissory note had been given but had not been paid; that the note was neither given nor accepted as payment of unpaid instalments on the contract; that some changes were made in the property by defendants, but that these changes and alterations had not increased the value of the property; that the conditional sales contract had not been mutually rescinded by the parties.

Judgment was entered for plaintiffs.

[5] When an appeal is taken on the judgment roll alone we must presume that the evidence supported the findings. Geneusz v. Harrington, 218 Cal. 760, 25 P.2d 4. In Norton v. Newerf, 45 Cal.App. 10, 187 P. 57, 58, it was said: "The appeal being on the judgment roll, the only questions to be considered are: (1) Did the complaint state facts sufficient to constitute a cause of action; (2) are the findings within the issues; (3) is the judgment supported by the findings; and (4) Does reversible error concerning a matter of law appear on the face of the record?"

[6-8] The sufficiency of the complaint to state a cause of action to quiet title cannot be questioned. As it was found that those allegations were true, the findings support the judgment quieting plaintiffs' title to the real property. As the promissory note was not given and accepted in payment of the delinquent instalments, and neither the note nor the instalments were paid, the only effect of the note was to extend the times of payment of the instalments. Other defaults occurred after the due date of the note and before the action was filed, so the action was not prematurely brought. The other findings on the cross-complaint are sufficient to support the judgment that defendants take nothing by it.

It is clear that the findings support the judgment and that they are within the issues.

[9] Defendants seek to attack the judgment of the justice's court under which they were dispossessed urging that it was erroneous. Francis v. West Virginia Oil Co., 174 Cal. 168, 162 P. 394. No appeal was taken from that judgment and it has long since become final. A consideration of this question would require us to consider the various documents attached to the clerk's transcript which is not properly certified so the documents are not properly before us. There being no proper record for the consideration of this question we cannot decide it here.

There being no error on the face of the record, the judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

56 Cal.App.2d 918

ICE BOWL, Inc., v. SPALDING SALES CORPORATION.

Civ. 12200.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1943.

1. Sales 🔑287(3)

Where buyer of skates made no complaint of any breach of an express warranty until four months after skates were accepted and first installment of purchase price was due and until suit was threatened, evidence sustained finding that the statutory notice of breach of warranty was not given within reasonable time after buyer knew or should have known of the breach. Civ.Code, § 1769.

2. Sales 🔑441(3)

In action by buyer against seller for breach of warranty of skates, evidence that buyer did not rely on seller's skill and judgment in selecting the skates, and that the skate and shoe combinations bought were reasonably fit for particular purpose for which the skates were required did not authorize recovery on theory of breach of implied warranty. Civ.Code, § 1735(1).

3. Sales 🔑434

In order that a buyer may invoke provisions of statute creating implied warranty of merchantability, buyer must allege that the goods were unmerchantable. Civ.Code, § 1736(c).

4. Sales 🔑439

Burden is on buyer alleging breach of implied warranty of merchantability to prove such allegations. Civ.Code, § 1736 (c).

5. Sales 🔑441(3)

In action by buyer against seller for breach of warranty of skates, evidence that skates were free from any defect rendering them unmerchantable, did not authorize recovery on theory of breach of implied warranty of merchantability. Civ. Code, § 1736(c).

6. Trial 🔑397(5)

In action by buyer against seller for breach of warranty of skates where court specifically found that the skates were reasonably fit for use as rental skates for ice skating, failure to make finding on allegation that the skates were purchased for the purpose of renting them for a fee to buyer's patrons was immaterial.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Ice Bowl, Inc., against the Spalding Sales Corporation for breach of warranty, wherein defendant filed a cross-complaint for the purchase price of the goods sold. Judgment for defendant, and plaintiff appeals.

Affirmed.

R. H. Schwab, of Sacramento, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff and cross-defendant, Ice Bowl, Inc., appeals from a judgment in favor of the defendant and cross-complainant, Spalding Sales Corporation, in an action involving the purchase by appellant from the respondent of 593 pairs of ice skates and shoe combinations at an agreed price of $3.95 a pair. Appellant's action was for damages for breach of warranty, and respondent's cross-complaint was for the recovery of the purchase price of the property sold and delivered. The cause was tried before the court sitting without a jury, and the court found generally against appellant and in favor of respondent. Judgment was entered accordingly; and the grounds of appeal, as they are stated by appellant in its opening brief, are that the trial court erred in failing to find on the issue raised by paragraph III of the complaint, and that findings VI, VII, VIII and X are not supported by the evidence.

Resolving all conflicts in the testimony in favor of the prevailing party, the material facts may be stated as follows: In August, 1940, Roy Hann, representing appellant, called at respondent's store in Sacramento which was being conducted by Lloyd Toomey, and told Toomey the Ice Bowl wanted to buy some skates for its rink in San Jose, within the price range of $3.95, which was the wholesale price of the cheapest skates carried by Spalding. He stated also that he wanted the soft-toe type. Toomey ordered samples from the San Francisco warehouse, and upon the arrival of the samples Hann looked them over and took away at least one sample, priced at $3.95, saying that "they were going to look them over." The next day Hann returned, bringing with him a list showing the number and sizes of the skates the Ice Bowl already had on hand and the additional skates needed. At that time he told Toomey that they had decided on the soft-toe model priced at $3.95, for which Hann had previously expressed a preference. Toomey had recommended the hard-toe skate for rink use, and gave his reasons therefor, but rather than accept Toomey's recommendation appellant selected the soft-toe skate, and ordered 593 pairs, at the price of $3.95 a pair, payments to be made as follows: One-half on December 1, 1940, one-quarter on January 1, 1941, and one-quarter on February 1, 1941. The skates were delivered to and accepted by appellant in San Jose, and were thereafter used for rental purposes; in fact in November, 1941, which was shortly prior to the trial of this action, the skates were still being used for rental purposes. However, appellant failed to make any of the payments falling due on December 1, 1940, January 1, and February 1, 1941; and late in February, 1941, respondent began to press appellant for payment. In response to these demands appellant promised that payments would be made in March and April, 1941. Meanwhile the counters in some of the skates began breaking down, and a Mr. Mabrey, another representative of the appellant company, called and inquired whether anyone in San Francisco could strengthen the counters, saying that appellant "was willing to pay any charge to reinforce the counters." Respondent undertook to see what could be done, and it was subsequently found that the counters could be strengthened at a cost of 25 cents a pair to appellant; but appellant then decided not to have the work done. Up to that time, according to respondent's evidence, no suggestion was ever made that respondent was in any way liable for the condition of the skates; and following these conversations appellant again promised to make payments on the purchase price of the skates, and also promised to pay the state sales tax of $70.33, which had been omitted on the invoice. At the end of April, 1941, respondent, having learned of other suits against appellant, threatened to sue for the purchase price of the skates; and immediately afterwards appellant filed its action for damages.

Apparently the complaint was drafted on the theory that there had been an express warranty, which had been breached; but at the trial appellant seems to have taken the position that there was a breach of an implied warranty as to the fitness of the skates for a special purpose (Subd. 1, § 1735, Civ. Code); and on this appeal the additional contention is made that there was a breach of an implied warranty of merchantability. (Subd. (c), § 1736, Civ.Code.)

[1] It is our conclusion that appellant has not established a cause of action for damages under any of the foregoing theories. As stated, the cause of action pleaded in the complaint appears to be based on the theory of an express warranty, the material allegations in this behalf being "that there was a warranty that said skates were sufficiently strong and of the proper type to be used as rental skates." However, section 1769 of the Civil Code declares in part that "* * * if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor"; and here the trial court found that no such notice was given, and the evidence, although conflicting, supports the finding. In this connection the supporting evidence shows that following the delivery and acceptance of the skates no further transactions took place between the parties until the end of February, 1941, when respondent demanded that some payment on the purchase price be made; that thereafter and up to April, 1941, when suit to collect the delinquent payments was threatened, several conversations took place, but that in none of these conversations did appellant make any complaint that respondent was liable for the breaking down of the counters of the skates; that on the contrary, during that period, appellant repeatedly declared its intention and willingness to pay for the skates, and that not until April, 1941, when appellant was threatened with suit, did appellant intimate that any such warranty had been made or breached. Therefore, applying the provisions of said section 1769 to the foregoing facts, it is apparent that appellant failed to establish a cause of action for breach of express warranty.

[2] As stated, appellant's second theory, that there was a breach of an implied warranty, is based on subdivision 1 of section 1735 of the Civil Code, which provides: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." As will be seen, in order to recover under those provisions it must be established not only that the buyer has made known to the seller the particular purpose for which the goods are required, but also that the buyer has relied on the seller's skill or judgment; and here the allegations of the complaint do not bring the case within the operation of the above italicized provisions, and there is an express adverse finding, supported by substantial evidence, to the effect that appellant did not rely on respondent's skill and judgment in selecting the soft-toe skate, and that the skate and shoe combinations purchased by appellant "were reasonably fit for use as rental skates for ice skating," which was the particular purpose for which they were required.

[3-5] With respect to appellant's contention that it was entitled to recover under subdivision (c) of section 1736 of the Civil Code, the provisions of that section, so far as here pertinent, provide: "In the

case of a contract to sell or a sale by sample: * * * (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample"; and the argument of appellant seems to be that the evidence established a breach of the implied warranty of merchantability. However, in order to invoke the provisions of that section it is essential for a buyer to allege that the goods were unmerchantable, and in the present case there is an absence of such allegations; secondly, where such allegations are made, the burden is on the buyer to prove them (Alvernaz v. H. P. Garin Co., 127 Cal.App. 681, 16 P.2d 683; Barrios v. Iwaki, 32 Cal.App.2d 198, 89 P. 2d 417; Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 P. 369); and here, although there was an absence of allegations invoking the provisions of said section, the trial court definitely found that the goods were merchantable, and the finding is supported by substantial evidence. The finding reads as follows: "That the aforesaid sale was a sale by sample. That said skate and shoe combinations purchased by plaintiff and cross-defendant were selected by plaintiff and cross-defendant from a sample. That each and every one of the 593 pairs of skate and shoe combinations delivered by defendant and cross-complainant to plaintiff and cross-defendant as aforesaid corresponded with the sample in quality and each and every one of said 593 pairs of skate and shoe combinations were free from any defect rendering them unmerchantable." (See finding VI.)

[6] Paragraph III of the complaint, upon which the trial court made no finding, contained allegations to the effect that the skates were "purchased by plaintiff for the purpose of renting the same, for a fee, to patrons of plaintiff. * * *" However, the court specifically found, as above pointed out, that the skates "were reasonably fit for use as rental skates for ice skating"; consequently the failure to find on the allegation of paragraph III is unimportant.

Findings VII and VIII which appellant challenges upon the ground that they are wanting in evidentiary support are lengthy and cover practically all of the contested issues of fact raised by the complaint, the cross-complaint and the answers thereto; and the specific findings contained therein are based upon a great deal of conflicting evidence. The vital and determinative findings of fact embodied therein are those already discussed. It is unnecessary, therefore, to repeat what was there said. As to the remaining specific findings not already discussed, it is our opinion that they, too, are legally supported; and since they are based on evidence which is sharply conflicting it would serve no useful purpose to elaborate upon the evidence herein. Finding X which is also challenged merely negatives the allegation of paragraph VI of the complaint that as a result of said breach of said warranty appellant had been damaged in the sum of $5,000; consequently finding X amounted to no more than a legal conclusion which is sustained by the other findings.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

DEMPSEY et al. v. MARKET STREET RY. CO. et al.

Civ. 12208.

District Court of Appeal, First District, Division 1, California.

Feb. 4, 1943.

Hearing Granted April 1, 1943.

1. Carriers 🔑318(4)

In action for injuries sustained by street car passenger when passenger fell as car stopped while passenger was stepping down to front platform of car, evidence that car had stopped with a sudden jerk partially throwing passenger down was insufficient to support verdict for street car company.

2. Carriers 🔑298(1)

While a certain amount of lurching and jerking is inevitable in the lawful operation of a street car, a passenger is not required as a matter of law to anticipate a sudden or violent jerk of the car that has sufficient force to throw passenger to car floor.

3. New trial ⚿163(1)

A minute order granting plaintiff's motion for new trial on ground of insufficiency of evidence justifying verdict was an "order in writing" filed with the clerk within statute requiring such orders to be in writing and filed with the clerk, etc. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Order in Writing".

◆

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by Ilma Dempsey and another against Market Street Railway Company and others for personal injuries alleged to have been received by named plaintiff as the result of negligent operation of a street car of named defendant on which named plaintiff was a passenger. Verdict for defendant. From an order granting plaintiffs' motion for new trial, defendants appeal.

Affirmed.

Cyril Appel, Ivores R. Dains, George Liebermann, and George E. Baglin, all of San Francisco, for appellants.

George Olshausen and John K. Hagopian, both of San Francisco, for respondents.

PETERS, Presiding Justice.

Defendant appeals from an order granting plaintiffs' motion for a new trial. The action is one brought by plaintiffs, husband and wife, for personal injuries alleged to have been received by the wife as a result of the negligence of defendant. The jury rendered its verdict in favor of defendant.

Plaintiffs testified that they lived at Market and Octavia Streets in San Francisco; that on the evening of February 21, 1941, they left their home at about 7:15 p.m. to visit the home of the husband's mother on Divisadero Street; that at Haight and Octavia Streets they boarded a No. 17 car operated by defendant; that Mr. Dempsey told his wife to go to the front of the streetcar; that Mrs. Dempsey proceeded to walk through the car while her husband was paying the fare; that while this was occurring the streetcar was proceeding up the Haight Street hill toward Laguna Street. Mrs. Dempsey testified that it was her intention to proceed to the front platform of the streetcar and stand on the left of the front platform; that as she was in the act of stepping down upon the lowered platform the car stopped with a sudden jerk, partially throwing her down; that this occurred while she had her right foot poised in the air preparatory to making the downward step; that she had her left hand on the stanchion located at the back end of the front platform; that she fell onto her knee and grabbed the iron railing which surrounds the motorman; that the curtain behind the motorman was down. She described the jerk of the car that caused her to fall as a "violent" jerk that threw her forward on her foot and twisted it. Mr. Dempsey corroborated his wife as to the facts above described, and testified that the car seemed to "grab" as it was coming to a stop at Laguna Street; that the car stopped "with a sudden jerk"; that he was about three feet behind his wife; that he was carrying a suitcase; that the jerk was so violent that it caused him to bump against the bar in the front of the car so that he dented the suitcase. When asked to describe what he observed when his wife fell down he testified: "Well, the sudden jerk of the car—I will tell you what it felt like to me—I was torpedoed during the last war, and that is just the way it felt—a sudden jar like would throw anybody off their feet." Both plaintiffs testified that after Mrs. Dempsey fell Mr. Dempsey helped her to her feet, and they stood on the front platform until they reached Divisadero Street, some eight blocks from where the accident occurred, where Mr. Dempsey helped his wife to alight. The plaintiffs proceeded to the home of Mr. Dempsey's mother, where they discovered that Mrs. Dempsey had a badly swollen foot. They taped the foot and returned to their home by taxicab, Mrs. Dempsey suffering severe pain. Subsequently it was discovered that a small bone in the right foot was broken, and this action was instituted for the damages so caused.

Both plaintiffs admitted that they did not notify or complain to the conductor or motorman of the streetcar at the time of the injury. The accident happened on a Friday evening. Mr. Dempsey testified that on Saturday morning, after his wife had spent the night in discomfort and pain, he telephoned the carbarn of defendant that houses the No. 17 car, but was told that they had no information concerning the accident; that he then went out to the carbarn and was told that he must report the accident at the Sutter Street office of the company; that Saturday afternoon he called at that office but no one was there; that he again visited the office Monday morning at 9:15 a.m. and reported the accident. No evidence refuting the telephone and personal call at the carbarn, or the Saturday call at the office, was offered by defendant, and it was admitted the accident was reported on Monday morning.

Other than medical testimony, the defendant produced five witnesses. Its dispatcher Davis testified concerning the car schedules on the Haight Street line. He testified that a streetcar (Run 19, Mysing, motorman, Christopher, conductor) was due at Laguna and Haight Streets on February 21, 1941, at 7:28 p.m.; that another car (Run 14, Roach, motorman, Hefferman, conductor) was due there at 7:41½ p.m. on that evening. Those four employees testified that they had no knowledge of anyone being thrown to the floors of their respective cars at the time and place testified to by plaintiffs, and that no one had complained to them at that time and place. It should be noted that they did not testify that the cars on which they were working did not come to a sudden or violent stop at Haight and Laguna Streets on the night in question.

[1, 2] From this brief summary of the evidence it is obvious that if the jury had brought in its verdict in favor of plaintiffs, such verdict would find ample support in the evidence. Defendant argues that, as a matter of law, no cause of action was proved for the reason that no unusual movement of the car was shown. The contention approaches the frivolous. While it is true that a certain amount of lurching and jerking is inevitable in the lawful operation of a streetcar (Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Elliott v. Market Street Ry. Co., 4 Cal.App.2d 292, 40 P.2d 547), a passenger is not required, as a matter of law, to anticipate a "sudden," or "violent" jerk that has sufficient force to throw her to the floor. On such evidence the jury would be justified in finding that the streetcar was operated in a negligent fashion.

After the jury had returned its verdict in favor of defendant, plaintiffs moved for a new trial on the grounds of insufficiency of the evidence, that the verdict was against the law, and error in law occurring at the trial. By an order duly entered in the minutes within the time prescribed by law the trial court granted the motion for a new trial, on the following grounds: "1. Insufficiency of the evidence to justify the verdict; 2. Error in law occurring at the trial and excepted to by plaintiffs." If this minute order properly granted a new trial on the ground of insufficiency of the evidence, the evidence being sufficient to support a verdict for plaintiffs, the present appeal is without merit. Defendant contends that, because of the provisions of section 657 of the Code of Civil Procedure as amended in 1939, Stats. of 1939, chap. 713, p. 2234, this court must conclusively presume that the order was not granted on that ground. That section, so far as pertinent here, reads: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, *the order shall so specify this in writing and shall be filed with the clerk* within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." (Italics added.) The question presented is whether a minute order of the type above quoted duly entered in the minutes, specifying insufficiency of the evidence, complies with the requirement that "the order shall so specify this in writing and shall be filed with the clerk." Note that the section does not require the judge to sign the order. If the order does not comply with the section, because of the statutory mandate, we will be forced to conclusively presume something contrary to the actual fact—that is, we will be forced by the statute to conclusively presume that the order was not based on insufficiency of the evidence even though it is admitted it was so based. In support of its contention that the order does not comply with the section, appellant places its main reliance on the case of Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, decided by the Supreme Court in May of 1941. In that case, on the same day that a new trial was granted, a minute entry specifying insufficiency of the evidence was made. After more than ten days had elapsed, nunc pro tunc orders were signed by the judge and filed, granting a new trial on the same ground. The petitioner sought by certiorari to annul these last orders. The precise point decided by the Supreme Court was that the nunc pro tunc orders were void—a point not involved in the instant case. In the course of its opinion, however, the Supreme Court also discussed the validity of the minute entry in view of the 1939 amendment to section 657 of the Code of Civil Procedure—the precise point involved in the instant case. In one brief paragraph the court held that the minute entry did not comply with the amended section, stating (18 Cal.2d at page 81, 113 P.2d at page 453): "The entry of the minute order on May 28, 1940, did not satisfy the requirement that a written order specifying the insufficiency of the evidence be filed within ten days after the motion is granted. The entry which the clerk makes in his records is a synopsis merely of the court's order, tantamount to a history of it (18 Cal.Jur. 663; Bailey v. Superior Court, 215 Cal. 548, 11 P.2d 865), and before the amendment of 1939, this record clearly was sufficient compliance with the provisions of section 657, subdivision 7 (Pol.Code, sec. 4178, subd. 3). Again referring to Thomas v. Driscoll, supra [42 Cal.App.2d 23, at page 26, 108 P.2d 43, at page 45], we find the following analysis of legislative intent as indicated by the change in the statutory language: '* * * Unless something more than a mere minute entry is required that part of the amendment providing for a written order is meaningless. That the order should be written and "filed with the clerk" is definitely intended is manifest from the provision that "the court may direct a party to prepare the order". Since the legislature could not have intended that a party should prepare a minute entry, and since the order "shall be filed with the clerk" it is clear that the amendment requires an order in writing other than a minute entry by the clerk.'"

If this paragraph correctly interprets the amended section, or if this court is bound by that decision, then the present order must be conclusively presumed not to have been granted on the ground of insufficiency of the evidence.

Plaintiffs argue that the Whitley case does not correctly interpret the amended section, that the quoted language was dicta and is not binding on this court. They also contend that more recent decisions have overruled the quoted portion of the Whitley case. The main case relied upon by plaintiffs is Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 121 P.2d 829, decided by the District Court of Appeal, Second District, Division Three, in January of 1942. In that case the precise point involved on the present appeal—namely, whether an order entered in the minutes within the ten-day limit complies with the amended section—was presented. The court exhaustively analyzed the history, purpose and language of the 1939 amendment and concluded that the requirements of the amendment are satisfied by a minute order specifying insufficiency of the evidence. The holding of the court on this issue covers nine pages of the opinion, and need not be quoted herein. See 49 Cal.App.2d at pages 391 to 400, 121 P.2d 829. The court considered and set forth in its opinion the language above quoted from Thomas v. Driscoll, supra, and Whitley v. Superior Court, supra, and held that what was there said, was dicta. For the reasons set forth at length in the Cox opinion it is apparent that the conclusion reached by the appellate court, when the history, purpose and language of the amendment are carefully considered, correctly interprets the 1939 amendment.

A petition for hearing by the Supreme Court was filed in the Cox case. An examination of that petition discloses that one of the main points urged was that the Cox case had interpreted the 1939 amendment contrary to the interpretation given the amendment by the Supreme Court in the Whitley case. In spite of that fact, and, although the Cox opinion shows on its face that the appellate court refused to follow the Whitley case, and shows further that the appellate court held that what it characterized as the "dicta" of the Whitley case incorrectly interpreted the amendment, the Supreme Court, without a dissenting vote, denied the petition for hearing on March 27, 1942.

Subsequent to the decision of the appellate court in the Cox case, the same court, in Gossman v. Gossman, 52 Cal.App.2d 184, 188, 126 P.2d 178, 181, relying on the Cox case, in discussing a minute order granting a new trial on the ground of insufficiency of the evidence similar to the one involved in the instant case, held: "Such order was by minute entry timely entered, and recited that 'motion for new trial is granted on the grounds of insufficiency of the evidence and errors of law made during the trial. * * *' This order, so entered in the minutes, meets the requirements of Code of Civil Procedure, section 657, as amended in 1939." Again a petition for hearing was filed, and again the Supreme Court, without a dissenting vote, on July 20, 1942, denied the petition.

In August of 1942, the same court, in Bank of America v. Moore & Harrah, 54

Cal.App.2d 37, 128 P.2d 623, relying on the Cox case, in interpreting section 583 of the Code of Civil Procedure which permits the dismissal of an action not brought to trial within five years from the date of its filing "except where the parties have stipulated in writing" that the time shall be extended, held that a "stipulation entered in the minutes of the court is a stipulation in writing." 54 Cal.App.2d at page 43, 128 P.2d at page 626.

[3] It is our conclusion from these facts that whatever was said in the Whitley case on the point under discussion is no longer the law of the state, and that the Supreme Court has held that the law as stated in the Cox case correctly interprets the section in question. This court, under principles of stare decisis, should follow the Cox case.

In view of the conclusion that the trial court properly granted the new trial on the insufficiency of the evidence, it is unnecessary to discuss respondents' further contention that there were errors in law that likewise justified the order.

The order appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

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57 Cal.App.2d 1

PEOPLE v. MOONEY.

Cr. 3655.

District Court of Appeal, Second District,
Division 2, California.

Feb. 1, 1943.

1. Criminal law ⚷562

Determination as to whether the evidence presented is sufficient to support judgment of conviction must depend upon the circumstances of each case.

2. Criminal law ⚷559

Jury as triers of fact are permitted to make a finding of the ultimate facts established by evidence and from inferences reasonably to be drawn from such facts.

3. Gaming ⚷98(6)

Evidence *held* sufficient to support conviction for permitting premises to be used and occupied by another who there conducted bookmaking. Pen.Code, § 337a, subd. 5.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Howard A. Mooney was convicted for permitting premises to be used and occupied by another who there conducted bookmaking, and he appeals.

Affirmed.

A. H. McConnell, of Long Beach, for appellant.

Earl Warren, Atty. Gen., Burdette J. Daniels, Deputy Atty. Gen., John F. Dockweiler, District Atty., and Jere J. Sullivan, Deputy Dist. Atty., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Having been accused by information of permitting the storeroom and premises of 227 East Fourth Street, Long Beach, to be used and occupied by one Seavers who there conducted bookmaking (§ 337a, subd. 5, Pen.Code) appellant was convicted by a jury. After his motion for a new trial had been denied he was sentenced to imprisonment for a term of six months in the county jail. The appeal is taken from both the judgment and the order denying his motion for a new trial.

The only issue presented to this court is as to the sufficiency of the evidence to support the judgment. Inasmuch as appellant admits that his agent while occupying the storeroom did engage "in bookmaking activities as set forth in the information" the issue is further narrowed to the inquiry as to whether such activities of Seavers during his management of the store were known to appellant.

The pertinent provisions of the statute which appellant is accused of violating are as follows:

"Every person * * * (5) who, being the * * * lessee or occupant of any room, * * * building * * * or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3, 4, of this section; * * * is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

"This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive."

The premises were leased to appellant by one Thurston on or about the 11th day of February, 1942, to be used "as a storeroom for cigars and news stand." The lease was for the term of two and one-half months at $45 per month, $90 of which was paid in advance as appellant commenced his occupancy. Prior to his entering the Fourth Street building appellant had known Seavers for about five years. They had operated a cigar store at 127 W. Sixth Street from December, 1940, to the time of their removal to the new location. Appellant testified that upon occupying the Thurston premises he "made arrangements with Seavers to manage the cigar store and news stand" for 50 per cent of the profits from the sales of merchandise and from the operation of the pin ball machine; that the profits from the sales were divided weekly; that the profits from the pin ball machine were divided every second day; that sometimes Seavers brought the money to appellant's home. Not more than $50 worth of merchandise was kept in the establishment. Although the two men had done a very good business at their Sixth Street stand, at the new place on Fourth Street there was very little travel and they made fewer sales. Because of the light business done on Fourth Street, Seavers testified that he "had to make some money somewhere." Being an experienced bookmaker his opportunity was at hand and he embraced it eagerly. He kept scratch sheets and racing forms in the store which were daily observed by appellant. Each day two or three men regularly assembled there and they discussed racing horses with Seavers. A radio blared forth the results of the various race tracks. During the period of police observation, from February 16 to February 26, 1942, appellant admitted his knowledge for some time that Seavers "bet on and played the horses." Police officer Sullivan visited the store daily during the period of his watchful waiting and shadowing of Seavers and appellant. He testified that, on each of the eleven days appellant visited the store, he always came in just before or just after the races. Officer Wiggins witnessed appellant's visit to the store on February 19 when other customers were present. He remained in the store about forty minutes during which appellant was in front of the cigar counter. On that occasion, as Mooney was leaving, he told Seavers to admonish all patrons who might desire to bet on the horses that police officers were in the building. On the 20th of February Wiggins heard appellant tell Seavers that he should permit no one to use the telephone; that it was for business purposes only. The officer testified that the store closed shortly after four o'clock each day when Seavers went directly to the home of appellant. Seavers testified that he told appellant that he thought business would possibly pick up and that "as long as I had bookmaking customers I did all right, and, if he did not kick, I should worry."

From the facts disclosed by the foregoing a disinterested jury was warranted in finding that appellant had knowledge of the bookmaking activities of Seavers. His stand was located where there was little traffic. He invested only a modicum of capital. He employed Seavers as his manager on a profit sharing basis. It is inconceivable that he ever thought that 50 per cent of the profits from sales and from the pin-ball machine would furnish a subsistence to Seavers, to say nothing of paying one-half of the rent and operating expenses. It is incredible that any intelligent person could have believed that two men could engage in such enterprise upon so slight a capital, in such a location and expect to earn sufficient income from legitimate operations to justify a visit by Seavers to the home of appellant each day or every other day for the purpose of effecting a settlement of the accounts between them. Since appellant knew that Seavers engaged in betting on the horse races and saw the scratch sheets and racing forms on the counter on the occasion of his daily visits he could not have failed to be cognizant of the bookie operations of his manager. This inference is further fortified by the fact of the prompt visits of Seavers to appellant's home to divide the day's profits about four o'clock in the afternoons. What could account for such strange behavior under the circumstances other than illicit transactions which the two men wished to conceal from the minions of the law? To maintain such an establishment required the payment not only of rentals but for lights, telephones, utilities and incidental expenses incurred in the conduct of the place. No thoughtful person can believe that appellant would have created such a position for Seavers to carry on his sport of betting on horse races without a knowledge that his manager was accepting bets on races as a source for additional income.

[1-3] The authorities cited by appellant (People v. O'Brien, 37 Cal.App.2d 708, 100 P.2d 367; People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142; People v. Yoder, 35 Cal.App.2d 347, 95 P.2d 470; People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707) are unavailing. It is now the law that the determination as to whether the evidence presented is sufficient to support the judgment of conviction must depend upon the circumstances of each case. People v. Newland, 15 Cal.2d 678, 685, 104 P.2d 778. The jury as triers of the facts are permitted to make a finding of the ultimate facts established by the evidence and from inferences reasonably to be drawn from such facts. In the Newland case the court specifically disapproved of the cases cited by appellant insofar as they were inconsistent with the views expressed in that decision. Upon a review of the record as a whole we cannot say that sufficient facts could not have been found from the evidence to warrant the inference of guilt. People v. Newland, supra; People v. Caldwell, 55 Cal.App. 238, 130 P.2d 495.

The judgment and the order denying a new trial are affirmed.

W. J. WOOD, J., and McCOMB, J., concurred.

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57 Cal.App.2d 29

NATIONAL FUNDING CORPORATION OF CALIFORNIA v. STUMP et al.

Civ. 3205.

District Court of Appeal, Fourth District, California.

Feb. 3, 1943.

1. Estoppel 🔑75

Automobile dealers and purchaser of financing agreements from bank were not "estopped" to deny authority of dealers' manager to mortgage automobile to secure a personal loan because automobile was left in manager's possession, so as to entitle mortgagee to possession of automobile where automobile was covered by trust receipt under Uniform Trust Receipts Law. Civ.Code, §§ 3012 et seq., 3016.9.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Estoppel 🔑118

Evidence sustained implied finding of negligence on part of chattel mortgagee in making personal loan to automobile dealers' manager on automobile which had been financed under Uniform Trust Receipts Law and hence mortgagee was not entitled to possession of automobile upon manager's default as against dealers and financing company holding trust receipt. Civ.Code, §§ 3012 et seq., 3016.9

3. Chattel mortgages 🔑144

That automobile mortgage securing personal loan to automobile dealers' manager met all requirements of Vehicle Code did not determine mortgagee's right to possession of automobile upon manager's default, where mortgage was not registered until after dealers' and financing company's rights had accrued under Uniform Trust Receipts Law. Civ.Code, §§ 3012 et seq., 3016.9.

4. Appeal and error 🔑1071(6)

In action to recover possession of automobile by mortgagee who made personal loan to automobile dealers' manager, failure to make specific finding that mortgagee had knowledge of suspicious circumstances sufficient to put mortgagee upon inquiry which would have disclosed dealers' and financing company's claims under Uniform Trust Receipts Law was immaterial where findings made necessarily involved implied finding to such effect. Civ.Code, §§ 3012 et seq., 3016.9.

5. Automobiles 🔑56

In determining mortgagee's right to possession of automobile on which loan was made to automobile dealers' manager, that dealers allegedly could not secure dealers' license plates for automobile involved and that they could not operate such automobile without such plates were immaterial where automobile at time of loan was taken by manager without dealers' consent to another city without plates.

Civ.Code, §§ 3012 et seq., 3016.9; Vehicle Code, § 206, St.1935, p. 120.

6. Replevin ⚷76

Where automobile sought to be recovered in action in claim and delivery is being kept for purpose of sale, detention damages are not ordinarily recoverable.

7. Chattel mortgages ⚷292(2)

Parties with superior rights under Uniform Trust Receipts Law who were allowed full value of automobile at time chattel mortgagee wrongfully took possession thereof were not entitled to detention damages where only additional damage they could have suffered would be loss of interest if they could have sold automobile earlier, and there was no evidence that such sale could have been made. Civ.Code, § 3012 et seq.

8. Chattel mortgages ⚷292(2)

Parties with superior rights under Uniform Trust Receipts Law who were allowed full value of automobile at time chattel mortgagee wrongfully took possession thereof in action in claim and delivery, and for depreciation from time mortgagee took possession until date of trial, were not entitled to allowance for value of use of automobile. Civ.Code, § 3012 et seq.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action in claim and delivery by the National Funding Corporation of California against Walter G. Stump and others to recover possession of an automobile. From a judgment for defendants, plaintiff appeals.

Modified, and as modified, affirmed.

Sidney A. Shoop, of Los Angeles, Julius Novack, of San Bernardino, Elmer P. Bromley, H. E. Lindersmith, and Frank E. Carleton, all of Los Angeles, for appellant.

Wm. G. Junge, Daniel M. Potter, and Geo. S. Hupp, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action in claim and delivery to recover the possession of a Packard automobile.

The defendants King were automobile dealers in Victorville with a branch place of business in Barstow. For several years, the Bank of America had been "flooring" and financing automobiles for them under the Uniform Trust Receipts Law. Civ. Code, div. 3, pt. 4, tit. 14, ch. 3a, § 3012 et seq. The last statement of such trust receipt financing in connection with these defendants was filed with the secretary of state on December 21, 1940, pursuant to section 3016.9 of the Civil Code. On December 17, 1940, King Brothers employed the defendant Stump as manager of their Barstow branch. During the next three months King Brothers purchased some five or six Packard automobiles from Earl C. Anthony, Inc., which were financed and paid for by King Brothers through trust receipts with the Bank of America. These cars were turned over to Stump and sold by him in the regular course of business with the exception of the last one, which is here in controversy.

On or about March 10, 1941, Stump went to Los Angeles and got this last car from Earl C. Anthony, Inc., taking it to Barstow. He testified that he paid nothing to Earl C. Anthony, Inc., for the car, that the car was not charged to him, that the Bank of America paid Earl C. Anthony, Inc., for the car, and that he had no "flooring" arrangement with the Bank of America. Earl C. Anthony, Inc., handed Stump a carbon copy of the invoice, which was not marked paid and which reads in part: "Sold to Bank of America—Victorville, for Walter G. Stump, Barstow, California." About the same time the Bank of America paid Earl C. Anthony, Inc., $1,086.50, the full purchase price of the car, and a regular trust receipt therefor was executed by the Bank of America and by King Brothers. On or about March 28, 1941, the Commercial Credit Company, which is engaged in the business of "flooring" automobiles under the Uniform Trust Receipts Law, purchased from the Bank of America and paid for all of its "flooring" agreements with King Brothers covering new and used cars at both Victorville and Barstow, including the car here in question, and executed another trust receipt with King Brothers. On March 31, 1941, a statement of trust receipt financing was filed with the secretary of state which had been signed on March 27, 1941, by King Brothers and Commercial Credit Company.

In the meantime, on March 24, 1941, Stump brought this Packard car to the appellant's place of business in San Bernardino and applied for a loan thereon.

The car had no license plates on it and was not then registered to anyone. Stump exhibited the copy of the invoice which had been given him by Earl C. Anthony, Inc., and which was not marked paid, and also showed the plaintiff a letter signed by Earl C. Anthony, Inc., stating that Stump was an authorized Packard dealer at Barstow. In the presence of plaintiff's manager Stump executed a dealer's report of sale and application for registration which purported to be a sale of the car from Stump as a dealer to Stump as an individual. The plaintiff's manager called Earl C. Anthony, Inc., on the telephone but there is no evidence as to what was said by either of them. Without making any other investigation the plaintiff loaned Stump $979.25 on this Packard car and took a note for $1,179.25 with a chattel mortgage on this Packard car and a Plymouth car owned by Stump, and which had been covered by a previous chattel mortgage on which $200 was still due to the plaintiff. On March 31, 1941, a copy of the chattel mortgage was delivered to the Motor Vehicle Department for registration and on the same day application was made to have the Packard car registered with Stump as registered owner and the plaintiff as legal owner. Because of an error in the engine number of the Plymouth car on the mortgage it was not then registered but was returned to the plaintiff for correction. On April 14, 1941, a certificate of registration was issued naming Stump as registered owner of the Packard car and the plaintiff as legal owner, but was issued without reference to the mortgage. The plaintiff's manager corrected the copy of the mortgage which had been returned by the Motor Vehicle Department but did not make this correction on the original chattel mortgage or have the same reexecuted. On April 30, 1941, the copy of the chattel mortgage, as thus corrected, and the certificate of registration issued April 14, 1941, were again received by the Motor Vehicle Department and a new certificate of registration in the name of Stump as registered owner and the plaintiff as legal owner, supported by the chattel mortgage, was issued on May 14, 1941.

Stump failed to pay in accordance with the terms of his note and chattel mortgage and the plaintiff brought this action for the purpose of recovering possession of the car and establishing its right thereto. In the course of the action it obtained possession of the car and sold it to a third party, so that a return of the car was not possible. After a trial the court found in favor of the defendants and entered a judgment which, so far as material here, allowed $200 for depreciation of the car between the time it was taken by the plaintiff and the date of the trial, and awarded full value of the car at the time it was taken by the plaintiff by giving the Commercial Credit Company a judgment for $1,086.50, the amount due on its trust receipt, and giving King Brothers $363.50 covering the remainder of the value of the car, which amount included the $200 allowed for depreciation, and further awarding King Brothers $950 as detention damages. From this judgment the plaintiff has appealed.

It is not contended that Stump had any right or authority to mortgage this car to the appellant. The car was paid for by the Bank of America under a trust receipt arrangement with King Brothers and delivered to Stump as a representative of King Brothers, who executed a trust receipt to the bank. The bank later transferred its interest to the Commercial Credit Company which filed the necessary statement with the secretary of state and also received another trust receipt from King Brothers. There is nothing in the evidence to show that the bank and the Commercial Credit Company, respectively, did not have good title to this car during the times material here. The appellant's only attack on the validity of the trust receipts held by these respondents is that the court erred in finding that "for several years prior to December 12, 1940, the Bank of America had floored cars for said King Brothers." It is argued that the previous statement of trust receipt financing between the Bank of America and King Brothers expired on December 14, 1940, that the next one was not filed until December 21, 1940, and that therefore the latter of these was not a renewal of the former and the flooring was not continuous. The matter here in question arose while the statement filed December 21, 1940, was in full force and effect, and whether or not such "flooring" had been continuous in the past is not material here.

[1, 2] Appellant's main contention is that it was entitled to rely upon the apparent authority of Stump to mortgage this car and that the respondents are estopped to deny that authority because they

left the car in Stump's possession and thus enabled him to perpetrate the fraud. The car was covered by the trust receipts and no reason appears why the protection afforded by the Uniform Trust Receipts Law was not available to these respondents who had complied with the provisions thereof. Moreover, the mere fact that Stump was in possession of the car is overcome by a number of circumstances which should have put the appellant upon its guard. His possession was one for the purposes of sale only, and his taking the car to San Bernardino was in violation of the terms of the trust, and was unknown to the holders of the trust receipts. It may reasonably be inferred that the appellant was somewhat familiar with the way such business is usually conducted and with the necessity of looking into the title of a new car, even in the case of a dealer, with the exception of a sale made in the regular course of trade. The fact that Stump had driven the car to San Bernardino, some 100 miles from his place of business, without license plates of any kind upon it was, in itself, a suspicious circumstance. The fact that he exhibited a copy of a letter purporting to state that he was a sub-agent of Earl C. Anthony, Inc., would in no way tend to establish the further fact that he had fully paid for this car or was in a position to mortgage it. Not only was the copy of the invoice which he showed the appellant not marked paid but it showed on its face that the car had been sold to the Bank of America for Stump, and the appellant made no effort to ascertain whether the Bank of America still had a claim upon the car. The appellant relies in this connection upon the testimony of its manager that this copy of the invoice "was made out to Walter G. Stump." On the other hand, the only reasonable inference which may be drawn from the testimony of Stump is that the copy of the invoice which he showed to this manager was the copy which had been given to him by Earl C. Anthony, Inc., which was introduced in evidence, and which sets forth that the car was sold to the Bank of America for Stump. The further fact that Stump, in the presence of the appellant's manager and in connection with the making of the loan, made out the usual dealer's report of sale from himself as dealer to himself as an individual is such an unusual circumstance as would cause a reasonably prudent person not only to inquire why this was done, but to take steps to make sure that he had paid for the car and was entitled to thus deal with it. These circumstances were sufficient to put the appellant upon its guard and the slightest investigation would have disclosed the true ownership of the car and the interest held by the respective respondents. The implied finding of the court as to the negligence of the appellant in this regard is amply supported by the evidence.

[3] The appellant next contends that its mortgage met all of the requirements of the Vehicle Code for a valid chattel mortgage. This is not strictly correct as a true copy of the mortgage, as executed, was never filed or registered with the Motor Vehicle Department. However, this is not very important here since no registration of that mortgage took place until April 30, 1941, long after the respondents' rights had accrued and since, under the circumstances which here appear, the appellant was not entitled to rely upon any apparent authority of Stump to mortgage the car.

[4] It is next contended that the court failed to find upon a material issue in that it did not make a specific finding to the effect that this appellant had knowledge of suspicious circumstances sufficient to put it upon inquiry which, if pursued, would have disclosed the respondents' claims. The findings which were made necessarily involve an implied finding to this effect and, under the evidence, this implied finding is the only one which could reasonably have been made.

[5] Some contention is made that King Brothers were not regular Packard dealers, that under section 206 of the Vehicle Code, St.1935, p. 120, they could not secure dealer's license plates for such cars, and that they could not legally operate this car without such license plates. We cannot see that this is material here since the car was taken on this trip to San Bernardino by Stump without their knowledge or consent. This is not a case of misuse of license plates, and the only significant fact in this connection is that no license plates were on the car at the time the appellant made its loan, which fact should at least have aroused its curiosity.

[6-8] The only other point which requires consideration is that that part of the judgment which allows $950 for detention damages is not authorized by law. This car was being kept for the purpose of sale and under such circumstances detention

damages are not ordinarily recoverable. Morneault v. National Surety Co., 37 Cal. App. 285, 174 P. 81. The respondents were allowed the full value of the car at the time the appellant took possession of it, and the only additional damage they could have suffered would be a loss of interest on that amount in the event they could have sold it at an earlier date. There is no evidence in the record that such a sale could have been made and no evidence upon which an allowance of such interest could have been based. Moreover, in the other portions of the judgment the sum of $200 was allowed for depreciation on the car from the time the appellant took possession until the date of the trial. The respondents are not entitled to have both an allowance for depreciation and an allowance for the value of the use of the car. Morneault v. National Surety Co., supra. They are entitled to the value of the car at the time it was taken in this action, but not to an amount nearly double that value.

That portion of the judgment awarding $1,086.50 to the Commercial Credit Company is affirmed. That portion of the judgment in favor of King Brothers is reduced from $1,313.50 to $363.50 and, as so reduced, that portion is affirmed. Each party to pay its own costs.

MARKS and GRIFFIN, JJ., concurred.

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56 Cal.App.2d 862

TURNER v. METROPOLITAN LIFE INS. CO. et al.

Civ. 12144.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1943.

Hearing Denied March 29, 1943.

1. Descent and distribution 🔑26

At common law, the word "children" included only children born in lawful wedlock, at least as respects inheritance.

See Words and Phrases, Permanent Edition, for all other definitions of "Children".

2. Insurance 🔑585(1)

In determining right to proceeds of life policy as between opposing claimants, law of contracts rather than law of inheritance is controlling.

3. Parent and child 🔑1

"Child", in the ordinary and popular sense, means a son or daughter, a male or female in the first degree, the immediate progeny of human parents, or the offspring, male or female, of human parents, no distinction being drawn between legitimate and illegitimate offspring.

See Words and Phrases, Permanent Edition, for all other definitions of "Child".

4. Insurance 🔑585(1)

In construing beneficiary clauses of insurance contracts, technical definitions found in law dictionaries of the different human relationships are not controlling.

5. Evidence 🔑5(2)

It is a matter of common knowledge that in most cases the real purpose of life insurance is to provide for the maintenance of the insured's dependents.

6. Insurance 🔑585(4)

"Children", within beneficiary clause of master group life policy, included all children of insured whom he was legally bound to support, thus including illegitimate child, in view of statutes requiring such support. St.1935, p. 636, § 10110; Civ.Code, §§ 196a, 1644; Pen.Code, § 270.

◆

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Richard Lee Turner, a minor, etc., against the Metropolitan Life Insurance Company and others on a master group life policy, wherein Velma Gonzales and others, administratrices of the estate of Lewis William Turner, intervened. From a judgment for plaintiff, interveners appeal.

Affirmed.

Tsar N. Calfee and Norman A. Gregg, both of Richmond, for appellants.

Geo. R. Vaughns and Frank M. Larche, both of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff, by his guardian ad litem, brought this action against the defendant insurance company to collect $1,250 claimed to be due him as beneficiary under a policy of life insurance. The administratrices of the insured's estate presented an adverse claim to the money and were granted leave to file a complaint in intervention; whereupon and on stipulation the insurance company paid the money into court and was discharged from further liability. Thereafter the cause was tried on the merits and judgment was entered in favor of plaintiff. From said judgment the interveners have taken this appeal, which is presented on a clerk's transcript consisting of the judgment roll and the written opinion rendered by the trial court.

The policy sued upon is dated November 6, 1939, and is of the type known as a Master Group Policy. It was issued by said company to the Certain-Teed Products Company for the benefit of its employees, one of whom was Lewis William Turner; and the beneficiary clause read: "If there be no designated beneficiary at the time when any benefits shall be payable to the beneficiary, then such benefits shall be payable as follows: To the wife or husband, if living, of the employee; if not living, to the children of the employee who survive the employee, equally; if none survives, to either the father or the mother of the employee, or to both equally; if none of the above survives the employee, to the estate of the employee."

Turner, the insured, died June 25, 1941. He had been married, but there were no children from the issue of the marriage, and his wife predeceased him. The plaintiff is Turner's child, but he is a posthumous, illegitimate child, born shortly after Turner's death; and the interveners contended that the designation "children" in the policy as one of the classes of beneficiaries excluded illegitimate children. The trial court held adversely to such contention, and the interveners urge that this was error.

[1] The contention so made by the interveners is based on the common law, the substance of the argument made by them in this behalf being that under the common law illegitimates are held to be *nullius filii;* that as the sons of nobody they are deemed to have no inheritable blood; that they themselves may not inherit, nor can they transmit property by inheritance, except to their own lineal descendants; that notwithstanding some of the harsh and oppressive restrictions imposed upon illegitimates by the common law have been done away with in this state by statutory enactments, particularly by providing that an illegitimate may inherit from his mother and his mother from him, the rule of the common law still prevails that denies to an illegitimate the right to inherit from his father; and to his father and his father's kin the right to inherit from him, save under conditions specified in sections 255 and 256 of the Probate Code, which do not here exist; that therefore in the absence of statutory enactment granting to illegitimates full equal status with legitimates, the trial court herein was bound to hold against plaintiff in conformity with the common law definition of "children," which includes only children born in lawful wedlock. The two principal cases relied upon by the interveners as sustaining their view are Wolf v. Gall, 32 Cal.App. 286, 163 P. 346, 350, and In re Estate of Paterson, 34 Cal.App.2d 305, 93 P.2d 825.

[2] However, in thus contending that despite the admitted fact that plaintiff is the child of the insured he is excluded from the benefits of the insurance policy, the interveners seek to invoke the law of inheritance; and in each of the two cases relied upon by them the court was dealing only with a right of inheritance. If, therefore, plaintiff's right of action herein depended upon his right to inherit from his father, the argument advanced by the interveners would be pertinent. But it has been definitely held in this state, as in other jurisdictions, that in cases such as this, involving the right to the proceeds of a life insurance policy, the law of contracts and not the law of inheritance is controlling; that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession; and that the law of descents and distributions has no applicability to such cases. In re Estate of Ward, 127 Cal.App. 347, 359, 15 P.2d 901; Heydenfeldt v. Jacobs, 107 Cal. 373, 377, 40 P. 492; Mund v. Rehaume, 51 Colo. 129, 117 P. 159, 161, Ann.Cas.1913A, 1243. Therefore the determinative question here presented is not one of inheritance, but is whether under the rules established for the construction of contracts it was unreasonable for the trial court to hold that the word "children" as employed in the beneficiary clause of the policy covered all children of the insured; and it is our con-

clusion that it was not unreasonable so to hold.

[3, 4] As declared by section 1644 of the Civil Code: "The words of a contract are to be understood in their *ordinary and popular sense, rather than according to their strict legal meaning*; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed" (italics ours); and clearly the ordinary and popular sense in which the word child (the singular of children) is understood is as defined in the dictionaries, to-wit: a son or daughter; a male or female in the first degree; the immediate progeny of human parents (Webster's Dictionary); the offspring, male or female of human parents (Standard and Oxford Dictionaries). No distinction is drawn between legitimate and illegitimate offspring. It is quite true that in the law dictionaries the technical legal definition of "child" is restricted to conform to the common law definition, that is, to legitimate children; but as held in Mund v. Rehaume, supra, in construing beneficiary clauses of insurance contracts the technical definitions found in law dictionaries of the different human relationships are not controlling. That was a case involving the construction of the terms of a mutual benefit insurance policy where the benefits were made payable, in case the insured left no widow or descendants, to the insured's parents. The insured left no widow or descendants, and his mother predeceased him; and the trial court held that the insured's father was not the "parent" of the insured and therefore was not entitled to the insurance money because the marriage between the father and mother was absolutely null and void. The trial court's decision was reversed, and in so reversing it the court went on to say: "The lower court went upon the theory that, if the son could not transmit to the father under the technical laws of inheritance, then the father was not his parent and could not be a beneficiary. This is not the proper test. The proper construction of the contract, and not the law of inheritance, fixes the rights of the parties. The word 'parents,' if we accept the ordinary and common use of words, should be construed to mean the father and mother of the insured, under the circumstances of this case. The technical definitions of the words father, mother, child, and parent, found in law dictionaries, are not controlling in this contract. * * * Our statutes provide that all words, unless the intention was to use them in their technical sense, shall be understood and construed according to the approved and common usage of the language. * * * Applying the common meaning of the word to the facts in this case, it should be construed to mean the father and mother of the insured."

[5, 6] Furthermore, by statutory enactments in this state, illegitimate children have been placed on a full parity with legitimates insofar as their right to support and maintenance is concerned; and consequently under the Insurance Code an illegitimate child has an insurable interest in the life of its father. In this respect section 196a of the Civil Code provides: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances," which obligation may be enforced by civil suit brought in behalf of the illegitimate child by its mother or guardian; section 270 of the Penal Code declares that if the father "wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child" he may be prosecuted criminally for such omission; and section 10110 of the Insurance Code, St.1935, p. 636, provides that "Every person has an insurable interest in the life and health of: * * * (b) Any person on whom he depends wholly or in part for education or support." It is a matter of common knowledge that in most cases the real purpose of life insurance is to provide for the maintenance of the insured's dependents; and as will be seen, if the insured father herein had lived he would have been legally bound by civil and criminal laws to maintain his child, notwithstanding it was his illegitimate child. It would seem, therefore, that in the absence of any restrictive language to the contrary in the policy herein, it was not unreasonable for the trial court to construe the word "children" as used in the policy as meaning all children of the insured that he was legally bound to maintain. The well-considered decision rendered in Middleton v. Luckenbach S. S. Co., 2 Cir., 70 F.2d 326, 329, applied the above line of reasoning in a case involving the construction of a federal statute, 46 U.S.C.A. § 761, allow-

ing suit to be brought for the benefit of the "wife, husband, parent, child, or dependent relative" of a person whose death was caused by "wrongful act, neglect, or default occurring on the high seas," and it was held that the words "parent, child, or dependent relative" included illegitimate children and mothers of illegitimate children. The court in so holding said: "There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. The rule that a bastard is *nullius filius* applies only in cases of inheritance."

Even at common law it was held in some instances that the maxim that an illegitimate is *nullius filius* applied only in cases of inheritance (7 Cor.Jur., p. 958, note 42a; Garland v. Harrison, 8 Leigh, Va., 368; Hains v. Jeffell, 1 Ld.Raym. 68, 91 Eng.Reprint 942; Rex v. Hodnett, 1 T.R. 96, 99 Eng.Reprint 993); and if in cases such as this involving the construction of beneficiary clauses of contracts of insurance the law of inheritance rather than the law of contracts should be held to be controlling, it would mean that where the benefits of a policy are made payable to the insured's "children," an illegitimate child of the insured would be entitled to receive those benefits if its mother was the insured, but not if the father was the insured; or in case the policy insured both the mother and the father and both died, an illegitimate would receive the insurance left by the mother and be denied that left by the father, upon the theory that the illegitimate was the child of the mother but was not the child of the father, notwithstanding both the father and the mother are legally liable for its maintenance and support. Thus, if the laws of inheritance were held to be controlling in the interpretation of the beneficiary clause of a contract of insurance, it would in effect be holding that the word "children" as used in the policy insuring the mother meant one thing, and when used in a policy insuring the father meant something entirely different. In any event, the well-settled rule in this state is, as already pointed out, that the rights of a beneficiary of an insurance policy are not measured by the law of inheritance.

It may be conceded that cases are to be found construing compensation statutes and those granting the right to recover damages in tort actions, wherein a distinction is made because of illegitimacy; but those cases are invariably based on the technical wording of the statutes there under consideration, and are therefore not here in point. Bell v. Terry & Tench Co., 177 App.Div. 123, 163 N.Y.S. 733, and Scott v. Independent Ice Co., 135 Md. 343, 109 A. 117, cited by the interveners, were compensation cases wherein the statute itself defined a child as including a posthumous child or a legally adopted child; and the court held in effect that since the Legislature sought to define the word, if it had intended that illegitimate children were to have the benefit of the statute it would have included them in the definition; and the Legislature not having done so, it was beyond the power of the courts to add illegitimate children to the definition. In Murrell v. Industrial Commission, 291 Ill. 334, 126 N.E. 189, which was another compensation case, the statute read: "* * * widow, child, parent, grandparent or *other lineal heir* * * *." Laws 1915, p. 400, (italics ours); and it was held that the use of the word "or other lineal heir" in connection with the relationships therein specified restricted the operation of the statute to "lineal heirs," that is, to those there specified who were entitled under the laws of that state to inherit. And the decision in the case of Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N.E. 674, 54 L.R.A. 814, 86 Am.St.Rep. 460, strongly relied on by interveners, is not controlling here, because the policy there involved was issued by a mutual benefit association, and the decision was based on an interpretation of the particular by-laws of that association, and the statutes under which the association was organized. Furthermore, as said in 45 Corpus Juris, page 178, in referring to the Lavigne case, "there is authority to the contrary."

Here the insurance company and the insured employee contracted in unambiguous terms that if the insured was not survived by a wife the proceeds of the policy would be paid "to the children of the employee." Plaintiff is admittedly the employer's child, and since there are no words of limitation or restriction used in the policy in connection with the word "children," we agree with the conclusion reached by the trial court that said word should be taken in its ordinary and popular sense (Civ.Code, § 1644), which means all children of the employee.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

57 Cal.App.2d 39

GARETSON v. HESTER et al.

Civ. 2879.

District Court of Appeal, Fourth District, California.

Feb. 6, 1943.

1. Landlord and tenant 🔑53(1, 2)

In absence of provision in lease regarding right of sale, lessor at any time has right to sell property subject to lease and effect of sale is merely to substitute vendee to all rights of original lessor.

2. Landlord and tenant 🔑92(1), 95

Provision of lease that property was subject to sale but in event of offer to purchase lessee was to be given first opportunity to buy was not a "covenant" but was a "condition" upon which termination of lease could be predicated. Civ. Code, §§ 1069, 1641.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition" and "Covenant".

3. Landlord and tenant 🔑95

Where lease provided that property was subject to sale but that in event of offer to purchase lessee was to be given first opportunity to buy, the lease terminated on lessor's receiving bona fide offer of purchase and lessee's refusal to take advantage of option and purchase property at price named in offer. Civ.Code §§ 1069, 1641.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action to terminate a lease by Louise Garetson against D. C. Hester and others. Judgment for plaintiff and defendants appeal.

Affirmed.

Charles E. Burch, Jr., and Clarence Harden, both of San Diego, for appellants.

Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

GRIFFIN, Justice.

Action to terminate a lease. The property involved in this lease is 12.33 acres of land located on Camp Kearney Mesa, in San Diego County, just across the main highway which proceeds past the United States Marine Camp known as Camp Elliott. Plaintiff and respondent acquired the property in 1917, and has owned it continuously since that date. During all these years, up until the execution of the lease here involved, the property was brush land and had never been leased for any purpose. In 1936, the United States Marine Corps used a small parcel of land across the highway from the particular tract here involved as a summer tent camp. For many years the respondent had resided in Berkeley, California, and during all of the time involved in this action she was residing there. The appellant Hester had worked as a civilian employee for the post exchange at the Marine Corps base in San Diego and at the summer tent camp for about six years prior to the commencement of this action. In November, 1939, Hester started negotiations for the lease here involved. He had heard rumors that the government was going to erect a cantonment near this property. He went to see the appellant Blethen, who was in the business of selling and distributing beer. In the late summer of 1939 Hester told Blethen that he thought it would be a good business proposition to lease a small plot of ground and put up a beer hall. He asked Blethen to look up the owner of land adjacent to the area that the marines would occupy. Blethen, through a friend in a bank, contacted respondent and offered her $50 per year for the lease of the land above mentioned. After some dealings it was agreed that she should receive $100 a year. A lease was drawn accordingly. She testified that at that time she did not have any idea that a camp was being erected in the vicinity. Hester drew up the lease. The appellant Charles Scott was named in the lease as lessee because he was going to loan some money for the erection of a building on the property. The lease was executed on April 5, 1940, between respondent Garetson and appellant Scott. It provided for a lease of one year and for rental at the rate of $100 a year in advance. It further provided that the lease was to be renewable at the option of the lessee until 1946, at the same annual rental. It further provided, and this provision is an important element of the controversy in this action, as follows:

> "It is mutually understood and agreed that the property covered by this lease is subject to sale; however, the lessor agrees that in the event of an offer to purchase that lessee is to be given first opportunity to buy.
>
> "It is further mutually agreed that lessee will be permitted at any time to remove any improvements or structures that he may make or build on the premises, and to quit and deliver up the premises to lessor or her agent or attorney peacefully and quietly, at the end of the term, in as good condition and order * * * as the same are now, and to pay the rent above stated for such further time as the lessee may hold the same. * * *"

On April 15, 1940, Scott signed a written lease of the premises to appellant Hester. His lease contained the same provisions as the original lease to Scott, and there was inserted in the lease after its execution, the following:

> "It is mutually understood that this lease is renewable only until 1946, and that the property under this lease is subject to sale. However, owner has agreed with this lessor that in the event of an offer to purchase that this lessor is to be given first opportunity to buy, which right to purchase is hereby assigned to this lessee, D. C. Hester."

The above last-quoted provision was inserted in the lease by the parties four or five months after the execution of the lease by Scott, with the consent of Hester, and initialed by them. Hester went into possession of the property in April, 1940. It was testified that at the time of the execution of the original lease the rental value of the property, taking into consideration the contemplated erection of Camp Elliott in the vicinity, was approximately $1.00 a front foot per month. The front footage on the highway was approximately 1,383 feet. Leases on the property on which Camp Elliott was constructed were taken by the government and a great building program ensued. Immediately upon securing the lease Hester commenced to erect structures on the leased property. Out of the sub-leases and out of the business conducted by the appellant Hester and his partner, $1,000 gross a month, from all sources, was being realized at the time of the trial. In November, 1940, the respondent came to San Diego and drove out to her land on Camp Kearney Mesa. She was amazed to find a cantonment being rushed to completion across the road from her property. In November, 1940, she learned for the first time that Hester was connected with the lease. In April, 1941, a real estate broker secured a purchaser for her property by the name of Stout. On April 23, 1941, escrow instructions were signed by Stout and deposited with the title company in San Diego. At about the same time an agreement to purchase the real property here under lease was signed by Stout. In this written offer Stout offered to pay $15,000 for the property, $7,500 thereof in cash with the balance to be secured by promissory note payable in installments of $250 or more each month. The contracts were submitted to the respondent for her signature but she did not sign for the reason that the contracts required her to deliver the property free and clear of all encumbrances, which she could not do until the encumbrance of the lease here in question was removed. Notice of the offer of purchase was given to defendants and appellants and they declined to purchase the property at the price offered by Stout. Notice of rescission of the lease was signed by the respondent and served upon the appellants on June 16, 1941, prior to the commencement of this action. After the introduction of evidence and numerous exhibits, the trial court found against the plaintiff and respondent as to her allegations in her complaint that the defendants and appellants obtained the lease by fraud, but did find that the said lease contained the provision as above quoted and that the parties to said lease intended by such provision in the lease that in the event the said lessor should receive a bona fide offer to purchase the property described in the complaint, and in the further event that the lessor named in the lease should give to the said lessee an opportunity to buy said property at the same price offered, and in the further event that the lessee should fail and refuse or decline to purchase the said property at the said price, then and in that event the lease should be terminated and the lessor should be restored to possession of the property, free and clear of all liens and encumbrances placed thereon by the lessee, and free and clear of all right, title and interest of the lessee acquired through said lease or otherwise. The court further found, in regard to the lease from Scott, as lessor, to Hester, as lessee, that the parties to that lease intended by the inserted provision above quoted that respondent should have the privilege of selling the property referred to herein and that "in the event that the said plaintiff (the original lessor) should receive a bona fide offer for the purchase of said property, and in the further event that the said lessees, the defendants D. C. Hester and Charles Scott, were given the opportunity of purchasing the said property at the said offered price, and in the further event that the said lessees should decline or fail to purchase the said property at the said offered price, then and in that event, the said lease should be terminated." The court further found "that the plaintiff was unable to sell the property to * * * Stout until the leases referred to were canceled or rescinded * * * that the plaintiff was ready and willing to complete the contract of sale and to sell the property to Stout at the price mentioned except for the fact that she was unable to deliver the title to the said property free and clear of the encumbrance and lien of the leases referred to, and that the leases were clouds upon the title of the property and were an existing encumbrance thereon." In its judgment the court decreed that the leases be terminated and canceled effective on the 20th day of June, 1941, subject to the right of defendants to remove their improvements. It further decreed that the plaintiff was entitled to the possession of the property and the defendants were not. It quieted title to the property in favor of the plaintiff and gave judgment against Hester and Scott for $850 for rentals due and for costs.

The issue involved on this appeal is whether or not the parties to the leases intended by the language used that the leases should be terminated when an offer of purchase was received and the lessee refused to take advantage of the option and purchase the property at the price named in the offer.

[1-3] Appellants argue that there is no provision in the lease that the same should terminate upon the condition of lessees' failure to exercise the opportunity given them to purchase the property being leased; that there can be no termination of the lease without a forfeiting clause in it; that even so, the lease did not contemplate such termination except upon an actual sale, rather than an offer to purchase, and that the offer to purchase was not capable of specific performance in that it provided for liquidated damages in the event of its nonperformance on the part of the offerer. The interpretation given these instruments by the trial court, it seems to us, was not only fair and reasonable but an entirely proper construction that should be placed upon them. The lease clearly provided, and it is clear that the parties had in mind the fact that the property was "subject to sale," at all times. It was not the sale which was to terminate the leases, but a bona fide "offer to purchase" and the lessee was to be given the first opportunity to buy when such an offer was made. The leases further provided that at the "end of the term of lease," which term could inferentially mean when it was terminated at the end of the leasehold period or by failure of the lessee to exercise his option to purchase, he might be "permitted to * * * remove any improvements or structures" and to pay the rent for such further time as the lessees might hold the property. Obviously, the property was subject to sale without the insertion of any such clause. The lessor at anytime had the right to sell the property subject, of course, to the lease, and the effect of the sale would have been merely to substitute the vendee to all of the rights of the original lessor. Upton v. Toth, 36 Cal.App.2d 679, 684, 98 P.2d 515. The clause must, therefore, have an important intended meaning. The placing of the option in this

clause indicated very clearly that it was the intention of the parties, and insisted upon by the lessees, the appellants herein, that the lessees be protected in the event of the sale and be given the first opportunity to purchase. If it was not intended by the parties that a bona fide offer to purchase with a subsequent refusal by lessees to purchase should terminate the leases, there would have been no occasion whatsoever for this sort of an option. If the purpose of the clause was merely to grant an option to the lessees to buy the property during the life of the leases, it would not have been coupled with the clause reserving the property for sale. The two expressions together clearly indicate that it was intended by all parties that the sale of the land would terminate the leases. In no other way can the presence of the clause be explained. It certainly is a reasonable construction to believe that the parties intended to and did create a condition upon which a termination of the leases could be predicated. Upton v. Toth, supra; McVitty v. Flentge, 34 Cal.App. 781, 169 P. 666; Carstensen v. Gottesburen, 215 Cal. 258, 9 P.2d 831; § 1069, Civ.Code; Diepenbrock v. Luiz, 159 Cal. 716, 115 P. 743, Ann.Cas.1912C, 1084, L.R.A.1915C, 234; Glenn v. Inouye, 62 Cal.App. 259, 216 P. 418; Lunke v. Egeland, 46 Mont. 403, 128 P. 610, 612; § 1641, Civ.Code.

The argument of appellants' counsel that the clause in question is a covenant and not a condition and that therefore its violation will not forfeit or terminate the leases but only give rise to a suit for damages is not tenable. It appears to us that the clause in question is a condition and not a covenant in the sense argued by counsel. Turner v. Gorton, 247 Mich. 47, 225 N.W. 484; Johnston v. King, 83 Wis. 8, 53 N.W. 28.

The case of Exchange Securities Co. v. Rossini, 44 Cal.App. 583, 186 P. 828, relied on by appellants, was one where the court was considering a lease which contained a provision for termination of the lease upon sale after notice to the lessees, and it was there considering the claim by the lessees that the lessor had violated a "covenant contained in the lease by failing to give them an opportunity to exercise the option for the purchase of the property." The court held that the lessees could not, by reason of such sale, at their option, terminate the lease or be absolved from the obligation to pay rent reserved therein. Such are not the facts here presented. Appellants cannot, in view of the evidence and findings of the court, contend that the offer to purchase was not a bona fide offer or that they were not given the first opportunity to purchase the property. The leases did not provide that it depended upon an actual sale of the property to a third party before the condition was exercisable but "in the event of an offer to purchase" and lessees should be given the first opportunity to buy. The leases and the evidence submitted lead to the one conclusion that the parties intended, by the language used, to effect a termination of the leases upon the original lessor's receiving a bona fide offer of sale and the refusal of the lessees to exercise their option to purchase.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

56 Cal.App.2d 590

OLMO v. OLMO.

Civ. 6640.

District Court of Appeal, Third District, California.

Jan. 11, 1943.

As Modified on Denial of Rehearing Feb. 10, 1943.

Hearing Denied March 11, 1943.

1. Partnership 🔑344

A personal judgment cannot be rendered in favor of one partner against the other until all partnership assets have been collected and all the property has been sold and converted into cash.

2. Partnership 🔑344

A personal judgment cannot be rendered against a partner until all of partnership debts are paid.

3. Partnership 🔑311(5)

Evidence justified setting aside of agreement of settlement on ground that it was procured by plaintiff on fraudulent representations relied on by defendant.

4. Partnership 🔑328(3)

In action for dissolution of partnership and accounting, finding that partnership continued without interruption from certain date until filing of action was supported by substantial evidence.

5. Partnership 🔑332

In action for dissolution of partnership and accounting, if results arrived at by referee who was confronted with incomplete set of books were to plaintiff's disadvantage, plaintiff could not complain of a situation brought about by his own manipulation while books were in his custody.

6. Partnership 🔑328(3)

In action for dissolution of partnership and accounting, evidence did not support finding that partners owed their mother a debt of designated sum.

7. Partnership 🔑328(3)

In action for dissolution of partnership and accounting, evidence did not support finding that defendant accepted $2,000 under settlement agreement because plaintiff stated that that was the amount of his pilferings from partnership.

8. Partnership 🔑328(3)

In action for dissolution of partnership and accounting, where evidence showed that notwithstanding his illness, plaintiff managed to keep business running, finding that during period when plaintiff was ill, he absented himself from business but nevertheless drew salary of $250 per month was not supported by the evidence.

◆

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

On rehearing.

Opinion in 126 P.2d 372 modified.

Lloyd J. Cosgrove, James M. Hanley, and Herbert Chamberlin, all of San Francisco, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondent.

HAWKINS, Justice pro tem.

Since a rehearing was granted in this case, additional evidence has been presented to this court in the form of an exhibit attached to the referee's report which casts new light upon one phase of the case and makes necessary some modification of our original opinion. For this reason, the original opinion of this court is adopted with certain modifications, as follows:

This is an appeal from a judgment in favor of respondent upon his cross-complaint in an action for dissolution of a partnership known as Olmo Bros. Draying Co.

As grounds for reversal, appellant makes the following claims:

1. That certain partnership assets were not converted into cash, and a debt found by the trial court to be due to the mother of the parties hereto was not paid, and therefore a personal judgment could not be rendered against one of the partners.

2. That the court erroneously found that the partnership was commenced on July 1, 1929, instead of July 1, 1934, as claimed by appellant.

3. That appellant was relieved of liability by a written release dated July 1, 1934, which release was erroneously set aside by the court for fraud alleged in its procurement.

4. That an illegal method of accounting was adopted by the referee, that he failed to charge respondent for $2,000 paid him for the alleged fraudulent release, and that the accounting extended back only to October 10, 1929, while the court found that the partnership commenced on July 1, 1929.

5. That the evidence will not support certain findings of fact, and the findings of fact will not support the judgment.

Both appellant and respondent, by their pleadings, asked for a dissolution and an accounting, so no issue was raised on those questions.

The essential facts are these:

Appellant and respondent, who are brothers, formed a partnership on July 1, 1929. This partnership continued without interruption until sometime in May, 1932. At that time appellant told respondent that there were no profits in the business, and that he was going to withdraw, and thought he would leave San Francisco, where the partnership business was, and go to Los Angeles. In the preceding April, however, he had filed a certificate with the county clerk in San Francisco, stating that he was doing business individually under the name of Olmo Bros. Draying Co. Appellant claims that at that time respondent abandoned his interest in the partnership and voluntarily turned it over to appellant.

Contrary to appellant's statement, there had been some profits in the business, but respondent had left the bookkeeping to his brother and did not know much about that end of the business. He continued to work with appellant, drawing a salary of $150 per month. Appellant also drew a salary from the business.

Notwithstanding his statements, appellant did not leave San Francisco, but continued to operate the business with his brother as before. In April or May, 1934, respondent being in urgent need of funds, requested appellant to advance him some money from the partnership. Then for the first time, the partners quarreled over money matters, appellant claiming that respondent had no interest in the business.

The business was conducted from the family dwelling house, where the partners lived with their mother and the rest of the family, including an adult sister, Laura, who for some time kept the books of the partnership. Many discussions of the business were held with the whole family participating. Appellant never told any of the members of his family that he had dissolved partnership with his brother, until April or May, 1934. At this time Laura Olmo accused appellant of withdrawing large sums of money from the partnership for his own personal benefit, and in particular one check for $5,000 for which he made a stub marked only with five crosses. The check book with the questioned stub subsequently disappeared. Also, pages were torn out of other books, and certain partnership books and papers completely vanished. Appellant offered an explanation of the $5,000 check which proved to be false.

Notwithstanding the fact that appellant claimed respondent had no interest in the partnership, he offered to pay him $5,000 for his purported interest. At this time respondent was suspicious of the $5,000 withdrawal but did not have definite information that appellant had appropriated it. What he did not know was that at the very time negotiations were pending, appellant had withdrawn an additional $3,000 and placed it in his personal savings account.

The negotiations culminated in a written agreement of settlement effective as of July 1, 1934, whereby respondent retained a half-interest in the partnership, was paid $2,000 in cash, and released appellant from all prior claims and demands. Appellant and respondent thereafter operated the business together until January 14, 1935. At that time respondent got into a personal difficulty having no connection with the business, and went into hiding for three months. Appellant thereupon brought this action.

The partnership owned some trucks which respondent asserts were sold for storage charges, but there is no evidence to that effect.

[1, 2] The first ground for reversal claimed by appellant is meritorious. No personal judgment can be rendered by one partner against the other until all the assets have been collected and all the property sold and converted into cash. Clark v. Hewitt, 136 Cal. 77, 68 P. 303. No personal judgment can be rendered against a partner until all of the partnership debts are paid. Nakamura v. Kondo, 65 Cal.App. 211, 223 P. 425; Albery v. Geis, 1 Cal.App. 381, 82 P. 262.

Respondent maintains that there was no finding that there was a debt due from the partnership to the mother. The answer alleged that: "The plaintiff and defendant are obligated to their mother * * * for moneys advanced the copartnership, but that on or about the 1st day of March, 1935, plaintiff herein refused to pay and definitely stated that the copartnership was not obligated to pay the interest."

This allegation was found to be true.

Respondent contends that this finding does not allege a debt due by the copartnership but refers to a mere moral obligation, and further suggests that this court should so interpret the finding under the rule that "every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts." 2 Cal.Jur., p. 852, § 499.

To apply this rule, this court must assume that counsel for respondent performed an idle act by inserting this allegation in his answer and carrying it forward into his findings, as moral obligations have no place in these proceedings. We cannot perceive but that to indulge in the presumption suggested by respondent would be "inconsistent with the record on appeal."

The second and third grounds of reversal urged by appellant are not tenable.

There is abundant evidence that appellant concealed from respondent important information which, if known, would have caused him to refuse to enter into the agreement of July 1, 1934. In addition to the $5,000 and the $3,000 withdrawals hereinbefore referred to, there were other large, unexplained withdrawals including sums of several hundred dollars at a time, which were paid to a real estate firm from whom appellant was buying property. At the time of most of these withdrawals, a fiduciary relationship prevailed between the partners; respondent trusted appellant and relied upon his representations, express and implied, concerning the management of the business and the profits thereof.

[3] Under the existing circumstances the trial court was justified in holding that the written agreement of July 1, 1934, was procured upon fraudulent representations made by appellant, which were relied upon by respondent; and the court's action in setting aside the agreement was entirely proper. Vance v. Supreme Lodge, 15 Cal. App. 178, 114 P. 83.

[4] Appellant claims that respondent voluntarily withdrew from the partnership in May, 1932, but there is little to support that contention except his own testimony. Respondent continued to work with the firm and denied that he ever withdrew. In this he was supported by the other members of the family who testified that they were never informed of any change in the partnership relation. There is substantial evidence to support the finding that the partnership continued without interruption from July 1, 1929, until the filing of the action for dissolution.

[5] We find little substantial merit in the fourth ground for reversal urged by appellant. The referee was confronted with an incomplete and imperfect set of books, which had been partially destroyed and mutilated while in the custody of the appellant. Where records were missing, he resorted to a system of computations based upon average receipts and expenditures, which was the best method he could pursue under the circumstances. If the results arrived at have been to appellant's disadvantage he cannot complain of a situation brought about by his own dishonest manipulation. Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431.

[6] There is some merit in the final ground for reversal urged by appellant. That this is true has been indicated by observations previously made herein. The finding that there was a debt due to the mother of the partners is not completely supported by the evidence. There is evidence that she had advanced them considerable money, but the evidence as to the amount of these advances is very indefinite. At least the major portion of this debt had been outlawed. Respondent acknowledged the debt while appellant repudiated it. This question should be correctly and definitely determined by the trial court and a proper finding made.

There was evidence as to capital contributions made by the partners, but no finding on that subject.

[7] A finding that respondent accepted the $2,000 because appellant stated that that was the amount of his pilferings from the partnership, is not supported by the evidence. Appellant never admitted any pilferings, but claimed that he was the sole owner of the business and entitled to do as he pleased with its assets; and he did all he could to cover up his illegal withdrawals.

[8] There is a finding that during a period when appellant was ill, he absented himself from the business, but nevertheless drew a salary of $250 per month. The evidence shows that notwithstanding his illness he spent quite a little time with the business, both at the office and at home, and managed to keep it running under severe handicaps. This finding should be eliminated.

There are some inaccuracies in other findings, but they are not of sufficient importance to merit discussion here.

The exhibit hereinbefore mentioned appears to cover a complete account of the cash transactions of the partnership, but neither in it nor in the other evidence nor in the findings does it appear that appellant was given a credit or offset for the $2,000 which he paid to respondent under the voided fraudulent agreement of July 1, 1934.

Some of the suggestions for correction or improvement of the record made herein are not so necessary as to require a reversal and might have been passed over under the rule of presumption on appeal hereinbefore cited, except for the fact that a reversal was to be ordered for other reasons.

The record in this case is voluminous and it seems neither necessary nor expedient to order a complete new trial. The judgment is reversed with directions to the trial court to vacate the findings and judgment, and to reopen the case for the taking of such additional evidence as may be necessary to prepare proper findings as indicated herein; also to direct the referee to take additional testimony and to file a supplemental report accounting for the partnership assets and debts, and making the other corrections hitherto suggested.

The trial court is further directed thereafter to file new findings and a judgment which will conform to the views expressed in this opinion.

THOMPSON, J., and ADAMS, P. J., concurred.

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56 Cal.App.2d 877

PEOPLE v. BUSH.

Cr. 3654.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1943.

Hearing Denied Feb. 26, 1943.

1. Infants 🔑13

Fact that act committed upon a child under the age of 14 years is one of intercourse does not alter the actor's intent to arouse his lusts and passions by lewd and lascivious acts under statute defining crimes against children. Penal Code, § 288.

2. Infants 🔑13

Fact that accused may also have been guilty of statutory rape of six-year old girl did not invalidate conviction under statute defining crimes against children. Penal Code, § 288.

3. Infants 🔑20

In prosecution under information charging a violation of statute defining crimes against children, and that accused had sexual intercourse with a six-year old girl, instructions on intent required under the statute were not misleading under evidence of girl that accused had fondled her and confession of accused that he had raped her. Penal Code, § 288.

4. Criminal law 🔑1172(1)

In prosecution for crime against six-year old girl, where prosecution's conflicting testimony was insufficient to establish accused's claimed alibi, instructions that proof of an alibi would authorize an acquittal and that the time of commission of the offense was immaterial were not prejudicial. Penal Code, § 288.

5. Criminal law 🔑363

A declaration or act to be admissible as a part of a disputed transaction must be an undesigned part of the occurrence and illustrative of its character, and must be contemporaneous with the main occurrence. Code Civ.Proc. § 1850.

6. Criminal law 🔑363

Although each case involving "res gestae" must be determined upon its own facts, the res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but also matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form a part of the occurrence. Code Civ.Proc. § 1850.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

7. Criminal law 🔑366(4)

In prosecution for crime against six-year old girl, admissibility of witness' statement that girl had said that accused had done something nasty to her which was allegedly made within some two minutes from time witness had passed accused as the latter emerged from the girl's apartment, was addressed to the discretion of the trial court. Penal Code, § 288; Code Civ.Proc. § 1850.

8. Criminal law 🔑366(4)

In prosecution for crime against six-year old girl, trial court did not abuse its discretion in admitting as "res gestae" testimony that girl had stated that accused had done something nasty to her, where statement was made to witness within some two minutes of time that accused allegedly had passed witness as accused emerged from the child's apartment. Penal Code, § 288; Code Civ.Proc. § 1850.

9. Criminal law 🔑572
Infants 🔑20

Evidence established corpus delicti and sustained conviction for crime against six-year old girl as against defense of alibi. Penal Code, § 288.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge pro tem.

Henry N. Bush was convicted of a crime against a six-year old girl, and he appeals.

Affirmed.

Hearing denied; CURTIS, CARTER and SCHAUER, JJ., dissenting.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged by an information with a violation of section 288 of the Penal Code and appeals from the judgment of conviction of the offense as charged, the grounds of said appeal being as follows:

1. Alleged error in certain instructions;

2. Alleged error in admission of evidence;

3. Insufficiency of the evidence to support the verdict and judgment.

The record reveals that the victim was a little girl six years of age, who lived with her mother and a brother nine years of age, in a one-room apartment at Wilmington, California. On the night of May 22, 1942, the mother, who sold cosmetics and novelties, went out to make a delivery of merchandise to a cafe a block or two away from the apartment, leaving the little girl alone in bed. The mother had been away about twenty minutes when a Mr. Anderson, another tenant living in an adjoining apartment, entered the cafe and told the mother her little girl was crying. The mother immediately returned home and finding the child in a pitiable condition bleeding from the vagina and the external genitalia, took her to an emergency hospital. Because of the critical condition of the child she was shortly thereafter taken to the General Hospital where she remained about three weeks undergoing treatment for her injuries.

It appears from the record that the dwelling in which the child and her family resided had formerly been a grocery store which had been converted into three small apartments, one of which was occupied by Mr. Evald Anderson. Mr. Anderson testified that when he returned home that night he heard the little girl screaming or crying loudly; that he went to her apartment and about five steps outside thereof, he passed appellant who "was coming the other way, leaving * * * I saw him come out the door. * * * When I came in there the child was at—she was in the dark, she kept on crying, I asked her what she was crying for. * * * She said Hank (appellant) done something nasty to her * * * when I put on the light, no need telling me what had happened to her, blood was running down the leg, down the toes, trickled down to the floor. * * * I tried as fast as I could to get her mother, and get her to the hospital. * * * I called a man, a friend of mine living in the next apartment, to come out until I could run by her mother to get her to come home"; that he spoke to appellant and told him to stop, but the latter "just beat it * * * walking plenty fast." This witness also testified that after he turned on the light in the child's room, he saw appellant looking in a window of the room, at which time he distinctly saw appellant's face, and again told him, "You wait a minute there, I want to see you."

Dr. Paula Horn testified that she examined the little girl the next morning at the General Hospital, it being necessary to give her an anaesthetic. Said witness described the victim's injuries and testified that she was a specialist in obstetrics and gynecology and gave as her opinion that the injury she observed on the little girl was such as might have been caused by the insertion of a male organ.

Police Officer Ledbetter testified he was present when appellant was brought to the General Hospital into the presence of the child, at which time she pointed to appellant and said: "This is the man that hurt me," and described where she had been injured. Appellant at that time admitted in the presence of the officers that everything the little girl said was true.

The child took the stand at the trial and testified that she was six years old;

that she knew appellant as "Hank"; that she remembered the night when she was in bed alone and appellant got in bed with her and hurt her in her privates; that appellant stated to her that her mother had asked him to take care of her (the little girl). The court asked her: "* * * What did Hank hurt you with"? to which she replied: "His finger."

A full confession made by appellant was read to the jury in which he admitted all of the circumstances of the offense and admitted that he raped the child. He took the stand in his own defense, admitted he knew the little girl and her mother; stated that he spent the evening drinking with two friends; that he did not know what time he went home, but recalled he went by the house where the little girl lived and saw a crowd of four or five fellows around the place; that he started to go over there but changed his mind and walked on. Also, he denied he was in the apartment where the little girl lived that night.

Appellant complains of a number of instructions given by the trial court on the subject of intent, but has neglected to recite in his brief all of the instructions given on that subject. However, his principal objection appears to be that there is some ambiguity regarding intent when the information and the instructions are read together and that the jury was thereby misled.

The information first charges a violation of section 288 of the Penal Code and then charges that appellant "did have and accomplish an act of sexual intercourse with and upon the said * * * a female person * * * of the age of six years * * * with intent then and there of arousing, appealing to and gratifying the lusts, passions and sexual desires of the said * * * and Henry N. Bush."

[1-3] The trial court gave full and complete instructions on the subject of the required intent under a charge of violation of section 288 of the Penal Code. The evidence of the child was that appellant fondled her, while the statement and confession of appellant were that he raped her. The intent under section 288, supra, is to arouse the lusts and passions by lewd and lascivious acts, and the fact that the act was one of intercourse does not alter the intent in question. The fact that appellant may also have been guilty of an additional offense, that of statutory rape, is of no consequence. People v. Agullana, 4 Cal.App.2d 34, 37, 40 P.2d 848. In the light of the record, considering both the evidence and the full and complete set of instructions given, it is impossible to say that the jury was misled in any way.

Appellant urges that "in view of the evidence given by Phyllis Doganiere, who testified as a witness for the People, and that given by appellant herein that he was at no time" at the home of the child victim on the 22nd day of May, 1942, but was in the Star Cafe, it was prejudicial error to give the following instructions:

1. "The Court instructs you that the commission of a criminal offense necessarily requires the presence of the defendant at the necessary time and place. Proof of an alibi is therefore as much a traverse or complete answer to the crime charged as any other defense and proof tending to establish an alibi may raise enough doubt to produce an acquittal. A reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime must necessarily raise a reasonable doubt of his commission of it. The defendant is entitled to the benefit of that reasonable doubt in your mind that the defendant was present at the time and place alleged in the information, and if such reasonable doubt exists in your mind, you must acquit the defendant."

2. "The Court instructs the jury that it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed, and that the same was committed within three years prior to the filing of the information in this case."

Appellant was the only witness for the defense. He denied that he visited the home of the child victim on the night of May 22, 1942, and testified that he spent the entire evening drinking with friends at the Star Cafe; that he had no idea what time he left there for his home, but that on his way home he saw a crowd of people around the house where the little girl lived and started to go over there, but changed his mind.

The information alleged that the offense charged was committed on May 22, 1942, without fixing the exact hour. The prosecution produced evidence tending to prove that the offense was committed just shortly before midnight on the stated day. After the appellant rested his case, the prosecution presented Phyllis Doganiere as a rebuttal witness and she testified that she was the night cashier at the Star Cafe on the night in question; that she went on the night shift at 11; that appellant was involved in a fight in said cafe between 11 and 11:30 that night and that it was after 12 midnight when he left there.

Appellant cites in support of this contention the case of People v. Waits, 18 Cal. App.2d 20, 21, 62 P.2d 1054, in which it was held that an instruction identical with instruction No. 2, above quoted, was erroneous as to the defense of alibi. In the cited case appellant relied upon an alibi and produced testimony establishing it. It was there stated: "In light of appellant's alibi defense, the time the alleged offenses were committed became material, and it was the duty of the trial court to limit the jury in its consideration of the evidence to the period which the prosecution selected as the time of commission of the offenses."

[4] In the instant case the prosecution's witnesses first fixed the hour as shortly before midnight and then fixed the hour as after midnight. Appellant denied that he committed the crime or that he was in the victim's home on the night the offense was committed. Consequently, it cannot be said that the conflict in the testimony produced by the prosecution was sufficient to establish an alibi on behalf of appellant. Under the facts and circumstances here presented, the giving of the two instructions complained of did not constitute reversible error.

Appellant complains of error in the admission over his objection of the following testimony of the witness Anderson who was the first person to go to the assistance of the little girl:

"A. Yes; when I came there the child was at—she was in the dark, she kept on crying, I asked her what she was crying for.

"Q. What did she say?

"A. She said Hank done something nasty to her."

This statement was made by the child to the witness Anderson "inside of a minute or two" of the time said Anderson had passed appellant as the latter emerged from the child's apartment. Such statement was made so near the time of the attack upon the little girl as to make it a part of that occurrence.

Section 1850 of the Code of Civil Procedure recognizes the competency of certain hearsay evidence as an exception to the general rule excluding that class of proof: "Where, also, the declaration * * * forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration * * * is evidence, as part of the transaction."

[5] A declaration or act to be admissible under the rule enunciated by section 1850 supra, "must be an undesigned part, or incident, of the occurrence in question, and illustrative of its character. It must be, in a general sense, contemporaneous with the main occurrence, although, in case of a sudden accident or attack, the declaration would not be inadmissible merely because the occurrence immediately preceded it. It must be the natural and spontaneous outgrowth of the main occurrence, and must exclude the notion of deliberation or the design to manufacture evidence." (10 Cal.Jur. 1112, § 340.)

[6] "Owing to the varying phases of human affairs, it is not possible to lay down a rule which will determine what is the res gestae in every case, and each case must be determined upon its own peculiar facts. People v. Wong Ark, 96 Cal. 125, 30 P. 1115; People v. Blake, 129 Cal.App. 196, 202, 18 P.2d 399." (8 Cal.Jur. 93, § 190.)

"The res gestae embraces not only the actual fact of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence." (8 Cal.Jur. 96, § 193, and authorities there cited.)

[7, 8] The admissibility of the statement to which objection was directed was a matter addressed to the sound discretion of the trial court, and in the circumstances here presented, we are not prepared to say that the court in admitting the statement referred to committed an abuse of discretion.

Finally appellant complains that the evidence adduced at the trial is insufficient to support the judgment of conviction because of alleged weakness in the victim's testimony and also because appellant's confession was not free and voluntary.

[9] A complete answer to these complaints is the fact that the evidence is

legally sufficient in all respects to sustain appellant's guilt without either the testimony of the child or appellant's confession. As to the confession, the evidence was conflicting as to its free and voluntary character. The jury resolved such conflict against appellant.

The testimony of Mr. Anderson, who answered the child's screams and observed appellant leave the house while the victim was inside alone crying, and who, after turning on the lights, saw appellant come to the window and look into the room—is sufficient when coupled with other evidence, particularly that of the mother of the child regarding her brief absence from home, to establish the corpus delicti beyond a reasonable doubt.

An examination of the entire record shows that there was no miscarriage of justice in this case and that the trial was properly and fairly conducted. The evidence taken as a whole, including as it does appellant's admission of wrongdoing, clearly establishes appellant's guilt.

For the reasons stated, the judgment appealed from is affirmed.

DORAN, and WHITE, JJ., concurred.

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56 Cal.App.2d 786

GRIMES et al. v. STEELE et al.

Civ. 6697.

District Court of Appeal, Third District, California.

Jan. 25, 1943.

Rehearing Denied Feb. 23, 1943.

Hearing Denied March 25, 1943.

1. Vendor and purchaser 🔑95(2)

Where realty purchase contract expressly provided that acceptance of installments after due date should not waive time for paying future installments, effect of accepting the last overdue payments was exhausted on payments so received, and the contract continued with unimpaired force as to subsequent installments as they became due.

2. Payment 🔑75

In purchasers' action for specific performance of realty contract, evidence did not establish that money paid by purchasers to vendors' attorney was to be applied on purchase price, but showed that application was to individual debt to attorney.

3. Specific performance 🔑87

Purchasers who had not fully performed, offered to perform, or provided sufficient excuse for not performing all conditions of the agreement, could not demand specific performance.

4. Vendor and purchaser 🔑76

If vendor allows entire purchase price to become due, payment of price and tender of deed become "dependent and concurrent conditions", and nonpayment alone does not put vendee in default.

See Words and Phrases, Permanent Edition, for all other definitions of "Dependent and Concurrent Condition".

5. Quieting title 🔑14
Vendor and purchaser 🔑97, 303

If vendor allows entire purchase price to become due, vendor must tender a deed as a condition to demanding payment of the price, and without such tender cannot declare forfeiture, sue either for the whole price or for an intermediate installment, or quiet title.

6. Vendor and purchaser 🔑148

Where conduct or declarations of vendee show that tender of deed by vendor would be unavailing, such tender is unnecessary.

7. Quieting title 🔑7(2), 14
Vendor and purchaser 🔑148

Where purchasers of realty could not make payments on time, and after total amount became due tendered two payments only, and subsequently sought moratorium relief, and thereafter brought action for specific performance on untenable ground that they had paid in full, vendors were excused from tendering deed and demanding performance and title was properly quieted in vendors. Gen.Laws 1937, Act 5101.

◆

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Action by George Grimes and others against W. W. Steele and others for specific performance of real estate contract, wherein defendants filed cross-complaint to quiet title. From a judgment for defendants, plaintiffs appeal.

Affirmed.

L. A. Whitcomb, of Pomona, for appellants.

Snyder & Snyder, of Jackson, for respondents.

PAULSEN, Justice pro tem.

On June 21, 1933, appellants, as vendees, and respondents, as vendors, entered into an agreement for the purchase and sale of certain real estate. Appellants brought this action for specific performance of the agreement, and respondents filed a cross-complaint praying that their title be quieted. The court found that appellants were in default and had forfeited all rights under the contract before the bringing of this action. The judgment denied specific performance and quieted respondents' title to the property.

The agreement provided for a total purchase price of $643 payable in monthly installments with interest on deferred payments. It was further provided "that the said vendees shall be let into and have immediate possession of said premises; but that time is of the essence of this contract; and that if the said vendees shall fail to pay the said installments, or any of them when due, the said vendors shall be released from all obligation to convey said property; and, in such event vendees shall forfeit all right to said property and all payments theretofore made by them shall be forfeited to the said vendor; that acceptance of any of said installments after the date when same became due shall not be considered as a waiver of time of payment of future installments thereafter falling due. The said vendors, upon receiving payments at the time and in the manner hereinbefore specified, agree to execute and deliver * * * a good and sufficient deed * * *."

Upon the execution of the agreement appellants entered into possession and made periodic payments up to and including the 21st day of July, 1936. Ten of these, made subsequent to April 21, 1934, were accepted by respondents long after they became due. The final payment was due January 21, 1937, but on October 24, 1937, and November 18, 1937, appellants mailed payments of $18 and $20, respectively, to respondents. These were refused and respondents instructed their attorney to notify appellants that the agreement was terminated. Apparently this notice was not given. Appellants do not claim to have made other direct payments but assert that the purchase price was paid in full by other methods.

It is the contention of respondents that they recovered possession of the premises on October 22, 1937, but appellants insist that they rented the property to one Boering on October 27, 1937, received at least a part of the rent from him and had at all times kept furniture in the house and retained control of one room for their own use. They assert further that in January, 1938, the attorney who then represented them ordered Boering to pay the rent to Mr. Snyder, respondents' attorney, for application to the balance due on the purchase price and that four payments were received by respondents in that manner.

It further appears that on August 5, 1938, a portion of the land was sold to the state for highway purposes and respondents received $150 from that sale.

It is obvious that a substantial part of the purchase price was not paid.

[1] Respondents were not required to accept the small payments mailed to them in October and November, 1937, although at that time appellants could have tendered the full amount due and demanded a deed. The contract expressly provided that "acceptance of any of said installments after the date when same became due shall not be considered as a waiver of time of payment of future installments thereafter falling due." When the last of the overdue payments was accepted in July, 1936, the effect of the acceptance was exhausted on the payments so received and the contract continued to operate with unimpaired force as to subsequent installments as they became due. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126.

[2, 3] Appellants' own evidence refutes the suggestion that the money paid to Mr. Snyder was to be applied on the purchase price. Mrs. Grimes testified that her husband owed Mr. Snyder several hundred dollars for legal services and that she had ordered the rent paid on that account. While she had the right to apply the payments to either account at the time, she cannot claim that they were applied on the purchase price after having applied them to the personal account of respondents' attorney. It thus appears that so far as appellants' demands for specific perform-

ance is concerned, and aside from any other questions involved in the case, there is no evidence in the record to show that appellants had fully performed, offered to perform, or proved sufficient excuse for not performing all the conditions of the agreement. Under these circumstances they were not entitled to demand specific performance. Cates v. McNeil, 169 Cal. 697, 147 P. 944; Reyburn v. Young, 11 Cal. App.2d 476, 54 P.2d 87.

Appellants insist that the court was in error in quieting respondents' title. They argue that the acceptance of the overdue payments constituted a waiver of strict performance and that when respondents took no action until long after the final payment had become due it was then incumbent upon them to tender a deed and demand performance before appellants could be placed in default. It is admitted that no tender of a deed was made. It does appear, however, that on December 2, 1937, appellants filed a petition under the Mortgage and Trust Deed Moratorium Act of 1937 (Statutes of 1937, chapter 167, p. 460, Deering's Gen.Laws, 1937, Act 5101) asking for further time in which to make the payments then overdue and stating that they were "unable to pay the total amount due under said Contract of Sale." The petition was set for hearing on April 11, 1938, and was resisted by respondents on the ground that appellants were in default and their rights had terminated. On March 30, 1938, appellants filed a motion for postponement of the hearing until October 1, 1938. This motion was denied and upon the hearing the proceeding was dismissed. Thereafter appellants moved for a new trial and this motion was undisposed of at the time of the trial of the present action.

[4-7] It is well settled in this state that if a vendor allows the whole of the purchase price to become due the payment of the price and the tender of a deed then become dependent and concurrent conditions, and nonpayment alone does not put the vendee in default. The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment. Kerr v. Reed, 187 Cal. 409, 202 P. 142; Lemle v. Barry, 181 Cal. 6, 183 P. 148; Hoppin v. Munsey, 185 Cal. 678, 198 P. 398; Boone v. Templeman, supra; Caspar Lumber Co. v. Stowell, 37 Cal.App.2d 58, 98 P.2d 744; Ross v. McDougal, 31 Cal.App.2d 114, 87 P.2d 709; Monnette v. Title Guar. & T. Co., 30 Cal.App.2d 428, 86 P.2d 848. The same rule has been applied where the vendor seeks to quiet title. Sausalito Bay Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 P. 57. But it is equally well settled that where the conduct or declarations of the vendee are such as to show that such tender would be unavailing, the tender is not necessary. Hoppin v. Munsey, supra; Sausalito Bay Land Co. v. Sausalito Imp. Co. supra; Vaughan v. Roberts, 45 Cal. App.2d 246, 258, 113 P.2d 884. Appellants had, almost from the beginning, been unable to make their payments on time. Nine months after the total amount became due they tendered two payments only. Later they filed a petition stating they were unable to pay in full. They then sought to have this hearing postponed for many months and after a dismissal moved for a new trial. They filed the present action without offering full payment, contending on the contrary that they had paid in full. It is obvious that a tender of a deed and demand for performance would have been unavailing and were therefore excused.

Because of the conclusions reached on these phases of the case it is unnecessary to discuss the other points raised.

The judgment is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.

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SECOND SERIES

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21 Cal.2d 557

RICHARDSON v. ROYAL INDEMNITY CO.

L. A. 18529.

Supreme Court of California.

Feb. 9, 1943.

Rehearing Denied March 8, 1943.

1. Executors and administrators 🔑537(8)

Where allegations in action against surety of decedent who acted as guardian of incompetent and thereafter as administrator of incompetent's estate indicated a defalcation by decedent as guardian, a cause of action which attempted to charge decedent as administrator was demurrable.

2. Guardian and ward 🔑179

Before surety can be held for breach of bond filed by guardian a decree must establish fact of breach and amount due.

3. Guardian and ward 🔑182(5)

Where action against guardian's administrator and guardian's surety for guardian's defalcation was dismissed with prejudice as against administrator, and facts alleged showed that there was no adjudication in equity case or in probate court that any obligation existed on part of guardian or his estate to the estate of the ward which had not been discharged, allegations based on alleged breach [illegible] guardian stated no cause of action against surety.

4. Guardian and ward 🔑180

The rule that equity will afford relief against guardian who has fraudulently prevented full disclosure of assets of estate, and decree of probate court settling such fraudulent account will not bar equitable relief did not authorize ward's administrator to maintain action against guardian's surety for guardian's alleged defalcation.

5. Guardian and ward 🔑179

Where relief is sought against guardian's surety, fact of breach and amount due must be adjudicated by probate court or by decree in separate action against guardian.

6. Pleading 🔑236(4)

Where second amended complaint failed to state cause of action against guardian's surety, denial of application to file third amended complaint after plaintiff's dismissal with prejudice as against guardian's administratrix, and after entry of judgment, was not an abuse of discretion.

◆

In Bank.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by F. L. Richardson, as administrator de bonis non of the estate of Anna Baxter, deceased, against the Royal Indemnity Company to recover alleged misappropriations of defendant's principal while acting as guardian of the property of decedent. From a judgment for defendant, rendered after sustaining objection to the introduction of evidence by plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action, and from an order denying permission to file a third amended complaint, the plaintiff appeals.

Judgment and order affirmed.

Prior opinion, 128 P.2d 396.

F. L. Richardson, in pro. per., for appellant.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from an adverse judgment and order. F. L. Richardson, as administrator of the estate of Anna Baxter, deceased, filed a second amended complaint "for an Accounting and Recovery of Money" against Kathleen C. Bach, as administratrix of the estate of Charles T. Chandler, deceased, and The Royal Indemnity Company.

The second amended complaint alleges the following facts: In 1908 Anna Baxter was adjudged an incompetent and John R. Baxter was appointed guardian of her person and estate. He died in 1918, whereupon Charles T. Chandler was appointed his successor. Chandler filed a bond in the sum of $60,000 executed by the defendant, The Royal Indemnity Company, as surety. He served in the capacity of guardian until Anna Baxter's death in March, 1922. In June, 1922 Chandler filed his third and final account as guardian, showing $31,295.-25 of assets on hand. The account was approved as filed. Chandler was appointed administrator of the decedent's estate. He was directed by the decree approving and settling his account as guardian to turn over the assets shown by his guardian's account, namely $31,295.25, to himself as administrator. The Royal Indemnity Company was also the surety on Chandler's bond as administrator. It is further alleged that the sum of $15,122.55, evidenced by certain certificates of deposit, was also an asset of the estate during the time of Chandler's administration as guardian, that said sum was never accounted for by Chandler as guardian, but that it was fraudulently appropriated by him to his own use. As administrator he filed a final account which also did not show the $15,122.25 of additional assets. Chandler died in 1935 and before a hearing on the final account.

The plaintiff, F. L. Richardson, succeeded Chandler as administrator of the Anna Baxter estate. R. F. Smith was appointed administrator of Chandler's estate. Smith as administrator filed in the Baxter estate an amended account on behalf of Chandler purporting to show that there were assets in the sum of $17,901.53 unaccounted for belonging to that estate. The final account filed by Chandler and the amended account filed by Smith came on for hearing. The probate court approved the final account filed by Chandler. Its order approving Chandler's account and refusing to approve Smith's, was affirmed by this court on February 14, 1940. In re Estate of Baxter, 15 Cal.2d 166, 99 P.2d 276. On July 12, 1940, Smith was removed as administrator of Chandler's estate and Kathleen C. Bach was appointed in his place. The present action was commenced on May 11, 1940. Extenuating circumstances indicating the reason for delay in the discovery of the defalcation are alleged. It is also stated that Chandler as guardian was never discharged.

The second amended complaint contained a cause of action based on Chandler's alleged breach as administrator and a second cause of action based on his alleged breach as guardian.

January 3, 1941, on direction of the plaintiff, the action was dismissed with prejudice as to the defendant, Kathleen C. Bach, administratrix of Chandler's estate.

The Royal Indemnity Company, hereinafter referred to as the defendant, filed a demurrer which was sustained as to the first cause of action and overruled as to the second. The defendant thereupon filed its answer.

At the commencement of the trial the defendant objected to the introduction of any evidence on the ground that the remaining or second cause of action did not state a cause of action against the defendant. Judgment for the defendant was entered based on the court's order sustaining the objection. Subsequently the plaintiff sougnt leave to file a third amended complaint by which he purported to restore Kathleen C. Bach, administratrix, as a party defendant. By order of the court, permission to file the third amended complaint was denied. The plaintiff's appeal is from the judgment and from the order.

[1] The action was apparently filed pursuant to the suggestion in Re Estate of Baxter, 15 Cal.2d 166, 99 P.2d 276, that the granting of any relief on account of the alleged defalcation of Chandler was not a matter within the probate jurisdiction of the court in the administration of the decedent Baxter's estate, but was properly chargeable to Chandler either in an appropriate reopening of the guardianship proceeding or in an action invoking the equity powers of the court; that any recoverable loss from the surety was chargeable against Chandler in what was his true capacity when the alleged defalcation was committed. The allegations of the second amended complaint indicate a defalcation by Chandler in his capacity as guardian. The court correctly sustained the demurrer as to the first cause of action, which attempted to charge Chandler as administrator.

[2, 3] Likewise there was no error in the ruling sustaining the objection to the introduction of evidence on the second cause of action. When the action was dismissed with prejudice as against Chan-

dler's administrator, The Royal Indemnity Company, as surety on the bond of Chandler as guardian, was the only defendant in the action. The facts alleged show that there was no adjudication in either an equity case or in the probate court, that any obligation existed on the part of Chandler or his estate to the estate of Baxter which had not been discharged. It is elementary that before a surety can be held for a breach of the bond filed by the guardian, there must be an appropriate judicial decree establishing the fact of the breach and the amount due. Cook v. Ceas, 143 Cal. 221, 77 P. 65, and cases cited; Keck v. Keck, 16 Cal.App.2d 521, 526, 61 P.2d 79. We are not here considering any special defenses raised or which could be interposed by the defendant. Insofar as we are concerned with the facts shown by the second amended complaint there is no allegation, and because of the absence of any appropriate adjudication it cannot now be alleged, that there is anything due from Chandler as guardian which has not been settled and paid.

[4, 5] The cases relied on by the plaintiff state the rule invoked by him, namely, that equity will afford relief against a guardian who within that rule has fraudulently prevented a full disclosure of all the assets of the estate, and a decree of the probate court settling such a fraudulent account will not be a bar to equitable relief. See Caldwell v. Taylor, 218 Cal. 471, at page 475, 23 P.2d 758, 88 A.L.R. 1194, and cases cited. But those cases cannot assist the plaintiff. The equitable relief which he seeks is available to him only against the party who committed the breach, or his personal representative. In any action where relief was sought against the surety, the fact of the breach and the amount due had been adjudicated either by the probate court or by decree in a separate action against the defaulting fiduciary. See for example Maloney v. Massachusetts Bonding & Ins. Co., 20 Cal.2d 1, 123 P.2d 449.

[6] The trial court correctly concluded that the second amended complaint failed to state a cause of action against the surety. No abuse of discretion is shown in the court's refusal of permission to file the third amended complaint. Application to file it was made after the plaintiff's voluntary dismissal with prejudice as against Chandler's administratrix, and after the trial and the entry of judgment. There is no showing that the plaintiff was entitled to further opportunity to plead in the present action.

The judgment and the order are affirmed.

EDMONDS, CARTER, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

57 Cal.App.2d 82

HEARN et al. v. GUNTHER.

Civ. 2661.

District Court of Appeal, Fourth District, California.

Feb. 10, 1943.

1. Appeal and error 🔑277

The granting of a nonsuit is deemed excepted to and the court's ruling thereon may be reviewed on appeal from judgment based on such order. Code Civ.Proc. § 647.

2. Appeal and error 🔑248

An "exception" is an objection on a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer in an action or proceeding. Code Civ.Proc. § 646.

See Words and Phrases, Permanent Edition, for all other definitions of "Exception".

3. Appeal and error 🔑277

In action against motorist for wrongful death and personal injuries, where court granted nonsuit on ground that pedestrians were contributorily negligent as a matter of law in crossing street at point other than within marked crosswalk in violation of ordinance, although plaintiffs did not object to admission in evidence of the ordinance, they were not "estopped" from raising invalidity of ordinance on appeal. Code Civ.Proc. §§ 646, 647; Vehicle Code, § 562, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Appeal and error ⚷837(11)

Where motorist struck pedestrians crossing street at point other than within marked crosswalk, on appeal from judgment based on order granting nonsuit, appellate court could consider validity of city ordinance prohibiting pedestrians from crossing roadway other than by crosswalk notwithstanding ordinance had been introduced in evidence without objection. Code Civ.Proc. §§ 646, 647; Vehicle Code, § 562, St.1935, p. 188.

5. Municipal corporations ⚷703(1)

An ordinance prohibiting pedestrians from crossing public roadways other than by crosswalks in central or business districts is invalid. Vehicle Code, § 562, St. 1935, p. 188.

6. Automobiles ⚷245(72)

Where motorist struck pedestrians crossing street at point other than marked crosswalk, in action for death and personal injuries, whether pedestrians were contributorily negligent was a "question of fact" for the jury and not a "question of law". Vehicle Code, § 562, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action for wrongful death and for personal injuries by Bonnie Lee Hearn, a minor, etc., and others, against Fred Gunther. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Brittan & Mack and Kendall & Howell, all of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

GRIFFIN, Justice.

Respondent adopts appellants' statement of facts as related in their brief. It shows that about 9:30 a. m. on September 12, 1940, plaintiff and appellant Elsie Bafuna and Viola Hearn, deceased mother of Bonnie Lee Hearn, a minor, left the Midland Hotel in Bakersfield, which hotel was operated by appellants Ralph and Elsie Bafuna, and in which the deceased was employed, to go to the store of Sears Roebuck & Company to do some shopping. The Midland Hotel is located approximately 90 feet east of the intersection of Nineteenth Street and K Street on the northerly side of Nineteenth. The entrance to the Sears Roebuck & Company store, to which the ladies were walking is located directly across Nineteenth Street from the entrance to the Midland Hotel. At the intersection of Nineteenth and K Streets there were electrically operated traffic signals operating in all four directions and there were crosswalks for pedestrians clearly designated and marked with white lines indicating their boundaries. The two ladies came out of the entrance to the Midland Hotel together talking to each other. They proceeded across the sidewalk to the curb. Mrs. Bafuna looked in both directions while they were crossing the sidewalk. The ladies then stepped down over the curb to the street at a point about 66 feet east of the cross-walk. Mrs. Bafuna walked to the left of Mrs. Hearn. There were cars parked along the north side of Nineteenth Street in the vicinity of the hotel but there was ample room for the two ladies to walk abreast between the cars. After going between the automobiles and stepping out into the street, Mrs. Bafuna again looked both ways, but she did not see defendant's car at that time. She did notice, however, that the stop sign at the intersection of Nineteenth and K Streets was stopping traffic traveling on Nineteenth Street. The next time Mrs. Bafuna looked was when she was approximately in the middle of the street. She looked and saw that the stop sign was still stopping traffic traveling on Nineteenth Street. As she started to look to the east the car of the defendant struck her. At the time the car struck her the deceased, Mrs. Hearn, was to her right and holding her hand. The defendant's car knocked both of the ladies down and injured them. The injury to Mrs. Hearn resulted in her death four days later. The defendant had been driving westerly on Nineteenth Street at a speed estimated by himself at 20 miles per hour. He was driving well out into the center of the street and approximately on the north line of the car tracks which were running along the street. The defendant did not see the ladies approaching at any time until they were approximately 5 feet in front of his car. The left front side of his car struck them. The defendant did not see Mrs. Hearn at all until after the accident. He testified that Mrs. Hearn was "directly behind my line of vision as far as Mrs. Bafuna was concerned." From this testimony and from the position of the car after the accident, which was placed by the traffic officer at about one foot to the south of the south rail of the north pair of car tracks, it appears that all the defendant did to avoid the accident after seeing the two ladies was to apply his brakes. During the time he was covering the last 75 feet prior to the impact, he was not looking directly in front of him but had his head diverted to the left. There was nothing to obstruct the defendant's vision of the ladies as they crossed the street. He testified that he was looking to observe traffic coming from the west. However, one witness testified that the defendant was looking at the display of fishing tackle and guns in the window of the Sears Roebuck & Company store. It was stipulated at the trial that there was an ordinance in force in the city of Bakersfield providing that "When within a business district, no pedestrian shall cross a roadway other than by a crosswalk." It was also stipulated that the area in which the two ladies crossed the street was within a business district. At the conclusion of the plaintiffs' case the defendant moved for a nonsuit which motion was denied. At the conclusion of the defendant's case, the defendant again moved for a nonsuit and the court granted it on the ground that the deceased and the plaintiff Elsie Bafuna were guilty of contributory negligence as a matter of law.

[1-6] This case was decided by the trial court on February 17, 1941, prior to the decision in the cases of Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, decided May 1, 1942, and Ryan v. San Diego Electric Railway Co., 52 Cal.App.2d 460, 126 P.2d 401, holding in effect that an ordinance prohibiting pedestrians to cross public roadways other than by cross-walks in a central or business district is invalid. Respondent now contends that notwithstanding the ruling in the above entitled cases that the ordinance is invalid, that appellants, by their failure to object to the reception of the city ordinance in evidence, have waived their right to argue the question of the invalidity of the ordinance on appeal, citing Hershey v. Reclamation District No. 108, 200 Cal. 550, 254 P. 542. The granting of a nonsuit is deemed excepted to under section 647 of the Code of Civil Procedure and the court's ruling thereon may be reviewed on an appeal from a judgment based upon such order. Under section 646 of the Code of Civil Procedure an exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section 647. The instant case was not permitted to go to the jury. Had the case gone to the jury no doubt the court would have instructed it in the language of the city ordinance. Instead, the court construed the city ordinance as binding upon it, and disregarded the provisions of section 562 of the Vehicle Code, St.1935, p. 188, which permits a pedestrian to cross a roadway at a point other than within a marked crosswalk, but adds that such person shall then yield the right of way to all vehicles upon the roadway. We must therefore hold that although the appellants did not object to the admission in evidence of the city ordinance, they are not estopped from raising the invalidity of the ordinance on appeal, as contended by respondent, and we are not precluded on appeal from reviewing the order of the court which erroneously construed the validity of the ordinance when it granted the nonsuit, where such order (granting a nonsuit) is deemed excepted to under section 647, supra. This was the effect of a portion of the decision in Pipoly v. Benson, supra. See, also, Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736. In view of the established law and the evidence here recited, the question of the contributory negligence of the appellants was one of fact for the jury and not of law. Fuentes v. Ling, 21 Cal.2d 59, 130 P.2d 121; Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P.2d 317; Mitrovitch v. Graves, 25 Cal.App.2d 649, 78 P.2d 227; Wiswell v. Shinners, 47 Cal.App.2d 156, 117 P.2d 677; Griffiths v. Crawford, 10 Cal.App.2d 543, 52 P.2d 548.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 58

PETERSEN v. VANE.

Civ. 12237.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1943.

1. Judgment ⚷461(4)

In suit in equity to set aside default judgment in prior municipal court action, on ground that service on plaintiff as fictitious defendant in municipal court action was improper, evidence sustained finding that plaintiff was properly served as a fictitious defendant.

2. Process ⚷64

A process server, in serving a fictitious defendant, is not required to state to the fictitious defendant in exact words that he is the person sued as John Doe.

3. Judgment ⚷461(4)

In suit to set aside default judgment taken against plaintiff by defendant in prior municipal court action, on ground that service on plaintiff as fictitious defendant in municipal court action was improper, evidence sustained finding that plaintiff was, in effect, informed by process server that he was being served as a fictitious defendant in municipal court action.

4. Judgment ⚷419

If a process server fraudulently misleads a person served by telling him that summons is for someone else, equity has power to set aside judgment based on such service.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Suit in equity by Antone Petersen against LeRoy Vane to set aside a default judgment taken against the plaintiff by defendant in a prior municipal court action to recover for personal injuries received by defendant as result of a collision between a bicycle on which defendant was riding and an automobile driven by plaintiff's son. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Albert Picard and Francis McCarty, both of San Francisco, for appellant.

Edward F. Treadwell, John Langer, and Howard Magee, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Antone Petersen, brought this action in equity to set aside a default judgment taken against him by defendant in a prior municipal court action. The prior municipal court action was brought by the present defendant to recover for personal injuries received by him as a result of a collision between the bicycle on which defendant was riding and an automobile driven by the plaintiff's son. From a judgment denying plaintiff the relief requested, plaintiff prosecutes this appeal.

Appellant urges that he was never brought within the jurisdiction of the municipal court for the reason that the service upon him, as a fictitious defendant, was improper. He therefore contends that the default judgment should be declared a nullity.

The facts are as follows: On October 3, 1938, respondent Vane was injured by an automobile driven by Roy Petersen, son of appellant. On September 30, 1939, Vane instituted an action in the municipal court against Roy and others. The defendants were designated in the complaint and summons as "Roy Robert Petersen, Walter Petersen, First Doe, Second Doe, Third Doe, Fourth Doe, individually and as copartners doing business under the firm name and style of Antone Petersen & Sons." The automobile driven by Roy at the time of the accident was registered in the name of Walter, another son of Antone. Antone was engaged in the contracting business and Roy and Walter and another son, Herbert, worked in the business. Prior to the accident Antone had secured a contractor's license, the license indicating that Antone was the owner of the business. After the accident there was filed in San Francisco a certificate of Antone Petersen doing business under the fictitious name of Antone Petersen & Sons. There was also evidence, however, that, although Antone ran a union shop, none of the boys belonged to the union. If they were mere employees, under the union contract they should have joined the union, but if partners they were not required to do so. There was also testimony that no payroll deductions for the various social security taxes were made from the sons' salaries as was required by law if they were mere employees. The theory of the municipal court action was that Roy was a partner in the firm and that the tort was a partnership tort.

In due course Walter was properly served on April 4, 1940. Thereafter, Walter's attorney agreed with Vane's attorney to accept service for Roy. The joint answer of Roy and Walter was sworn to on April 14, 1940, and filed June 11, 1940. The attorney for the two boys refused to accept service for Antone.

After the answer of the two boys had been filed, attorney Langer became associated with counsel for Vane. He testified that when he came into the case he immediately took steps to have Antone served. He called in a regular process server by the name of Moore and instructed him to serve Antone. Moore testified on a prior trial, and his testimony was read into the record of this trial, that early in June, 1940, he tried several times unsuccessfully to serve Antone; that on June 19, 1940, he called at Antone's home and place of business; that Herbert Petersen was alone in the office; that he asked Herbert for his father; that Herbert left the room and returned and stated his father would soon be in; that Antone came into the office; that he asked him if he was Antone Petersen and he said "yes"; that he then handed him the papers and suggested that he get in touch with Mr. Langer; that after he had left the office Herbert came running after him and stated that the paper was not for his father; that he called Herbert's attention to his father's name on the summons and then left; that on the return of service he had originally written under "Names of Defendants Served," "Antone Petersen & Sons by serving Antone Petersen"; that when this return was submitted to attorney Langer the latter suggested, and Moore agreed, that it should be changed to read in accordance with the summons: "Antone Petersen served herein as First Doe, doing business, under the firm name and style of Antone Petersen & Sons"; that Langer made that change.

Langer testified that after he came into the case in June, 1940, he took steps to have Antone served; that he called in Moore and instructed him to serve Antone; that sometime between June 19th and 24th, 1940, and before he had actual knowledge that Antone had been served, Antone telephoned to him; that he asked Antone to come to his office to discuss the case; that he told Antone, "I feel that you are personally liable in the matter * * *"; that Antone denied liability; that he then told Antone, "Well, in that event, why, I will see you in court"; that he suggested to Moore that the return of service be changed to read as it was set forth in the summons.

Antone failed to answer within the time permitted by law and his default was duly taken and a default judgment for $1,995, and costs, was entered against him on July 23, 1940. The action against Walter and Roy was thereafter dismissed, and six months after the judgment against Antone was secured steps were taken to enforce it. This action was instituted in February, 1941.

Antone and Herbert contradicted much of Moore's and Langer's testimony. It was their testimony that the purported service took place in May and not in June, 1940; that Moore told Herbert that the documents he had were for Roy; that Moore asked Herbert to deliver them to Roy; that then Antone came into the office and Herbert told him Moore had papers for Roy; that Moore asked if he could leave them for Roy; that when he called Langer he told Langer that Moore had left a paper for Roy; that he could not see why it was left there because he, Antone, had nothing to do with the case. Not only was this testimony directly contradicted by Moore and Langer, but much of it is contradicted by record evidence. The service on Antone occurred on June 19, 1940. At that time Roy and Walter had already filed their joint answer. Obviously, there was no reason to be serving Roy on June 19th, unless the theory is that Moore tried to fraudulently mislead Antone. On that issue the trial court resolved the conflict in favor of respondent.

The trial court found that on June 19, 1940, Moore served the summons "upon Antone Petersen, doing business under the firm name and style of Antone Petersen & Sons by then and there delivering to and leaving with said Antone Petersen personally, a true copy of said summons, attached to which was a true copy of the complaint in said action."

The court found the facts as to the return of service and then found: "It is not true that the said Lawrence Moore at any time requested that plaintiff herein deliver the copy of said summons and complaint to one of his sons and it is not true that said plaintiff thereupon looked at said paper and found that his name was not mentioned therein, but on the contrary he looked at said summons and saw that said summons was addressed and directed to Roy Robert Petersen, Walter Petersen, First Doe, Second Doe, Third Doe, Fourth Doe, individually and as co-partners doing business under the firm name and style of Antone Petersen & Sons, and it is not true that plaintiff called the attention of Lawrence Moore to that fact or told Lawrence Moore that it did not constitute a service of summons; and it is not true that said Lawrence Moore at any time stated to said plaintiff that the plaintiff should deliver the same to one of his sons; and it is not true that said plaintiff thereupon told said Lawrence Moore he would do so."

[1-3] Thus, under these facts the court found, as a fact, that appellant was properly served as a fictitious defendant. These findings are amply supported. Appellant urges that in order to serve a fictitious defendant it is indispensable for the process server to tell the person served he is being served as a fictitious defendant. In this connection appellant refers to a dictum appearing in Mercantile T. Co. v. Stockton, etc., Co., 44 Cal.App. 558, 560, 186 P. 1049, 1050, which reads: "It was for the plaintiff to make known in some way the real persons whom he desired as defendants and whom he sued by fictitious names. This he can do by a service of summons on the person, stating that he was the person sued as John Doe, or by recognizing such person as a proper party litigant if he appeared without service of summons." Appellant urges that the words "stating that he was the person sued as John Doe" require the process server to inform the person served that he is being served as a fictitious defendant. Certainly, it is not required that those exact words be used. Without deciding what the minimum requirements may be in serving a fictitious defendant, the evidence and findings here demonstrate that appellant was, in effect, informed that he was being served as a fictitious defendant, and that he knew, or as a reasonable man should have known, that he was being so served. Admittedly appellant read the summons. He admitted that no one but himself could fit the description of "First Doe * * * individually * * * doing business under the firm name and style of Antone Petersen & Sons." He telephoned respondent's attorney and was informed that the attorney was contending the company was a partnership and that Antone was personally liable. He was also told that the attorney would "see you in court." Under such circumstances, the trial court was justified in concluding that appellant was informed he was being sued under a fictitious name just as clearly as if those exact words had been employed.

[4] Of course, if the process server fraudulently misleads the person served by telling him that the summons is for someone else, equity may possess power to set a judgment aside based on such service. But here the trial court on sufficient and competent evidence found against such contention.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

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57 Cal.App.2d 76

PEOPLE v. BUCKLES et al.

Civ. 6848.

District Court of Appeal, Third District, California.

Feb. 10, 1943.

1. Licenses 🔑28

The fact that purchaser of retail business withheld from purchase price amount of sellers' last quarter sales tax, as disclosed by their return, did not relieve purchaser from liability for additional taxes subsequently assessed against sellers, as any portion of sales tax withheld by retailer remains "unpaid" and "due" to state within Retail Sales Tax Act. Gen.Laws Supp. 1935, Act 8493, §§ 3, 9, 17, 18, 26, 30; Gen. Laws 1937, Act 8493, §§ 17, 20.

The word "due", in its primary and proper sense, means simply owing, but is sometimes used in secondary sense of payable, either immediately or at some future time.

See Words and Phrases, Permanent Edition, for all other definitions of "Due" and "Unpaid".

2. Licenses ⚷28

The fact that purchaser of retail business withheld from purchase price amount of sales taxes shown by records of sellers and State Board of Equalization to be due at date of sale did not relieve purchaser from liability for additional taxes subsequently assessed against sellers, as purchaser could have required seller to produce board's receipt for taxes paid or certificate that no taxes were due before paying purchase price. Gen.Laws Supp.1935, Act 8493, § 26.

3. Appeal and error ⚷671(4)

On appeal from judgment against purchaser of retail business for sales taxes assessed against sellers, purchaser's contention that one assessment covered sellers' operations after date of sale must be held without factual foundation, in absence of anything in record to show such fact. Gen. Laws Supp.1935, Act 8493, § 26.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Action by the People against Rex W. Buckles, the Midland Chevrolet Company, and another for sales taxes. From a judgment for plaintiff against defendant Chevrolet Company, such defendant appeals.

Affirmed.

Philip S. Ehrlich, Albert A. Axelrod, and Julien R. Bauer, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Respondent State of California commenced an action against defendants Rex W. Buckles and Elizabeth Lucille Buckles and defendant and appellant Midland Chevrolet Company to recover sales taxes. Defendants Buckles defaulted and judgment was entered against them. Appellant Midland Chevrolet Co. contested the action and after trial upon an agreed statement of facts, a judgment was entered against appellant and this appeal is from said judgment.

Defendants Buckles were engaged in the business of conducting a Chevrolet automobile agency at Woodland, California, under the name of Buckles Chevrolet Company, for several years prior to May 11, 1937, when said defendants entered into an agreement with appellant for the sale to appellant of said business and the equipment, fixtures, furniture, supplies and other assets listed in an inventory prepared by the parties. Notice of intended sale, to be consummated on May 18, 1937, was recorded on May 11, 1937, and the State Board of Equalization had actual notice of such intended sale prior to May 18, 1937. On July 16, 1937, defendants Buckles filed their sales tax return for the final quarter of the operation of their business and paid to the State Board of Equalization $406.93 as the amount of sales tax disclosed by that return, which sum had been withheld by appellant from the purchase price of said business. The Board of Equalization was not satisfied with the returns filed by defendants Buckles, and on June 14, 1937, commenced an audit of the books of said defendants Buckles, and, as a result of said audit, said board on June 30, 1937, made an additional assessment against said defendants Buckles in the sum of $1,996.17, together with interest in the sum of $139.03, and mailed notice thereof to defendants Buckles at the address of said business. On July 17, 1937, defendants Buckles filed a petition for reassessment of such additional taxes and interest and on January 23, 1939, said board re-assessed said additional taxes and interest at the sum of $2,440.53 and mailed notice of such re-assessment to defendants Buckles on February 3, 1939. On July 23, 1938, the board made a further additional assessment against said defendants Buckles for the quarter ending June 30, 1937, in the sum of $96.16 and mailed notice thereof to said defendants. The defendants Buckles failed to pay said taxes and a penalty of 10 per cent, amounting to $217.88, was imposed by the board in accordance with section 20 of the Sales Tax Act, Gen.Laws Supp.1937, Act 8493. On April 30, 1940, respondent commenced an action against defendants Buckles and appellant to recover the amount of said taxes, penalty and interest.

Section 26 of the Retail Sales Tax Act provided at the time herein involved (Stats. 1935, p. 1263; Deering's Gen.Laws Supp. of 1935, Act 8493) in the portion pertinent herein as follows:

"If any retailer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assignors."

[1] The principal contention urged by appellant for a reversal of the judgment is that "appellant, having withheld the defendants Buckles' last quarter sales tax from the purchase price of said defendants' business, Section 26 of the Retail Sales Tax Act imposed no liability upon appellant for sales tax subsequently assessed against the defendants Buckles by additional assessments, as such assessments were neither 'due' nor 'due and unpaid' as of May 18, 1937, the date the sale of the business was consummated." Appellant makes no contention that the amount for which judgment was rendered was not actually due from the defendants Buckles for said taxes, interest and penalties, but appellant contends that they were not "due and unpaid" on May 18, 1937, the date on which the sale of the business was consummated.

We are unable to agree with this contention of appellant. The Retail Sales Tax Act (which will be referred to hereinafter as the Act) in section 3 imposes a tax upon retailers of 3 per cent of the gross receipts of certain tangible personal property and provides that such tax shall be paid at the time and in the manner "hereinafter provided." Section 9 provides that the tax shall be a direct obligation of the retailer and requires the retailer to file his return on or before the 15th day following the close of the taxable period. Section 17, Gen.Laws Supp. 1937, Act 8493, provides for an additional assessment if the board is not satisfied that the retailer's return is sufficient. Section 20 provides that the retailer may petition for a re-assessment within thirty days; that the decision of the board upon a petition for re-assessment shall become final thirty days after service upon the retailer of notice thereof; and that all such assessments made by the board "shall become due and payable" at the time they become final. Section 30 provides that at any time within three years after the delinquency of any tax, the board may bring an action to collect the amount delinquent with interest and penalties.

There can be no doubt that, under the Act, upon the making of every taxable sale there was created "a direct obligation of the retailer" to pay to the State of California 3 per cent of the amount thereof, said payment to be made as provided in the Act. If a retailer withholds any portion of said sales tax, it remains "unpaid," and in the primary sense of the word "due," as it is used in section 26 of the Act, it remains due to the state until it is paid. In Crocker-Woolworth National Bank v. Carle, 133 Cal. 409, at page 411, 65 P. 951, at page 952, the court said: "Finally, the affidavit was not false in saying the claim was 'due.' The word was evidently used in its primary and proper sense, as meaning simply 'owing.' Cent. Dig., word 'Due,' par. 6; Bouv.Law Dict., same word. The word is also sometimes used in the sense of 'payable,' but this is a secondary sense."

In Gelgud v. Los Angeles Rock, etc., Co., 14 Cal.App.2d 604, at page 608, 58 P.2d 673, at page 675, it is said: "The word 'due' has a double meaning. It does not always mean that the money is then immediately payable. It is sometimes so used, but it is also used to refer to an existing obligation which may be payable at some future time. Ahlgren v. Walsh, 173 Cal. 27, 158 P. 748, Ann.Cas.1918E, 751; Joy v. Rousseau, 72 Cal.App. 179, 236 P. 972." See, also, Berylwood Investment Co. v. Graham, 43 Cal.App.2d 659, 666, 111 P.2d 467.

It is quite clear to us that it was the intention of the Legislature in enacting said section 26, to prevent a retailer who has failed to pay the state all of the tax due under the Act from selling his business and departing with the purchase price, by requiring that the purchaser, before paying over the purchase price, take the precaution of demanding either the receipt of the Board of Equalization that the tax has been paid in full or its certificate that no tax is due, and by imposing upon any purchaser who failed to protect himself and the state in this simple manner a statutory liability to pay the amount due to the state up to the amount of the purchase price.

The fallacy of appellant's entire argument upon this point is that appellant assumes that the additional assessments provided for by sections 17 and 18 of the Act create a new obligation or liability, whereas such so-called assessments are merely a determination by the board of the amounts that the retailer has failed to pay. Appellant asserts that the amount of such additional assessment is not due and unpaid until such assessment becomes final as provided in section 20. It is true that section 20 does provide that all such assessments "shall become due and payable" at the time they become final, but this does not justify a holding that such taxes were not "due and unpaid" when the sale of the business to appellant was consummated, because as a matter of plain fact they were taxes which the vendor had theretofore failed to pay but which he became obligated to pay under the Act when the taxable sales were made.

Appellant cites People v. Hochwender, 20 Cal.2d 181, 124 P.2d 823, 825, and its reliance on that case merely emphasizes the failure of appellant to realize the distinction between taxes "due and unpaid" and taxes "due and payable." In the Hochwender case the court states that "By section 20 assessments made under the provisions of section 17 become *due and payable* at the time of service of notice thereof." (Italics ours.) All of the language of the opinion cited by appellant has reference to that "due and payable" provision for the whole question before the court was the date on which the tax became delinquent. There is no language in the opinion which indicates or justifies any conclusion that the liability for retail sales taxes arises only on the last date on which payment could be made without penalty. Such a conclusion would have rendered completely ineffective section 26, and would not have been warranted under the issues involved in the Hochwender case.

[2] Appellant argues further that because it withheld all the sales taxes shown by the records of the seller and of the Board of Equalization to be due from the seller at the date of the sale, it cannot be liable for the sales taxes subsequently assessed. Appellant states that the books of the board at the date of the sale showed no taxes due from the seller and that "consequently, there was no measure by which appellant could estimate what was a 'sufficient' portion of the purchase price to be withheld" and that "obviously, the law did not require appellant to speculate as to any future liability, for its clear intent only requires the purchaser to withhold delinquent taxes." We believe that what we have heretofore said sufficiently answers this argument but deem it proper to observe that section 26 of the Act provides a simple method by which a purchaser may protect himself. He can require the seller to produce a receipt from the board showing that all taxes have been paid or a certificate stating that no taxes, interest or penalties are due, before turning over any part of the purchase price. This requirement is both simple and salutary. If . purchaser chooses to rely upon the assurance of the seller that all taxes have been paid and pays over the entire purchase price without protecting the state or himself by demanding such receipt or certificate, he has no just cause to complain if it is thereafter determined by the board that the seller has failed to pay the sales tax due to the state and his statutory liability as purchaser is enforced.

[3] Appellant raises the final point that an assessment of $96.16 tax and interest covers operations of the defendants Buckles, the sellers, after May 18, 1937, the date upon which the sale was consummated. The assessment in question refers only to the second quarter of 1937. It may be that such assessment included operations of defendants Buckles subsequent to May 18, 1937, but in the absence of anything in the record to show it, we must hold that this contention of appellant is without factual foundation and that the record supports the finding of the court upon this point.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

57 Cal.App.2d 11

TAYLOR et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 12300.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1943.

Rehearing Denied March 4, 1943.

Hearing Denied April 1, 1943.

1. Appeal and error 🔑1001(1)

Where power company proceeded upon theory that collision of automobile with pole had not been caused by breaking of wire but that breaking of the wire was caused by collision of automobile with pole, and issue was submitted to the jury under proper instructions and jury found in favor of plaintiff and there was abundant evidence to sustain such finding, finding was conclusive on appeal.

2. Electricity 🔑19(3)

Where pole line was owned and maintained exclusively by power company, along a public street just inside the curb line, power company had exclusive right of control over such line which was all that was required to satisfy the first prerequisite for the application of the doctrine of "res ipsa loquitur" in determining power company's liability for injuries sustained by occupants of automobile which collided with the pole.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Evidence 🔑20(1)

It is common knowledge that high voltage wires do not ordinarily fall upon the highway without negligence on the part of those in control of such wires.

4. Electricity 🔑19(3)

In action against power company for damages sustained when its wire broke and fell into street and automobile occupied by plaintiffs collided with pole, where defendant admitted exclusive ownership and maintenance of the pole line, plaintiffs were not required to prove that such an accident does not ordinarily happen without negligence of defendant.

5. Electricity 🔑19(3, 13)

In action against power company for damages sustained when wire broke and fell into street and automobile occupied by plaintiffs collided with pole, where defendant's experts gave opinion that fall of wire was result, not cause, of collision, but plaintiffs' experts testified that collision could not have caused the fall, inference of defendant's negligence, arising from its admitted exclusive ownership and maintenance of the pole line was not dispelled by clear, positive, uncontradicted evidence not open to doubt, hence doctrine of "res ipsa loquitur" was applicable and court properly instructed jury thereon.

6. Appeal and error 🔑1064(1)

Where defendant contended on appeal that court committed prejudicial error in instructing jury on doctrine of res ipsa loquitur, but it did not appear that result would have been different if instructions had been given in the manner claimed by defendant to be correct, judgment would not be reversed on the ground of any error in instructions.

7. Appeal and error 🔑260(3)

Where plaintiffs' counsel objected to question put to defendant's expert and moved to strike the answer thereto, and court granted the motion and defendant's counsel agreed to pass the question for the time and did not thereafter refer to the subject matter of the question, error could not be predicated on the striking of the answer.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Wilma Taylor and others against the Pacific Gas & Electric Company, for damages sustained when an automobile occupied by plaintiffs collided with a pole of the defendant. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, and Ezra Decoto, of Oakland, for appellant.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for respondents.

SPENCE, Justice.

Plaintiffs Robert M. Taylor and Wilma Taylor are husband and wife. Plaintiff Robert E. Taylor is their minor son. This action was brought to recover damages alleged to have been sustained by plaintiffs when the automobile of plaintiffs ran into a pole of the defendant company under the circumstances hereinafter set forth. The cause was tried by a jury, plaintiffs had judgment and defendant appeals.

The accident occurred on Hopkins Street in the city of Oakland, which street runs in a general northerly and southerly direction in the vicinity in question. The defendant, a public utility corporation, maintains its high voltage power lines upon poles which are located just inside the curb line along the westerly side of said street. The poles are the ordinary heavy wooden poles customarily used for that purpose and are about 50 feet in height. On the day of the accident, one of the high voltage wires broke and the two ends of said broken wire fell to the street. Mrs. Taylor had been driving along Hopkins Street in a northerly direction. She testified that she was travelling at bout 35 miles per hour in a 45 miles per hour zone at the time that the wire broke and fell into the street in front of her. In this sudden emergency, she swung her car to the left or in a westerly direction, put on her brakes but nevertheless ran into the pole in question. Defendant briefly summarizes her testimony as follows: "There is no dispute that the record shows that respondent Wilma Taylor testified that as she was driving an automobile along the street she saw suddenly a wire falling and emitting flashes ahead practically in her path and that in seeking to avoid it she swung her car to the left across the left half of the highway, up onto the sidewalk and into that one of appellant's poles from which the wire had broken. It was admitted to be appellant's pole and wire." The testimony of Mrs. Taylor was corroborated by several disinterested witnesses.

[1] Upon the trial, defendant proceeded upon the theory that the collision of the automobile with the pole had not been caused by the breaking of the wire but, on the contrary, the breaking of the wire had been caused by the collision of the automobile with the pole. Defendant introduced some evidence, principally certain expert testimony, tending to support this theory and this issue of fact was clearly presented to the jury by an instruction reading, "If you believe from the evidence that the wire was caused to fall as the result of the automobile driven by Mrs. Taylor striking the pole, you must then return your verdict in favor of the defendant." The jury, by its verdict in favor of plaintiffs, impliedly found against defendant on this issue of fact thereby repudiating defendant's theory. It is conceded that there was abundant evidence to sustain such implied finding.

[2-4] On this appeal, defendant contends that the trial court erred in giving any instructions on the doctrine of res ipsa loquitur. Defendant first argues that "no exclusive control of this pole line was proved" as the pole line was along a public street just inside the curb line and "it was open to influences and forces entirely beyond the control of appellant." It is admitted, however, that the pole line was owned and maintained exclusively by defendant. It therefore had the exclusive right of control over said pole line and this is all that is required to satisfy the first prerequisite for the application of the doctrine. Van Horn v. Pacific Refining, etc. Co., 27 Cal.App. 105, 148 P. 951; Helms v. Pacific Gas & Electric Co., 21 Cal.App.2d 711, 70 P.2d 247. Defendant further argues that "No proof was made that this kind of accident does not ordinarily happen without negligence of appellant." We are of the view, however, that it is a matter of common knowledge that high voltage wires do not ordinarily fall upon the highway, in the manner in which plaintiffs' evidence showed that this wire fell, without negligence on the part of those in control of such wires and that therefore plaintiffs were not required to make such proof. See Diller v. Northern Calif. Power Co., 162 Cal. 531, 123 P. 359, Ann.Cas.1913D, 908; Langazo v. San Joaquin L. & P. Corp., 32 Cal.App.2d 678, 90 P.2d 825; Burns v. Holyoke Street Ry. Co., 253 Mass. 443, 149 N.E. 127; Simmons v. Commonwealth Edison Co., 203 Ill.App. 367; Union Gas & Electric Co. v. Waldsmith, 31 OhioApp. 118, 166 N.E. 588; 18 Am.Jur. 504–506. Defendant further argues that "assuming this doctrine is otherwise here applicable, any inference of appellant's negligence was here dispelled by 'clear, positive and uncontradicted evidence which is not open to doubt.'" It is a sufficient answer to this argument to point out that the evidence upon which defendant relies was not of the class described. Said evidence was that of experts produced by defendant who gave their opinions, in response to hypothetical questions, that the falling of the wire was caused by the collision of the automobile with the pole. The plaintiffs, however, produced expert testimony to the effect that the falling of the wire could not have been caused by such collision. Defendant now states that its explanation of the cause of the fall of the wire was "either the impact of this automobile or some other force that started a violent swaying of this pole to tear the

wires loose." As above stated, the direct evidence of several witnesses, which was accepted by the jury, shows that the impact of the automobile with the pole followed rather than preceded the falling of the wire. As to any "other force" for which the defendant was not responsible, the record is devoid of any evidence on the subject. In the absence of such evidence, even defendant's experts were forced to concede that if the wire fell before the automobile collided with the pole, some defect caused the wire to fall. For example one of defendant's experts was asked on cross-examination, "Now, assuming the wires were already down when she approached, then your answer would have to be that there was something defective up there wouldn't it?" He answered, "Yes."

[5] We conclude that the doctrine of res ipsa loquitur was applicable under the facts presented by the record; that we cannot say that the inference of negligence was dispelled by the testimony introduced; and that it was therefore proper for the trial court to instruct the jury with respect to said doctrine.

[6] Defendant further contends that even assuming that it was proper to instruct the jury with respect to said doctrine, the trial court committed prejudicial error in the instructions given to the jury on that subject. The trial court instructed the jury quite fully, giving some instructions proposed by plaintiffs and some instructions proposed by defendant with respect to said doctrine. We find no error, and in any event no prejudicial error, in the instructions given and it would serve no useful purpose to set forth said instructions here. As above stated, plaintiffs were entitled to the benefit of doctrine of res ipsa loquitur. In explanation of the cause of the falling of the wire, defendant offered only one theory which found any support in the evidence to show its freedom from negligence, to wit: the theory that the falling of the wire had been caused by the collision of the automobile with the pole. That theory was repudiated by the jury. We believe that defendant's claims of error in the instructions are hyper-technical and that there is no likelihood that the result would have been different if instructions had been given in the manner which defendant asserts would have been in all respects technically correct.

[7] The only remaining contention of defendant is that the trial court committed prejudicial error in striking out the opinion of an expert witness. This assignment of error is based upon the portion of the record which reads as follows:

"Q. From your investigation are you able to form an opinion as to what caused that wire to burn and fall to the ground? A. The force of the impact of the automobile against the pole knocked the wires out of the insulators.

"Q. What caused them to burn? A. The two conductors lying against the steel pins caused a short resulting in an arc which burned the B phase down. * * *

"Q. Can you think of any other reason for the wires falling than the one you just gave? A. None whatever.

"Q. State whether that kind of accident causing those wires to fall and burn in the manner they did is an accident that usually occurs because the company is negligent? * * * A. No, sir.

"Mr. Mitchell. Just a moment. The witness answered before I could make the objection, and I object on the ground it is argumentative.

"The Court. Isn't that the very question the jury is going to pass on?

"Mr. Briare. It is within the province of the expert, I believe.

"Mr. Mitchell. I move to strike that out on the ground it went in before I had a chance to make objection.

"The Court. Granted. In other words, an expert can't give an opinion on the very issue that the jury has to determine.

"Mr. Briare. May we be heard on that subject, your Honor?

"The Court. All right.

"Mr. Briare. We can take it up at the recess. I think there is an authority in this class of case where an expert might offer an opinion.

"The Court. I had this same question with the Lynn Bent case.

"Mr. Briare. We will pass it for this time."

Following the striking of the answer upon plaintiffs' motion, which motion was made upon the ground that the answer went in before counsel had a chance to interpose an objection, there was some discussion regarding the admissibility of the evidence but the court signified its willingness to hear argument on the subject. Thereupon counsel for defendant suggested that argument be had during the recess and said

"We will pass it for this time." This constituted a temporary withdrawal of the question and it does not appear that the question was again asked or that any further reference was made to the subject during the trial. It requires no citation of authority to sustain our conclusion that error may not be predicated upon the portion of the record to which reference has been made.

The judgment is affirmed.

NOURSE, P. J., concurred.

57 Cal.App.2d 311

DOUGLAS AIRCRAFT CO., Inc., v. BYRAM, County Tax Collector, et al.

Civ. 13675.

District Court of Appeal, Second District, Division 3, California.

Feb. 24, 1943.

1. Taxation 🔑5, 85

Where contract for construction by company of airplanes for federal government provided that title to all property upon which any partial payment was made should vest in government, title to materials and parts became property of federal government upon making of partial payments, and thereafter material and parts could not be taxed as property of company, notwithstanding that there was no change of possession. Civ.Code, §§ 3439, 3440; Pol.Code, §§ 3716, 3717, 3629; Const.1849, art. 11, § 13; Const. art. 13, § 1.

2. Fraudulent conveyances 🔑179(1)

As between a seller and those not creditors of a seller, a transfer without any change of possession is not rendered invalid by statute. Civ.Code, § 3439.

3. Taxation 🔑5, 85

Where contract for construction by company of airplanes for federal government provided that title to all property on which any partial payment was made should vest in government, title which passed to government pursuant to contract was not a bare legal title, for security only, with beneficial title remaining in company, and hence, material and parts after making of partial payments by federal government could not be taxed as property of company. Const.1849, art. 11, § 13; Const. art. 13, § 1.

4. Taxation 🔑61

A "usufructuary right" that is, the right of using and enjoying the profits of a thing belonging to another, without impairing the substance, is a "property right" subject to taxation. Const.1849, art. 11, § 13; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right" and "Usufructuary Right".

5. Taxation 🔑67

Where contract for construction by company of airplanes for federal government provided that title to all property upon which any partial payment was made should vest in government, company, after partial payments by federal government pursuant to contract, retained no "possessory interest" in materials and parts subject to taxation. Const.1849, art. 11, § 13; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Possessory Interest".

6. Taxation 🔑543(8)

Where inclusion of city as a party defendant in taxpayer's action to secure refund of taxes was authorized by statute because part of tax collected by county had been levied by city, a judgment against city for whole sum collected was not thereby warranted. St.1939, p. 1372, § 5138.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Douglas Aircraft Company, Inc., against H. L. Byram, County Tax Collector of the County of Los Angeles, and others, to secure a refund of taxes paid by plaintiff on partially constructed airplanes and materials. From a judgment for plaintiff, the defendants appeal.

Affirmed in part, and reversed in part.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellants.

H. W. Elliott, of Los Angeles, and H. M. Dunham, of Fresno, for respondent.

BISHOP, Justice pro tem.

The plaintiff seeks by this action to secure the refund of taxes paid by it on partially constructed airplanes and materials, on the ground that the unfinished planes and parts were tax exempt, because they belonged to the United States government, and the fact that the plaintiff had possession of the incomplete planes and materials, as it made use of them in fulfilling its contract with the federal government to build airplanes, did not give it a taxable interest in them. The defendants having failed to file answers to plaintiff's amended complaint within the time allowed them after their demurrers to that complaint were overruled, judgment was rendered that the plaintiff recover from the defendants "and each of them" the sum of $16,191.99. From a procedural standpoint, then, the problem presented is whether or not, as to each defendant, the amended complaint states any cause of action that might support the judgment, for the defendants have appealed from the judgment on the judgment roll alone. We have reached the conclusion that a cause of action was stated against the defendant county, but that no cause of action was stated against any of the other defendants, excepting only the defendant city of Santa Monica, and that as to that defendant no judgment for any particular sum of money was warranted.

We find it alleged, in the amended complaint, that prior to the first Monday in March, 1940, the plaintiff and the War Department of the United States government had entered into contracts for the manufacture, sale and delivery by the plaintiff to the government of airplanes and spare parts therefor at a total price of $25,518,465.13. By a term of these contracts, partial payments were to be made as the work progressed, based on authenticated statements of expenditures. "In preparing such statements of expenditures the material delivered in the factory and work done upon such material for the performance of the contract may be taken into consideration." Then there is this provision of the contract:

"Article 37. Title To Property Where Partial Payments Are Made.—The title to all property upon which any partial payment is made prior to the completion of this contract, shall vest in the Government in its then condition forthwith upon the making of any such partial payment or payments."

In furtherance of its obligations under these contracts, the amended complaint continues, the plaintiff purchased materials and performed work upon them, then rendered statements and invoices showing in detail and by item the materials delivered. Before the first Monday of March, 1940, partial payments amounting to $5,720,352.30 had been made, and the materials delivered in the factory and in process of fabrication, upon which the progress payments were in part based, were earmarked as property belonging to the United States government. In the statement furnished the county assessor by the plaintiff, as required in 1940 by section 3629, Political Code, the plaintiff listed not only its own property but also that earmarked as belonging to the federal government, but the latter was specified as being the property of that government and not the property of the plaintiff. The county assessor, however, as of the first Monday of March, 1940, assessed to the plaintiff the property earmarked and reported to him as belonging to the federal government, including it under the following description: "The possessory interest and all other right, title and interest in and to the personal property located at 3000 Ocean Park Boulevard, Santa Monica, and described as follows: Raw Materials, Planes in Process and Finished Planes, $956,360.00." There was considerable property, admittedly owned by and properly assessable to the plaintiff, included under this assessment, but of the total, $285,251 was included as the value of the possessory (or other) interest of the plaintiff in the earmarked property. The plaintiff appealed, unsuccessfully, to the Board of Supervisors of the defendant county, sitting as a Board of Equalization, for an elimination of the assessment on the earmarked property, and then, in December, it paid, under protest, the sum of $16,191.99 required because of the assessment to it of an interest in the earmarked property. Within six months thereafter this action was commenced.

[1, 2] We have no doubt that the materials and parts upon which partial payments had been made became, pursuant to the contract provisions, the property of the federal government. It was so held in Craig v. Ingalls Shipbuilding Corp., 1942,

192 Miss. 254, 5 So.2d 676, where contract provisions much like ours were construed, and we see no basis for giving the contracts any other construction. The suggestion that there was no passing of title because there was no change of possession as required by section 3440 of the Civil Code, does not stand analysis. The section, one of those in the Uniform Fraudulent Conveyance Act (Civ.Code, sec. 3439) provides in its pertinent part: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * *." As between a seller and those not creditors of the seller, a transfer without any change of possession is not rendered invalid. The County, so far as the complaint reveals, was not a creditor of the plaintiff at any time before noon of the first Monday of March, at which time it may be said to have become the plaintiff's creditor for taxes which then became a lien on any property belonging to the plaintiff. Pol. Code, secs. 3716, 3717. But it is arguing in a circle to say that the county became the creditor of the plaintiff with respect to the property in question, for the county became plaintiff's creditor, as to that property, only in the event that title had not passed to the federal government, but the theory on which it is argued that retention of possession prevented title from passing, is that the county became plaintiff's creditor. True, it appears that the plaintiff owned other property and so became obligated to pay taxes to the county, with the result that the county became its creditor. Were the county endeavoring to collect the taxes due it on this other property by levying on the property involved in this action, it might well be that it could insist that it was the plaintiff's creditor and that the transfer not accompanied by an immediate change of possession, was, as to it, fraudulent and void. Lindstrom v. Spicher, 1925, 53 N.D. 195, 205 N.W. 231, 41 A.L.R. 968; Richards-Conover Hardware Co. v. Sharp, 1939, 150 Kan. 506, 95 P.2d 360. But the county's relation to the property in question does not appear to be that of a creditor; and it is only as a creditor that the county may question the validity of the transfer to the federal government.

[3] The county further contends that, if title did pass to the federal government, it was at most a bare, legal title, for security only, the beneficial title remaining in the plaintiff. This contention falls for lack of a tenable premise. The terms of the contract providing that title passes contain no suggestion that it is taken for security only. In one sense, of course, that was its purpose. When anyone buys an automobile or a bond he makes sure that he takes title to secure himself from possible loss due to action by the seller's creditors or by the seller himself. But to say that the federal government took title "for security" in this sense, is not to forward the county's case at all, and is not its contention. But it cannot be successfully argued that the federal government took the legal title to secure the obligation of the plaintiff to perform its contract, for here are the alternatives: (1) If the plaintiff fails to finish a plane as agreed, the federal government trucks its property away; (2) if the plaintiff fully performs its contract by completing a plane, the federal government flies its property away. Title is not restored to the plaintiff when it performs its obligation. It is plain that title was not taken to secure the performance of any obligation.

If, as appears to be the fact, the plaintiff has no other legal interest in the property in question, there remains its possessory interest, and this, the county urges, is a taxable interest. Admittedly there is no statutory provision explicitly covering the situation, and no decision in point, but reliance is placed upon the decisions holding that a possessory interest in real estate is taxable, even though the property itself may be exempt. We are challenged to determine that a like interest in personal property is taxable, without awaiting legislative or judicial precedent, our attention being directed to the case of State v. Moore, 1859, 12 Cal. 56, fortified by People v. Shearer, 1866, 30 Cal. 645, where possessory interests in exempt real property were held (or said) to be taxable, although neither legislation nor earlier decisions then supplied a precedent.

The problem considered by the Supreme Court in the two cases just referred to and the problem before us have one vital element in common; in each the question is:

Is the "possessory" interest property? If so, it is taxable, by virtue of the constitutional mandate that "all property * * * shall be taxed" (Const.1849, Art. XI, sec. 13, present Const., Art. XIII, sec. 1). The possessory interests involved in the two early cases, one to mining property, the other to agricultural land, were found to be "property." In the Moore case it was pointed out: "the right of the locator to sell, hypothecate, or in any manner dispose of his property in a mining claim, has been upheld, as well by legislative enactment as by judicial decisions. * * * in McKeon v. Bisbee, 9 Cal. 137 [70 Am.Dec. 642], we held that the interest of the possessor of a mining claim was property under the law, and subject to be seized and sold under execution. The Legislature recognized a proprietary interest in the possessor of mining claims by authorizing their hypothecation." In the Shearer case 30 Cal. at page 659, the court stated: "These possessions, as before stated, are recognized and protected as property by the Legislature in many instances, and by the Courts and the people always."

[4, 5] If plaintiff's right to have possession of the federal government's property could itself be said to be property, we would, of course, conclude that it was taxable, but it does not have the characteristics of "property." This is not because the objects to which the interest attaches is personal, rather than real, property, but because the interest is not "property," judged by any standard of which we have knowledge. A usufructuary right, that is, "the right of using and enjoying the profits of a thing belonging to another, without impairing the substance" (Heintzen v. Binninger, 1889, 79 Cal. 5, 6, 21 P. 377), is a property right, as illustrated by the cases holding a leasehold interest in land to be a taxable property right. See Hammond Lumber Co. v. Los Angeles County, 1930, 104 Cal.App. 235, 239, 240, 285 P. 896. Obviously that is not the nature of the right which the plaintiff had in the property involved in this action. A common characteristic of a property right, is that it may be disposed of, transferred to another. It seems plain to us that that characteristic is lacking in plaintiff's possessory interest. The legislature has not authorized the hypothecation of such an interest, nor given it any recognition as "property." The use which the plaintiff was permitted to make of the partial planes and parts was entirely for the benefit of their owner, the federal government, and not for the benefit of the plaintiff. The fact that the plaintiff was to be paid for fabricating a plane out of the government's material does not change its use of the material from a use for the government to a use for the plaintiff. Plaintiff's compensation becomes due because it makes use of the materials and partially completed planes, not for itself, but for the government.

Whatever argument, in support of our view, could be made out of the fact that section 107 of the Revenue and Taxation Code, adopted in 1939, St.1939, p. 1277, contains a definition of "possessory interests," and limits them to land and to taxable improvements on tax exempt land, is unavailable to us because the Code by its own terms (section 27) did not become effective until February 1, 1941, practically a year after the assessment which gave rise to this case. This explains our reference throughout the opinion to sections of the Political Code, except where the procedural question of parties defendant was involved.

[6] Our conclusion that the plaintiff had no possessory interest arising to the dignity of taxable property, calls for the affirmance of the judgment which permitted the plaintiff to recover from Los Angeles County the tax paid. On no theory, however, was the plaintiff entitled to a judgment against any of the other defendants for the recovery of the tax illegally exacted. This is admitted by the respondent and does not merit discussion. The inclusion of the city of Santa Monica as a party defendant was authorized by section 5138 of the Revenue and Taxation Code, as a part of the tax collected by the county had been levied by the city, but a judgment against the city for the whole sum collected was not thereby warranted.

The judgment is accordingly affirmed, in so far as it affects the defendant county of Los Angeles; it is reversed as it affects the remaining defendants.

DESMOND, P. J., and SHINN, J., concur.

57 Cal.App.2d 99

DOLCH v. RAMSEY.

Civ. 3206.

District Court of Appeal, Fourth District, California.

Feb. 10, 1943.

Hearing Denied April 8, 1943.

1. Mines and minerals 🔑51(5)

The measure of damages in an action for trespass on a mining claim, in absence of oppression, fraud, or malice is the amount which will compensate for all detriment proximately caused by the trespass.

2. Mines and minerals 🔑51(5)

Where one invades another's mine as result of inadvertence or an honest mistake, measure of damages therefor is value of mineral extracted, less cost of mining and milling.

3. Mines and minerals 🔑51(5)

Where trespass on mining claim is intentionally committed, with knowledge of owner's rights, measure of damages is value of minerals after reduction, without deducting expense of mining and milling.

4. Mines and minerals 🔑20(1)

The locator of a mining claim must erect corner posts or monuments in making his location. St.1939, p. 1080, § 2302.

5. Notice 🔑6

A person may not have actual knowledge of certain facts, but if he has knowledge of sufficient facts to cause a reasonably prudent person of ordinary intelligence to make inquiry, the law will impute knowledge of those facts which may be easily ascertained by reasonable inquiry.

6. Notice 🔑5

Where the law imputes knowledge, it has the same legal effect as though there was actual knowledge.

7. Mines and minerals 🔑51(5)

Where defendant, who started working mining claim in December, 1940, had knowledge that property had been located as mining claim by another, that prior locator had claimed it as late as 1937, and that at least one corner post was in place, but defendant did not attempt to erect corner posts and locate property, defendant had constructive "notice" that claim had been patented and belonged to plaintiff, and therefore defendant was a "trespasser" and was liable for value of gold he took, notwithstanding cost of mining and reducing ore was much greater than its value. St.1939, p. 1080, § 2302.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice" and "Trespasser".

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Appeal from Superior Court, San Bernardino County; Benjamine F. Warmer, Judge.

Action by Elizabeth Dolch against M. G. Ramsey for gold wrongfully taken from a mine. Judgment for defendant, and plaintiff appeals.

Reversed.

Duckworth, Mussell & King, of San Bernardino, for appellant.

James L. King, of San Bernardino, for respondent.

MARKS, Justice.

[1-3] This is an appeal from a judgment refusing plaintiff damages for gold ore wrongfully taken by defendant from a patented mine owned by plaintiff.

The parties are in substantial agreement on the law governing the case. They agree that the applicable rule is correctly stated in 17 Cal.Jur. 540, section 182, as follows: "The measure of damages in an action for trespass on a mining claim, in the absence of oppression, fraud or malice, is the amount which will compensate for all the detriment proximately caused by the trespass. Accordingly, where one invades another's mine as the result of inadvertence or an honest mistake, the measure of damages therefor is the value of mineral extracted, less the cost of mining and milling. * * * Where the trespass is intentionally committed, with knowledge of the owner's rights, the measure of damages is the value of the mineral after reduction, without deducting the expenses of mining and milling." See Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093; Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 87 P.2d 1045; Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215.

It is undisputed that defendant removed 212 tons of ore from the property. Fifty tons, which had been previously mined, were taken from a dump and the balance was mined by defendant from an old tunnel and drift. It is also undisputed that defendant sold the concentrates from this ore for $2,979.32; that the mining expense was $3,034.51, and the milling, concentrating and selling costs were $1,507.27, resulting in a net loss to defendant of $1,562.46.

The trial court found: "That the defendant, M. G. Ramsey, did on or about December 5, 1940, enter upon said premises in good faith and believing that said premises were open for location and without any knowledge of any other claim thereon and thereto and for a period of approximately six months thereafter performed work openly upon said premises and did remove ore therefrom as hereinbefore found. That the said defendant, in so doing, acted without oppression, fraud or malice and as a result of inadvertence and an honest mistake and without any knowledge of the ownership of plaintiff."

The sole question for decision is whether the evidence, or reasonable inferences to be drawn from it, supports the foregoing findings. If so, the judgment for defendant must be affirmed. If the contrary is true it must be reversed.

The claim was properly located by plaintiff's husband, since deceased, in 1897. It was again located by plaintiff. These parties built a road to the property and conducted mining operations. They made cuts, sank a shaft and drove a tunnel 154 feet long into the mountain. They removed ore and plaintiff's son who had worked on the property testified that gold had been recovered and sold. He did not know the amount nor its value.

Plaintiff applied for a patent in 1939. A patent, dated February 6, 1940, was issued to her and was recorded on October 21, 1940.

The engineer who surveyed the property in November, 1937, as a preliminary to the application for a patent, set 4x4 inch corner posts that extended about four feet above the surface of the ground. These were originally painted white.

At the time defendant first went onto the property, and during all of his operations, these corner posts were in place and were plainly marked V-1, V-2, V-3 and V-4, and had the number of plaintiff's patent on them. To perpetuate the locations the surveyor blazed three witness trees near three of these corner posts with the same information on them. He also placed a stake near one of the corner posts. Attached to this stake was a board upon which was fastened a map of the mine. This map carried the information that a patent had been applied for and had been issued. The heavy paper carrying the map had dimensions of about 14 by 20 inches. The map and the certificate of the cadastral engineer were printed in black ink and were surrounded by a conspicuous black border. From a photograph in evidence it was plainly visible to anyone who would look for it.

It is admitted that the terrain was rough and covered with scattered brush and that there were some trees growing on the property. Defendant admitted that one of the corner stakes was clearly visible from a road he built into the mine. He admitted having seen this stake. He made no investigation of it and claimed it conveyed to him no suggestion that the property might be claimed by another. He also admitted that another corner stake was visible from near the dump although he denied having seen it prior to the time he was advised of plaintiff's ownership of the property. He produced a picture which he had taken from near the dump on which this stake clearly appears. The conclusion is inescapable that had he looked from a position near the dump towards this corner stake he must have seen it.

Defendant had been connected with mines and mining for several years. He had operated two leased mining claims and had helped locate another claim. He had owned and operated his reduction plant for several years. It had a capacity of fifty tons of ore a day and was situated less than a mile from plaintiff's mine. He had lived near this plant for several years.

He testified that he first went onto plaintiff's property on December 4, 1940; that he saw the old workings and the discovery monument. He returned the next day with Arthur May, his mining foreman. They found an old rusted can in the discovery monument. It contained the original location notice signed by Edward Dolch in 1897, another signed by Mr. and Mrs. Dolch and Ole E. Rossen, and a third by Mrs. Lizzie Dolch. The can also contained the following:

"Notice

"Notice of Exemption from Assessment work on this claim for year 1936-1937 has been filed with County Recorder at San Bernardino.

"Mrs. Edward Dolch
(By M. Law)"

Arthur May prepared a new location notice in which he copied the description from the Dolch notice. It was signed by defendant and returned to the can with the other papers and placed in the discovery monument. A duplicate was recorded.

Ramsey testified that no monuments were erected by him or for him; that "we assumed the previous locator would have those up." He also testified that he did not look for the corner or side monuments but merely saw the discovery monument. He further testified: "I saw this one post, number '3', from the road, but I didn't see any sign on it, and didn't know what it was, and didn't know what it represented.

"Q. Was it the only post that came under your observation during your observations there? A. As far as I remember. I don't remember seeing any other post; it would have made little difference; the only thing I went by was the location monument where the can was.

"Q. After discovering or finding the contents of this can, with the location notices, the last one of which was apparently in 1939, did you attempt to find any other location notices, or any other monuments of any kind? A. No; not to search for any monuments; we didn't look for any other monuments.

"Q. You depended entirely upon what you found in the can in the location monument? A. That is right.

"Q. Did you at any time ever go over and examine and look closely at this post number '3', that you stated you noticed, going by? A. No; just saw it from a distance.

"Q. Did you at any time see any of the other posts—'1A', '2', or '4'? A. Not that I recall. I might have passed by them; but I wouldn't have known what they represented if I did see them."

Defendant built a road into the property which ran within about fifty feet from the corner post he admitted having seen. He moved machinery in and commenced his mining operations, employing three or four men in this work. On June 7, 1941, he was informed that he was working on a patented mine belonging to plaintiff. He immediately moved off from the property.

The finding to the effect that Ramsey entered and worked the property in good faith, believing that it had been abandoned and was open for location, was based upon the general appearance of the workings which were old and delapidated and on his testimony, as follows:

"Q. Now, Mr. Ramsey, at the time that you first went on this property and posted your notice or claim in the can and filed the notice of claim in the Recorder's office, did you at that time have any information or knowledge that anybody else had any claim to or claim on the property which you later worked on, and which you now know as Dolch's property? * * * A. I had no knowledge that it was patented, or that anyone had a claim on it. * * *

"Q. Did you at any time during the period that you operated on the property, from December 5th, approximately, 1940, to when you discontinued, about June 7th, 1941—did you at any time have any knowledge or information that anyone else had any claim to or ownership in the property? * * * A. I didn't know it was patented or that it was claimed by anybody at any time that I was on there."

This question is now presented: Does this evidence support the finding of the trial court of good faith on Ramsey's part when undisputed evidence shows that had he used the slightest diligence or had he obeyed the law in making his location he would have discovered that the property was patented and that Mrs. Dolch was the lawful owner of it?

Section 2302 of the Public Resources Code, St.1939, p. 1080, provides as follows: "The locator or locators of any lode mining claim shall define the boundaries of the claim so that they may be readily traced, but in no case shall the claim extend more than fifteen hundred feet along the course of the vein or lode, nor more than three hundred feet on either side thereof as measured from the center line of the vein at the surface. Within sixty days after the date of location of any lode mining claim hereafter located, the locator or locators shall erect at each corner of the claim and at the center of each end line, or the nearest accessible points thereto, a post not less than four inches in diameter, or a stone monument at least eighteen inches high."

[4] If, as Ramsey testified, the description in his location notice was copied from

the Dolch location notice, the boundaries and corners of the two locations would be identical. He was required by law to erect corner posts or monuments in making his location. If he had done so he would have discovered the corner posts of the patented mine, the witness trees with their markings and the map of the mine, all bearing the information that a patent had been issued to plaintiff.

[5, 6] His belief that the mine had been abandoned and was open to location was his own conclusion, not based on what was in plain sight (the two corner posts), nor on what he could have discovered by the use of reasonable diligence, and on what he failed to discover by reason of his failure to obey the law in making his location. We believe that his good faith should be measured, not entirely by the words he used in testifying, but by those words when weighed in the light of information easily available to him and the reasonableness of his conclusion when measured by what was in plain sight and what he could have learned by the use of his natural senses and the employment of reasonable prudence. A person may not have actual knowledge of certain facts, but if he has knowledge of sufficient facts to cause a reasonably prudent person of ordinary intelligence to make inquiry, the law will impute knowledge of those facts which may be easily ascertained by reasonable inquiry. When the law imputes knowledge, it has the same legal effect as though there was actually knowledge.

The rule is thus stated in Sterling v. Title Ins. & Trust Co., 53 Cal.App.2d 736, at page 748, 128 P.2d 31, at page 38: "A common situation is one where conflicting property rights are involved, and of these Mr. Pomeroy says (Pomeroy's Equity Jurisprudence, Vol. 2, 4th Edition, p. 1154, sec. 608): 'Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth, to a knowledge of the interest, claim, or right which really exists, then the party is absolutely charged with a constructive notice of such interest, claim, or right.'" See, also, Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; West v. Great Western Power Co., 36 Cal.App.2d 403, 97 P.2d 1014; Price v. Mason-McDuffie Co., 50 Cal.App.2d 320, 122 P.2d 971.

Defendant had knowledge that the property had been located as a mining claim by others; that the prior locator had claimed it as late as 1937; that at least one corner post was in place. As we have observed, had he obeyed the law and erected corner posts when he attempted to locate the property he would have found that the mine was patented and belonged to plaintiff. However, he preferred to rest on the appearances of the workings which conveyed the impression that the mine had not been worked for a considerable time. His conclusion that the claim had been abandoned rested on this one fact. As he was a mining man of several years experience he should have known of the several mining moratorium acts of Congress which excused assessment work by those taking advantage of them. He had actual notice that plaintiff had taken advantage of one of them. Thus he knew or should have known that assessment work on the mine might have been excused for several years. Thus his conclusion that the claim, because of its dilapidated condition with no sign of recent work, had been abandoned, rests upon a most unsubstantial foundation. The conclusion seems inescapable that a man of ordinary intelligence and common prudence would have been warned by these facts within his knowledge and would have investigated the ownership of the property before spending $4,541.78 on it and removing ore of the value of $2,979.32 which was actually the property of another and to which he had no right.

[7] We must hold that defendant had constructive notice that the claim had been patented and belonged to plaintiff; that he was a trespasser when he went on the property and removed gold ore that belonged to another. Under these circumstances he did not act in good faith without knowledge that the mine was the property of another. Under such circumstances he was liable for the value of the gold he took, without any deduction of his expenses in wrongfully taking it. Lightner Mining Co. v. Lane, supra. The case of Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 12 S.Ct. 877, 36 L.Ed. 762, is factually similar to the instant case. In 1879, Harshaw, and others, made application to the Land

Office for a patent to the Alta Mine and paid into that office the amount required for that purpose and received a certificate of purchase. Thereafter they sold the mine to the plaintiff which worked it until 1882, during which year it did no assessment work thereon. In 1883, J. K. Luttrell, believing the claim abandoned because of the failure to do assessment work, located the mine, took possession and worked the property. The patent was issued to Harshaw and his associates in January, 1884. Plaintiff, as successor to Harshaw and his associates, sued for the value of the gold removed from the mine.

The Supreme Court held that the application for the patent and the acceptance of the purchase price by the United States made Harshaw and his associates the equitable owners of the mine and that thereafter no assessment work was necessary; that under these circumstances the belief of Luttrell that the claim had been abandoned because no assessment work was done in 1882 could not excuse the unjustified trespass.

On appeal the defendant urged that it should have been credited with its costs in mining the ore. This claim was rejected by the court. A similar conclusion was reached by the Ninth Circuit Court of Appeals in Big Sespe Oil Co. v. Cochran, 276 F. 216.

Defendant urges that the judgment should be affirmed because plaintiff was not damaged, since the cost of mining and reducing the ore was much greater than its value. This argument is without merit. It has been repeatedly held in many jurisdictions, including California, that under the circumstances here, the value of the minerals taken, without deduction for the cost of taking, furnish the correct measure of damages which, to that extent, are in the nature of a penalty for the wrongful trespass. This sufficiently appears in the cases already cited.

Defendant relies strongly on the case of Lightner Mining Co. v. Lane, supra, as supporting the judgment. A study of that case leaves the conclusion that defendant can get no support from it. The plaintiff brought the action to recover the value of gold ore taken from its mine The jury returned a verdict awarding the plaintiff the full value of the ore without any deduction for the mining costs. The Supreme Court reduced the judgment by the amount of those costs. It found the evidence sufficient to show fraudulent taking and fraudulent concealment of the taking of the ore by the employees of the defendants without their knowledge or consent and without any ratification on their part. The reason for the reduction of the judgment was summarized as follows: "It is the settled law of this state that exemplary damages cannot be given against a principal for the fraud of the agent, unless the principal either had knowledge of the fraud at the time, or authorized it, directly or by implication, or ratified it after it came to his knowledge." [161 Cal. 689, 120 P. 778, Ann.Cas.1913C, 1093.]

In the instant case defendant can claim no such exemption from liability because of ignorance. The mining was done under his direction. He knew the ore he received, reduced and sold, came from the mine although he may not have personally engaged in mining it.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

Hearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.

CITRON v. FRANKLIN.

Civ. 12203.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1943.

Rehearing Denied March 6, 1943.

Hearing Granted April 1, 1943.

1. Corporations 🔑116

Where agreement granted to optionee an option to purchase 25 per cent. of optionor's corporate stock and provided that if optionor sold his stock to others prior to exercise of the option, optionor would pay optionee 10 per cent. of excess of the amount so received over amount which optionor had paid into corporation, optionee was not required to exercise his option after such sale to others to be entitled to such excess. Civ.Code, § 3532.

2. Corporations 🔑116

Where option for purchase of corporate stock providing for computation of purchase price upon amount which optionor had paid into corporation was executed contemporaneously with agreement for employment of optionee by corporation, and no method was provided to determine such amount and optionee was employed by corporation until after sale of optionor's stock to others, option impliedly required optionor to furnish information as to his investment in corporation when optionee attempted to exercise the option during the life thereof, and delay in furnishing such information would extend the option until a reasonable time after such information had been furnished. Civ.Code, § 1655.

3. Corporations ⚷116

Where option for purchase of corporate stock provided that if optionor sold the stock to others prior to exercise of the option, optionor would pay optionee 10 per cent. of amount received for stock in excess of amount which optionor had paid into corporation, and impliedly provided that optionor's delay in furnishing optionee information as to optionor's corporate investment, which determined price of stock to optionee, would extend the option, and optionor, although timely requested by optionee to do so, did not furnish such information before selling stock to others, option was extended to time of sale, and optionee was entitled to the specified amount. Civ.Code, § 1655.

4. Evidence ⚷450(1)

Written agreement granting to optionee an option to purchase optionor's corporate stock and reserving to optionor the privilege of selling the stock to others provided that if optionor sold the stock to others, he would pay optionee 10 per cent. of the excess of the amount so received over the amount which optionor had paid into the corporation, and providing for computation of price to optionee on optionor's corporate investment, was unambiguous, and testimony relating to the understanding of the parties concerning the agreement was inadmissible. Civ.Code, § 1655.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by William J. Citron against J. J. Franklin on an option contract. Judgment for plaintiff, and defendant appeals.

Affirmed.

George Olshausen and B. E. Kragen, both of San Francisco, and Lionel B. Benas, of Oakland, for appellant.

Clarence A. Linn, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought to recover upon a contract. The cause was tried by the court sitting without a jury and plaintiff had judgment against defendant J. J. Franklin in the sum of $2,646.33. Said defendant appeals from said judgment.

Plaintiff had been engaged for many years in purchasing and booking motion pictures for use in the Hawaiian Islands. Defendant had been engaged for many years in exhibiting motion pictures. In 1934, defendant conceived the idea of organizing a corporation in the Hawaiian Islands and of forming a chain of motion picture theatres there together with a film exchange. In pursuance of this idea, defendant negotiated with plaintiff and, as a result of the negotiations, two written contracts were entered into on the same day, July 20, 1934.

One of said contracts, attached to the complaint as Exhibit B, purported to be entered into between plaintiff and the corporation which had not then been organized. It was called a "Purchasing Agency Agreement" and plaintiff was thereby employed by the corporation to act as its purchasing agent. It further provided that plaintiff should be elected vice-president of the corporation "as soon as same may be conveniently done."

The other of said contracts, attached to the complaint as Exhibit A, was entered into by plaintiff and defendant personally. This is the contract upon which the present action was based. It recited that defendant was the owner of all the stock of the corporation, that plaintiff was the purchasing agent thereof and that defendant desired to grant plaintiff the option to purchase 25 per cent of all the stock owned by defendant. It was then agreed as follows:

"1. That first party does hereby give and grant unto second party an option to purchase not more than twenty-five per cent (25%) of all the stock owned and held by first party in the Franklin Theatres Enterprises, Inc., a corporation.

"2. That the purchase price to be paid by second party upon the exercise of the aforesaid option shall be computed upon the amount of money or other consideration which first party has advanced and paid into the said corporation upon the date that the said option shall be exercised.

"3. It is distinctly understood and agreed that the aforesaid option shall remain in force for a period of one year from the date of the execution of this agreement, it being understood in this respect, however, that first party shall in no way be precluded from selling or disposing of the said stock to persons other than second party, provided, however, that second party shall share the proceeds from the sale of said stock as is provided hereafter.

"4. It is distinctly understood that in the event first party shall sell his stock in the aforesaid corporation to any one other than second party prior to the exercise by second party of his option, then and in that event first party agrees to pay unto second party ten per cent (10%) of all monies and other consideration realized by first party over and above the amount of money and other consideration which first party has paid for the aforesaid stock or has advanced to the said corporation."

After entering into these contracts, defendant went to the Islands and acted as the head of the new venture while plaintiff remained on the mainland and acted as purchasing agent. The corporation was formed, it prospered and defendant finally sold his stock on May 31, 1937, before plaintiff had exercised his option to purchase the stock but during the extended time for the exercise of the option as found by the trial court.

There was but little conflict in the evidence. Such conflict as there was relating to the sale price of the stock and the amount which defendant had paid into the corporation was resolved by the trial court in favor of defendant. The sale price was found to be $30,000 and the amount paid in by defendant was found to be $3,536.61. The trial court gave plaintiff judgment for 10 per cent of the difference between these amounts. On this appeal the findings concerning these amounts are not challenged.

[1] Defendant first contends that the trial court erred in imposing any liability upon him as the trial court found that plaintiff never exercised his option. The trial court found, however, that the option had been extended from time to time up to and including the time of the sale on May 31, 1937. Assuming for the moment that this latter finding was sustained by the evidence, we find no merit in defendant's contention. The intent and purpose of the parties appears entirely clear and unambiguous from a reading of the option agreement. Plaintiff desired and the agreement granted to him an option to purchase 25 per cent of all stock owned by defendant. Defendant desired to retain and the agreement reserved to him the privilege of selling all of his stock to others at any time. The agreement then provided that in the event defendant sold his stock to others "prior to exercise by second party of his option," defendant would pay to plaintiff 10 per cent of the amount received on such sale over and above the amount which defendant had paid into the corporation. It is apparently defendant's claim that plaintiff was not entitled to the benefit of the last-mentioned provision upon the sale of the stock but only in the event that plaintiff exercised the option after the sale had taken place. He stresses the words "prior to the exercise by second party of his option" and claims that those words cannot be construed to mean "during the life of the option." In other words, defendant urges a construction under which plaintiff would have been required to have gone through the formality of exercising his option to purchase the stock after defendant had sold all of his stock to others and at a time when defendant was no longer in a position to sell any stock to plaintiff. Such a construction is wholly unreasonable. The law does not require idle acts, Civ.Code, § 3532, and the clear intention of the parties, as evidenced by the terms of the agreement, was that plaintiff was to be entitled to the benefit of the 10 per cent provision immediately upon the sale to others at any time during the life of the option.

Defendant further contends that the evidence was insufficient to support the trial court's finding "That the terms of said agreement, Exhibit A, were extended from time to time and up to and including the date of which defendant, J. J. Franklin, sold all of his capital stock in the Franklin Theatrical Enterprises, Ltd., to Adolph Ramish, to wit: May 31, 1937." The evidence on this issue is quite voluminous and includes both letters and conversations. Neither the writing of the letters nor the making of the oral statements was denied by defendant. We need refer only to some portions of these letters and statements.

The written agreement was made on July 20, 1934 and, by its terms, the option was to remain in force for one year. After executing the agreement, defendant spent most of his time in the Islands while plaintiff spent most of his time on the mainland. At an early date, two men, Ramish and Rosen, had also become financially interested in the venture, Mr. Ramish being made president and Mr. Rosen a vice-president of the corporation. On May 23, 1935 and before the expiration of the one year, plaintiff wrote to defendant, "I informed him (Rosen) I was ready to put up my end of it and I presume either you or he will call on me shortly to cover my 25% interest. Am glad everything is going along fine. Feel confident the four of us will be on the easy side of the street." On May 31, 1935, defendant replied: "Regarding your interest you need not worry about that in the least. Whenever you are ready, you will make the deal with me as I suppose you know that my word is as good as a bond even if you didn't have a contract. * * * We all of course, are directors. I am glad that you realize that we are on the way and that we are almost reaching the goal we set out to reach. I am not forgetting for one moment, regardless of what you say I accomplished, the fine work that you did and without which I could not have accomplished what we did so far. A company with four men with experience that we have had must go places. We have everything in our favor."

On June 6, 1935, plaintiff again wrote defendant: "You may be assured that I have the utmost confidence in what you say and when you come to the mainland we can arrange all matters pertaining to my interest with the company." On July 5, 1935, defendant wrote plaintiff, "I have been held up here because of the many changes that we have had to make in the plans of the King Theatre but hope to get away very shortly and then we will be able to get together with you on your contract. * * * I cannot forget your loyalty throughout the storm, and I want to say to you that I am happy to have you as one of my partners."

Defendant did not come to the mainland as soon as expected and on September 25, 1935, he wrote plaintiff: "As I told you in previous correspondence that my word is as good as any bond and that I would live up to my agreement with you. * * *" On November 7, 1935, plaintiff wrote defendant: "I would like to know what amount of your stock and interest you would want me to take and just what it would cost me in round numbers? Of course, you know that I am not a man of means and have very little cash that I can place my fingers on." On November 14, 1935, defendant wrote plaintiff: "Regarding the stock, when you are out here (Honolulu) we will discuss that matter further. We had an understanding and when you come here we will discuss it further. When you see what we have here you will realize the opportunity."

In December 1935, plaintiff, Rosen and Ramish visited Honolulu and conferred with defendant. Plaintiff's testimony of the conversations then held and subsequently held concerning the option was corroborated by Rosen and was not denied by defendant. Plaintiff said, "How about my end of it? I want to take up my option." Defendant said, "We are too busy. I can't talk now. You don't have to worry. My word is my bond. You can come in any time you want." When plaintiff asked for the information concerning the amount defendant had invested, defendant told him that he was "very, very busy," that it was the "wrong time" to talk about it but that he would give him the information in the "very near future."

In 1936, defendant came to the mainland and conferred with plaintiff, Rosen and Ramish. The subject of the option was again discussed. It will be remembered that the unchallenged finding of the trial court shows that defendant had paid into the corporation only $3,536.61. In their conversations, plaintiff said: "Jack, now that you are here from Honolulu, I want to know definitely how much I am to put up for my option of twenty-five per cent. Tell me what it is." Defendant said, "Listen, I put up $42,000 of my own money." Both plaintiff and Rosen took exception to this figure, plaintiff saying it was "ridiculous" and Rosen saying "You haven't got that kind of money." Plaintiff asked defendant for a statement of the amounts advanced but defendant "put it off" saying, "I am too busy. I have to go back to the Islands."

The correspondence continued after defendant's return to the Islands but the tone of the letters gradually became less cordial. On October 16, 1936, defendant wrote to plaintiff, "Consolidated are now very anxious to make a deal along the lines we discussed and if our partners will not be thinking only of themselves we will come out with flying colors. Everything points to success." On the same day, plaintiff wrote to defendant: "As you must know, had you given me the exact amount you put into the theatre project, as now appears on the books of the company, I certainly would have handed you my check and I feel confident I could have put over a deal you now have in mind. You have always informed me that you had invested. At one time you told me $32,000, at another time $40,000. Both Mr. Ramish and Mr. Rosen on several occasions, informed me that you had been credited with $15,000 on the company's books. So you see, Jack, my reason for hesitating. You assured me many times that I could come in any time I desired. That your word with me was always good and that whenever I was ready I could come in. I have always been ready but the above held me back."

Defendant replied on November 11, 1936: "As to what Ramish says I have invested, he can say what he likes, the books will show I invested over $41,000.00 and not $15,000.00 as he says. The statement I gave you some time ago was made out by Mr. Turner, in that one it was $32,000.00, but I have since shown that it is $41,000.00." On December 14, 1936, defendant again wrote: "Regarding Mr. Ramish's statement of what I invested, it does not interest me in the least for it is contemptible falsehood. I showed you my investment, made up by Mr. Turner, from my invoices. Since then other invoices were given to Mr. Turner which made it $42,000, but that is neither here nor there. Our deal was not predicated on what I invested. You have certainly had every opportunity to come in but so far you never took advantage of it. It would be ridiculous to base the business on the amount of money Mr. Ramish suggests. My books speak for themselves."

On January 5, 1937, defendant wrote: "I always told you I would take care of you, meaning that you would not have to take up your stock according to the time limit in your contract, but if we should sell the business and you have not taken up your stock by that time you certainly couldn't expect me to close with you at such time * * * you have the same opportunity today that you had when we signed the contract, but it must be exercised before a sale of the business is made, otherwise same will not be recognized by me." Plaintiff replied on January 25, 1937: "For a long time past, Jack, I have been willing and anxious to take up the option according to our agreement. I asked you for a statement of the amount invested by you so that I would know the amount of my prorata, but was unable to get a clear, definite statement. If you will give me an exact statement of the amount invested in the company by you, I will act on the option as soon as I can verify your statement. As you know, I have not access to the books and must depend on the officers of the company to furnish me the figures." Defendant replied to this letter on February 3, 1937: "Regarding the stock again I don't know how I could make myself clearer than I have in my last letter, no one in the world could ever accuse me of ever taking advantage of anyone or ever breaking my word. Ramish and Rosen have nothing whatsoever to do with our transaction and again let me advise you that I do not care what either of them say I invested, because whatever they say in this respect is not the facts. However, what I invested in the business has nothing whatever to do with our contract, but let me again remind you that I handed you a statement made out by Mr. Turner while he was in L. A. of all expenditures I had made and that amounted to $38,000.00. I again explained to you that I gave them additional $8000.00 worth of bills when Turner came to Honolulu, but in a thousand years, you, nor anyone else, will be able to make out his books the way he has them set up now. * * * How, then, can you ever expect to get any proper figures even if you should want them from him. As per the contract which I made with you, which stated that you could come in on twenty-five per cent of my holdings, none can say that you have offered to take up your option and that I refused it, but circumstances occur where options cannot last forever, because of certain conditions. Therefore, I again say that although your option ran out, you can take advantage of the opportunity providing you take it immediately, otherwise you cannot expect me to feel any further obligation in the matter as I have been more than fair in this entire transaction. You realize that a sale of the business may be made any day or a deal may be made that requires quick action and unless you have made your investment before that time, you can't expect me to hold up deals as that is asking too much." On February 18, 1937, plaintiff replied: "Note what you say regarding the option. Just as soon as I can get the necessary data be assured Jack I want to take advantage of the option you have extended me."

Defendant apparently concedes, at least for the purpose of argument, that the time for the exercise of the option was extended but claims that the evidence was insufficient to support the finding that the time was extended to and including the time of the sale on May 31, 1937. It is argued that the extension was for an unspecified time, that it therefore covered only a reasonable time and that a reasonable time expired prior to May 31, 1937. Defendant further argues under a separate heading that the evidence was insufficient to support the finding that the extension was based upon a good and sufficient consideration. Plaintiff argues that the time provision for the exercise of the option was waived by both written and oral agreements for extensions based upon good and sufficient consideration and that defendant, by his fraudulent conduct, prevented the exercise of the option and was estopped. In the reply brief, defendant argues that as neither prevention of performance nor estoppel was pleaded, plaintiff may not rely thereon.

[2] As we view the situation, many of these contentions need not be considered here for the reasons hereinafter stated. The action was one upon an option agreement which was admittedly made upon a good and sufficient consideration. It was executed contemporaneously with an agreement for the employment of plaintiff by the corporation as its purchasing agent. Plaintiff served in that capacity with the corporation until the time of the sale and continued to serve thereafter. The option agreement provided that the option price should be computed upon the amount which defendant had paid into the corporation. No method was provided by the express terms of the agreement to enable plaintiff to determine the amount which defendant had so paid. We therefore believe it necessary, in order to make the agreement reasonable, to read into the agreement the implied terms that defendant would furnish plaintiff with accurate information concerning that amount at any time that plaintiff expressed his desire to exercise said option during the life thereof and that any delay on the part of the defendant in furnishing such information would extend the life of the option until a reasonable time after such information had been furnished by defendant. Civ. Code, § 1655. If these terms were not implied terms of the agreement, then plaintiff would have had no way of determining (1) whether it was desirable to exercise the option or (2) the amount to be tendered to defendant in the exercise thereof.

[3] Under the express terms of the option agreement, the life of the option was from July 20, 1934 to July 20, 1935. The evidence shows that plaintiff expressed his desire to exercise the option as early as May 23, 1935 in a letter written to defendant on that date. Thereafter plaintiff reaffirmed his desire to exercise the option on numerous occasions and made repeated requests to defendant to furnish him with the necessary information. No accurate information was furnished to plaintiff by defendant at any time. For some period of time after May 23, 1935 and despite repeated requests by plaintiff, defendant gave no information whatever concerning the amount but gave plaintiff the broadest assurances that his option could be exercised at any time. Thereafter defendant grossly misrepresented the amount which he had paid into the corporation, insisting that he had paid into the corporation approximately ten times the amount which he had actually so paid. Plaintiff took exception to these misrepresentations and reaffirmed his desire to exercise his option upon the basis specified in the option agreement. In his letters of December 14, 1926 and February 3, 1937, defendant denied that the amount that he had actually invested in the corporation had anything to do with the exercise of the option thereby repudiating the terms of the option agreement. In the first of said letters he stated "My books speak for themselves" indicating that he considered the parties bound by the figures shown by the books. In the second of said letters, he repudiated the figures shown by said books. The only conclusion that can be drawn from the admitted facts is that defendant, through fraudulent representations, endeavored to gain an unconscionable advantage over plaintiff either by persuading plaintiff to refrain from exercising a valuable option or by obtaining from plaintiff thousands of dollars to which defendant was not entitled in the event that plaintiff did exercise said option. In any

event, the uncontradicted evidence shows that defendant wholly failed to furnish plaintiff with accurate information at any time, and under our view of the implied terms of the option agreement, the life of the option was thereby extended at least to and including the time of the sale as found by the trial court.

[4] Defendant finally contends that the trial court erred in sustaining certain objections to questions propounded to plaintiff upon cross-examination regarding his understanding of the terms of the option agreement. As above indicated, we believe that the terms of the option agreement upon which the trial court based its judgment were clear and unambiguous. There was therefore no error in sustaining objections to questions relating to the understanding of the parties concerning said terms.

The judgment is affirmed.

NOURSE, P. J., concurred.

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57 Cal.App.2d 334

FOY v. FOY.

Civ. 13748.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1943.

1. Marriage ⚷58(7)

It is not every fraud which will serve as an excuse for annulment of a marriage, but only those frauds which are vital to the marriage relation. Civ.Code, § 82.

2. Marriage ⚷58(7)

The chastity of a wife, prior to marriage, is not vital to the marriage relation, and hence a false representation by a wife before marriage that she had not been unchaste is not a ground for annulling marriage. Civ.Code, § 82.

3. Marriage ⚷58(7)

The alleged fact that wife made alleged false representation to husband before their marriage that her minor daughter was the child of a former legitimate union was not such "fraud" as would entitle the husband to annulment of the marriage. Civ.Code, § 82.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Elliott James Foy against Maria Najara Foy for annulment of marrage. From a judgment in favor of the plaintiff, defendant appeals.

Judgment reversed.

Manuel Ruiz, Jr., of Los Angeles, for appellant.

N. E. Youngblood, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1] One of the causes for which a marriage may be annulled is stated in section 82 of the Civil Code to be: "That the consent of either party was obtained by fraud." But "* * * it is not every fraud which will serve as an excuse for having a marriage annulled; only those frauds which are vital to the marriage relation are sufficient causes. Mayer v. Mayer, 1929, 207 Cal. 685, 279 P. 783; Marshall v. Marshall, 1931, 212 Cal. 736, 300 P. 816, 75 A.L.R. 661; notes, 14 A.L.R. 121 and 75 A.L.R. 663." People v. Godines, 1936, 17 Cal.App.2d 721, 723, 62 P.2d 787, 788. It would seem that the chastity of the wife, prior to marriage, is not vital to the marriage relation, for it has been held that a false representation, made by the wife before marriage, that she had not been unchaste is not a ground for annulling a marriage. Wilcox v. Wilcox, 1916, 171 Cal. 770, 772, 155 P. 95, 96; Sutton v. Sutton, 1936, 12 Cal.App.2d 355, 356, 55 P.2d 261, 262; and see Barnes v. Barnes, 1895, 110 Cal. 418, 421, 42 P. 904, 905; and Vileta v. Vileta, 1942, 53 Cal.App.2d 794, 796, 128 P.2d 376.

[3] The judgment appealed from in this case granted plaintiff an annulment of his marriage. The sole basis on which the annulment was sought was that the defendant had falsely represented before her marriage to the plaintiff that her minor daughter was the child of a former, legitimate union. We see no difference in principle existing between this case and those beginning with Barnes v. Barnes, supra, and we do not

consider the soundness of the principle a question open to debate before us, in view of the prior decisions of our Supreme Court. It follows that the judgment must be, and it is, reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

57 Cal.App.2d 46

PERKINS v. MAIDEN.

Civ. 12230.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1943.

Rehearing Denied March 11, 1943.

Hearing Denied April 8, 1943.

1. Estoppel 🔑99

Statute forbidding litigant to falsify what by his declaration, act or omission he has deliberately led another to believe is the truth and to act thereon does not preclude litigant from showing the true significance of declaration or omission. Code Civ.Proc. § 1962, subd. 3.

2. Evidence 🔑448

Where ambiguity appears in language used in written instrument, resort may be had to parol evidence to show true significance of language, notwithstanding statutory presumption as to truth of facts recited in written instrument, and court will adopt the more reasonable interpretation. Code Civ.Proc. § 1962, subd. 2.

3. Trusts 🔑43(1)

In action to establish that money was not loaned to defendant but delivered under express trust for investment, parol evidence was admissible to explain ambiguity disclosed by defendant's letters to deceased lender of the money and his widow referring to money as "your money" and as "placed with" defendant. Code Civ.Proc. § 1962, subds. 2, 3.

4. Trusts 🔑44(1)

Conflicting evidence sustained finding that money delivered to defendant by plaintiff's deceased husband was loaned to defendant and repaid with interest in monthly installments, and was not delivered under express trust for investment.

5. Trial 🔑165

"Motion for a nonsuit" is in effect a "demurrer to sufficiency of evidence" in that it admits the truth of the facts for the purpose of considering the motion but denies that as a matter of law evidence is sufficient to support plaintiff's action.

See Words and Phrases, Permanent Edition, for all other definitions of "Demurrer to Sufficiency of Evidence" and "Motion for Nonsuit".

6. Courts 🔑99(1)

After motion for nonsuit has been denied, judgment may be entered for defendant without further evidence and without violating doctrine of res judicata, since in determination on the merits court is not required to accept evidence as true, but considers probative value thereof.

7. Appeal and error 🔑1195(3)

Where order granting nonsuit has been reversed, upon a subsequent trial, the doctrine of the "law of the case" does not apply.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

8. Appeal and error 🔑1009(4)

Where defendant contended money allegedly delivered to him by deceased father-in-law under express trust for investment was actually loaned to defendant and had been repaid with interest in monthly installments, fact that approximately $4,000 in excess of principal and interest had been repaid when defendant stopped monthly payments, after separation from wife from whom he was ultimately divorced, did not warrant reversal of judgment that money was not held in trust.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Ella Perkins, as administratrix of the estate of H. W. Perkins, deceased, against F. Bruce Maiden, to recover money allegedly delivered to defendant by plaintiff's decedent in trust for investment. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

Edw. R. Solinsky, of San Francisco, for appellant.

George M. Naus, of San Francisco, for respondent.

WARD, Justice.

Plaintiff, the administratrix of the estate of F. W. Perkins, her deceased husband, brought this action to recover the sum of $5,000 and interest, alleging that on October 7, 1920 this sum had been delivered to defendant by F. W. Perkins upon the understanding and agreement that it was to be loaned out and invested by defendant at interest for the benefit and profit of Perkins, and that defendant would keep said money invested and thereafter, on demand, return the principal and accrued interest; that defendant accepted the money pursuant to and in accordance with said understanding and agreement, and thereafter invested and loaned it at interest, and from that time up to January 1, 1935 paid monthly or bi-monthly to Perkins the interest thereon earned and collected upon such investments and loans; that after the death of Perkins on January 1, 1935 defendant continued to make such payments to plaintiff, as the surviving widow of Perkins, until about February 1, 1936, when he discontinued them and refused to make any further payment.

Defendant in his answer admitted the delivery to him of the $5,000, but denied that it was upon the understanding and agreement alleged. The cause went to trial upon this issue and resulted in a judgment for defendant. A motion by plaintiff for a new trial was denied and she has taken this appeal from the judgment.

Defendant is the son-in-law of F. W. Perkins, deceased, having married the latter's daughter Winte. The couple separated in the year 1933 and were divorced in 1938. Since the death of Mr. Perkins, his widow has resided with their daughter, Mrs. Maiden.

At the trial F. Bruce Maiden, the defendant, was the only witness as to the transaction between Perkins, deceased, and himself. It is admitted that a note for the sum of $5,000 bearing interest at the rate of 12 per cent per annum, and due one day after date, was given by him to Perkins on receipt of the money by him. It also appears from the evidence that Maiden was a man of ample means and large earning capacity; that he invested part of his fortune in short term loans at high interest. The nature of the transaction between him and Perkins is best described by the following testimony:

"Q. State, Mr. Maiden, the substance of the conversation, if any, between you and Mr. Perkins at the time of or preceding the delivery of this note and with respect to the $5,000? * * * A. Mr. Perkins came to me and said that he needed very badly to receive some income from his money, that he had sold out everything he had and he was living out of his pocket, and he asked me to find an investment or to lend his money. I told Mr. Perkins I would try to find an investment for him. The time passed and I was unable to find one. * * * He came to me one day and said he felt it was difficult to either make a loan of $5,000 or buy a place for exactly $5,000, and that he knew I handled large transactions and that he would like to have me borrow the money and do as I pleased with the money and pay him what I could afford to pay him for the money. I asked him what amount of money it was necessary for him to live on. He told me approximately $75.00 a month but he might get by on $50.00 a month, he would at least try. I told him I would borrow the money at $50.00 a month and if he found out later he could not get by I would do something else about it. And for approximately the first year the $50.00 a month was paid, which was 12 per cent."

At that time the payment to Perkins was increased to $75 a month under the circumstances shown by the following testimony of the defendant. In reply to the question: "* * * at or about the time of the change of the payments from $50.00 to $75.00 a month was there or not any conversations between you and Mr. Perkins regarding it?", the witness answered: "He came to me and said he found it difficult to live on the $50.00 a month which he was receiving, and he had told me at the time the loan was made that he needed $75.00 a month to live on but he would try to get by with $50.00, and he at that particular time needed more money and what could I do about it? And I told him I would pay $25.00 a month on account of the principal. He indicated to me that this was a temporary thing, that he didn't expect it to last, that he was in a spot then and needed more money, and that probably it would not run very long, and I told him I would pay him $25.00 a month more on the principal, with the $50.00 which was 12 per cent, and that was our arrangement."

Mr. Perkins' expected increase of funds apparently did not materialize and the increased monthly payments continued until reduced for other reasons.

About four years after the making of the note a renewal note was executed. The facts and circumstances of the renewal were testified to by both the defendant and Mrs. Olinda Ingham, for many years his secretary and cashier. To the question "Now what, if anything, occurred at that time with respect to a renewal of the note, in the presence of Mr. Perkins, of course?", the latter replied: "Mr. Maiden explained that Mr. Perkins was dissatisfied with Mr. Maiden's carelessness in making the payments and he, Mr. Maiden, therefore decided to turn it over to me and instructed me to be very prompt in making the payments and stated to get everything shipshape, that the note was to be renewed at that time, and I cannot remember whether I actually drew the note or whether it was a note on a printed form which Mr. Maiden filled in, but I do definitely remember those circumstances."

The monthly payments of $75 were kept up until about January 1, 1934; from that time to the date of Perkins' death on January 1, 1935, $60 a month was paid; thereafter, until October of that year payments of $50 a month were made to the widow, the plaintiff herein, following which three payments of $25 each were made her in November and December, 1935 and January, 1936, after which time all payments ceased.

The testimony of the defendant regarding the making of the original note, and also his testimony and that of Mrs. Ingham relative to the making of the renewal note, was objected to by the plaintiff on various grounds, namely, that the testimony was irrelevant, incompetent and immaterial, hearsay, self-serving, and particularly that it was an attempt to contradict defendant's own admissions and declarations that the $5,000 delivered to him was upon the understanding and agreement alleged in the complaint, which admissions and declarations he was estopped to deny. These objections were overruled, and a subsequent motion to strike the testimony denied.

The purported admissions and declarations referred to in the above-stated objections were contained in correspondence offered in evidence by the plaintiff. On January 31, 1934 the defendant wrote to Mr. Perkins as follows: "Dear Mr. Perkins: For some time past I have had difficulty in maintaining the interest rate on your money. As you know in times past, when things were active, money could be used to greater advantage. Money is harder to get now than ever, still inactivity has reduced interest rates everywhere. I have, therefore, had to reduce the interest to $60.00 per month in place of $75.00 per month, as formerly. This will make your check on February 1, 1934, $120.00 in place of $150.00. Also in the future it will be more convenient to pay the $60.00 each month instead of every other month. If this is agreeable to you, kindly send your check book each month to Mrs. Ingham and she will take care of the matter as usual."

On November 20, 1935 Mrs. Ingham, in her capacity as secretary and cashier of the defendant, wrote to Mrs. Maiden (defendant's wife, at the time separated and living with her mother) the following letter: "Dear Mrs. Maiden: In reply to Mrs. Perkins' letter, Mr. Maiden directed me to deposit in her account $25.00, duplicate deposit slip for which is herewith. Mr. Maiden asked me to inform you that the $75.00 per month which was paid to the Perkins account until January 1, 1934, the $60.00 per month which was paid until January 1, 1935, and the $50.00 per month which was paid from then until now has provided six per cent interest on the Five Thousand Dollars placed with Mr. Maiden; and in addition to this interest, has provided approximately Twelve Thousand Dollars. This means that the Five Thousand Dollars has been repaid twice over with Two Thousand Dollars to spare. Mr. Maiden has instructed me to deposit $25.00 each month in Mrs. Perkins' account until he gives me further orders."

This letter was written at the direction of the defendant and was in reply to one received by Mrs. Ingham from Mrs. Perkins in which she stated: "As I have not received my interest this month from Mr. Maiden, I thought perhaps you had forgotten it. Would it be too much trouble for you to send it soon, as I am very much in need of it. Thanks for all your favors to me."

The trial court, as stated, gave judgment in defendant's favor after making findings sustaining his contentions.

On her appeal the plaintiff urges the following points: (1) That, contrary to the trial court's finding number 2, the evidence establishes a continuing express trust rather than a loan; (2) That the evidence is insufficient to support finding 3, to the effect that the long series of payments by defendant had extinguished both principal and interest of the note and its renewal; (3) That the evidence is insufficient to support finding 5, to the effect that the defendant does not hold, nor has he ever held, any money in trust for plaintiff's deceased husband; (4) That the court erred in admitting certain evidence and denying the motion to strike it,—being the evidence as to the circumstances of the making of the notes in question already detailed.

Irrespective of the form in which the contention of appellant is stated, reduced to its simplest terms the principal issue is whether or not the evidence sustains the finding upon which the judgment is based—that the $5,000 was received by defendant from F. W. Perkins as a loan, and not in trust to invest and pay Perkins the income derived therefrom.

Appellant's argument at the trial was that as between parties or their successors, the truth of facts recited in written instruments will be conclusively presumed, and equity requires that whenever a party to a transaction by his own declaration or omission deliberately leads another to believe a thing to be true, he cannot in litigation arising upon such declaration or omission be permitted to falsify it. Code Civ.Proc. § 1962, subds. 2 and 3.

In an attempt to maintain the contention that the proofs establish a continuing trust rather than a loan, appellant is forced to rely entirely upon language from the above-quoted letters of January 31, 1934 and November 20, 1935, respectively, wherein defendant in referring to his difficulty in maintaining the interest rate uses the expression "on your money," and his secretary refers to the $5,000 as being "placed with Mr. Maiden."

[1, 2] The provisions of the above subdivisions do not preclude a party from showing the true significance of the declaration or omission. Under such circumstances, if an ambiguity appears in the language used resort may be had to parol evidence, and the court will adopt the interpretation which to it appears the more reasonable. The question here is: Did the portions of the letters relied upon by appellant as matter of law create a trust relationship. The expression "your money" and the reference to the $5,000 as being "placed with Mr. Maiden" are consistent with the existence of the trust relationship claim; on the other hand, they are when used colloquially quite consistent with the existence of a loan. Certainly the trial court could not, on the strength of two or three isolated, ambiguous expressions, immediately conclude that they established the existence of a trust, and deny to the defendant the right to introduce evidence to show that his contention was in fact the true nature of the transaction. The term "your money" is of course technically incorrect when referring to money that has been loaned to another, but being of quite common usage in such a transaction they afford little if any basis for a finding of the court that they conclusively prove the person employing them is a trustee of the money referred to.

[3, 4] Under the circumstances the trial court had a right and duty to resort to parol evidence, and after its admission correctly denied the motion to strike such evidence. When the parol evidence is considered, there seems to be little doubt that the defendant's evidence was the stronger and more satisfactory, and abundantly sustains the finding that defendant has not held, nor does he hold, any sum of money in trust for F. W. Perkins.

This is the second appeal. The former (Perkins v. Maiden, 41 Cal.App.2d 243, 106 P.2d 232) was from a judgment entered for defendant after an order of nonsuit. It was held that plaintiff had made out a prima facie case and that the order of nonsuit was improper.

[5-7] A motion for a nonsuit is in effect a demurrer to the sufficiency of the evidence in that it admits the truth of the facts for the purpose of considering the motion, but denies that as a matter of law the evidence is sufficient to support plaintiff's claim. It is possible that a motion for nonsuit may be denied and without further evidence judgment be entered for defendant. The reason therefor is that on the motion for nonsuit the truthfulness of the evidence must be assumed; whereas in a determination on the merits the court considers its probative value, and may decide that plaintiff's evidence is not trustworthy and render a judgment free from any claim of res judicata in a previous trial. It has also been held that, after

granting of a nonsuit and a reversal of the order on appeal, upon a subsequent trial the doctrine of the law of the case does not apply. Ramsey v. Powers, 74 Cal.App. 621, 241 P. 567; Biurrun v. Elizalde, 75 Cal.App. 44, 242 P. 109.

The court found: "During the first year subsequent to said 7th day of October, 1920, defendant paid to said F. W. Perkins interest at the rate of $50 a month upon said note; and beginning on the 7th day of October, 1921, and running continuously to the 1st day of January, 1934, defendant made payments of $75 each and every month to be applied first to accrued interest and the remainder to the principal sum due; and from the 1st day of January, 1934 to the 1st day of January, 1935, defendant paid $60 each and every month to be applied first to accrued interest and the remainder to the principal sum due; and after the death of said F. W. Perkins on January 1, 1935, to and including the month of October, 1935, defendant paid to the present plaintiff, Ella Perkins, as Administratrix of the Estate of F. W. Perkins, deceased, $50 each and every month to be applied first to accrued interest and the remainder to the principal sum due; thereafter defendant paid to the present plaintiff, Ella Perkins, as Administratrix of the Estate of F. W. Perkins, deceased, the sum of $25 in November and December of 1935 and January of 1936. The Court finds that the whole of the principal and interest due or owing under said note has been fully paid."

Appellant contends that this finding is "contradictory, absurd, untrue in the light of the evidence and cannot stand."

[8] The portion of the finding to the effect that the "whole of the principal and interest due or owing under said note has been fully paid" is correct, but any inference that might be drawn that the note was not fully paid until 1936 is incorrect. From a computation prepared by appellant and presented on appeal, it appears that the amount in full was paid in installments of principal and interest at the rate of 12 per cent prior to January, 1931. If the computation is correct, and it has not been challenged, then all payments in recent years might be classified as gratuitous. If there is any inference to be drawn from this fact, that the transaction was in the nature of a trust rather than a straight loan, it was a question to be considered by the trial court. Otherwise we fail to understand how plaintiff is injured by the receipt of approximately $4,000 in excess of the principal and interest mentioned in the note. The continuance of payments may be explained by the fact that they were made by the defendant to his father-in-law, and upon his death to the mother-in-law, and their ultimate discontinuance by the fact that this relationship was interrupted, and indeed ended, by divorce.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

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57 Cal.App.2d 138

MITCHELL v. CHENEY SLOUGH IRR. CO.

Civ. 6720.

District Court of Appeal, Third District, California.

Feb. 15, 1943.

Hearing Denied April 15, 1943.

1. Deeds 🔑168

Where habendum clause of deed conveying strip of land to irrigation district provided for reversion if land were not used for five successive years for maintaining a pumping plant and irrigation and drainage system thereon, undisputed evidence that land was not so used for more than ten successive years prior to commencement of action did not sustain judgment quieting title to such land in irrigation district and required decree quieting title in vendor.

2. Deeds 🔑155

Conditions which result in a forfeiture of title to land are not favored and are strictly construed against party in whose behalf they are created. Civ.Code, § 1442.

3. Deeds 🔑155

Lawful restrictions in deed with respect to use of land and providing for a reversion may be enforced in accordance with express language of deed.

4. Deeds 🔑155

Title to land may revert to vendor for breach of a condition subsequent when deed clearly provides for forfeiture of title on that account. Civ.Code, § 1109.

5. Deeds ⚿166

Where habendum clause of deed conveying strip of land to irrigation district provided for reversion if land were not used for five successive years for maintaining pumping plant and irrigation and drainage system thereon, fact that vendor and another rancher at their own expense used part of pumping plant and irrigation ditch after irrigation district had ceased doing business did not prevent a reversion. Civ.Code, § 1109.

6. Deeds ⚿166

Where habendum clause of deed conveying strip of land to irrigation district provided for reversion if land were not used for five successive years for maintenance of a pumping plant and irrigation and drainage system thereon, fact that vendor procured permission of the district to use a pump and canal to irrigate his own orchard, although he knew that district's irrigation and drainage system had not been operated for more than ten successive years, did not "estop" vendor from asserting the reversion.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Deeds ⚿166

Benefits of provisions of a condition subsequent in a deed and of right of reversion of title to real property may be waived expressly or by acts, conduct and circumstances indicating that vendor does not rely upon covenant.

8. Deeds ⚿166

Where irrigation district to which plaintiff had conveyed strip of land for purpose of construction thereon of pumping plant and irrigation and drainage system ceased operations, and plaintiff, for purpose of irrigating his orchard, obtained permission of district to use portion of equipment at his own expense, plaintiff by such use did not "waive" reversionary clause in deed providing for reversion if land were not used for original purpose for five successive years.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

9. Estoppel ⚿110

Waiver or estoppel must be pleaded to render it available as a defense.

◆

Appeal from Superior Court, Colusa County; Ben R. Ragain, Judge.

Action by Burr H. Mitchell against Cheney Slough Irrigation Company to quiet title to certain land. From a judgment quieting title to a portion of tract in defendant, plaintiff appeals.

Reversed, with directions.

Huston, Huston & Huston, of Woodland, and Rutledge & Rutledge, of Colusa, for appellant.

U. W. Brown, of Colusa, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against him in a suit to quiet title to a strip of land which was conveyed to the defendant by a deed containing an express declaration in the habendum clause that the land would revert to the grantor, his heirs and assigns, if the grantee ceased to use the land for a pumping plant, irrigation and drainage system for a period of five successive years.

The defendant was incorporated under the statutes of California as a mutual voluntary irrigation association, by articles which were filed December 2, 1915, for the purpose of operating "a canal, irrigation and drainage system" in Colusa County, California. The articles provide that the corporation may acquire water rights and all property necessary to construct and maintain a plant "for the purpose of irrigating the lands of the stockholders only of this Corporation." It further provides that the corporation may "do any and all things necessary or proper to be done in conducting the business of supplying its stockholders with water for irrigation and domestic purposes and for draining the same from their lands." The articles provide for capital stock in the amount of $100,000, to be divided into 10,000 shares of the par value of $10 per share. 3,680 shares were sold and distributed to sixteen charter members, who paid therefor the aggregate sum of $36,800. The plaintiff, Burr H. Mitchell, was a charter member of the company and owned 300 shares of its capital stock. He owned the tract of 391 acres of land in Colusa County, the title to which is involved in this suit. The entire tract embraced within the district consisted of 8,067 acres of land, most of which was devoted to raising rice until the year 1928, when that industry ceased to prosper on account of the low price of rice and the irrigating enterprise then discontinued business. About 5,000 acres of land within the district were irrigated for a few years after the organization of the district. The corporation expended considerable money in digging a canal on the acquired strip of land and in installing and equipping three separate pumps and other improvements. The defendant's income was derived from assessments levied on the lands of the shareholders who were engaged in cultivating rice in the district.

The plaintiff, Burr H. Mitchell, sold and conveyed to the defendant, July 10, 1916, by deed, the northerly seventy-five feet of his tract of land described in the complaint, for a valuable consideration and to encourage the success of the irrigation enterprise so as to procure water for the benefit of his own land and the lands of other stockholders in the district. The deed recites that:

"In consideration of the sum of Ten ($10.00) Dollars * * * and for other valuable consideration, [the party of the first part] does hereby grant and dedicate to the said party of the second part, its successors and assigns forever, (except that it may be terminated by non-use as hereinafter provided) the following-described strips of land. * * * [Here follows the description of the seventy-five foot strip of land in controversy]. * * *

"The land hereby conveyed is granted for the purpose of constructing and maintaining a pumping plant on the bank of the Sacramento River to pump water from said river for irrigation purposes, and for the purposes of constructing and maintaining irrigation and drainage ditches and waterway with the right to flow water therein over, along and across said rights of way; and on condition that said ditches and canals and the gates and locks that may be therein constructed shall be kept in good repair to prevent leakage or seepage while in use for irrigation purposes. * * *

"To have and to hold all and singular the said premises, together with the appurtenances unto said party of the second part, its successors and assigns forever, except that in case the same is not used for a pumping plant and irrigation and drainage system for a period of five (5) successive years, the full title to said strips of land shall revert in and to said party of the first part, his heirs and assigns forever."

This deed was accepted by the defendant subject to the said condition therein expressed, and it was duly recorded.

The complaint, which was filed in February, 1940, seeks to quiet title to the entire 391 acre tract of land in Colusa County, including the northerly seventy-five foot strip thereof, which was conveyed to the defendant as above related, subject to reversion of the title to plaintiff upon breach of the said condition subsequent. The answer denies the material allegations of the complaint and asks that title to said seventy-five foot strip of land be quieted in the defendant. The court adopted findings determining that said seventy-five foot strip of land was conveyed by plaintiff to the defendant July 10, 1916, "for the purpose of constructing and maintaining a pumping plant * * * for irrigation purposes," and that the defendant and its successors and assigns were entitled to hold title thereto forever "except that in case the same is not used for a pumping plant and irrigation and drainage system for a period of five successive years," it shall revert to the grantor. The court further found that the defendant entered into possession of said strip of land in January, 1916, and thereafter constructed thereon a pumping plant, consisting of three separate pumping machines, and an irrigation canal; that "beginning with the year 1916 and continuing each year thereafter, except one year, down to and including the year 1940, said pumping plant and irrigation and drainage system has been used in the possession of defendant and has been used as a pumping plant and irrigation and drainage system."

Judgment was rendered accordingly quieting title in plaintiff to the said 391 acre tract of land but specifically excepting from said decree the northerly seventy-five foot strip thereof. From that judgment the plaintiff has appealed.

[1] We are of the opinion the findings and judgment with respect to the title to said northerly seventy-five foot strip of land are not supported by the evidence.

The record shows without conflict that the strip of land was conveyed to the defendant for the express purpose of using it only for the construction and maintenance thereon of a "pumping plant and irrigation and drainage system." The conditional reversion clause of the deed seems too clear for controversy. It provides that if the strip of land is not used for a period of five successive years "for a pumping plant and irrigation and drainage system" title thereto shall revert to the grantor. The evidence is undisputed that the strip of land was not used by the defendant or by anyone else for an "irrigation and drainage system" for a period of more than ten successive years prior to the commencement of this action. The land was not used for that purpose later than 1928. In fact, the industry of raising rice in that vicinity, which was the chief source of defendant's income, ceased that year. Rice was never thereafter produced in any substantial amount on the lands within that district. No rice was planted after 1927. The defendant's business as an irrigation district absolutely ceased before that time. No assessments were levied upon the lands of that district after 1924. Mr. Seaver, a director of the defendant company, testified that for six years prior to the commencement of this action, the defendant did not spend a dollar on the upkeep or maintenance of that irrigation system. In December, 1939, the plaintiff demanded of the defendant a reconveyance of that strip of land for breach of the said condition, which was refused.

The plaintiff is entitled to a decree quieting title in him to the northerly seventy-five foot strip of his land, which is described in the complaint, on account of the breach of the condition subsequent.

[2-4] Conditions which result in a forfeiture of the title to land are not favored, and they are to be strictly construed against the party in whose behalf they are created. Sec. 1442, Civ.Code; Wedum-Aldahl Co. v. Miller, 18 Cal.App.2d 745, 750, 64 P.2d 762; Hasman v. Elk Grove Union High School, 76 Cal.App. 629, 245 P. 464; 9 Cal.Jur. 340, sec. 200; 3 Thompson on Real Property, 112, sec. 2030; 26 C.J.S., Deeds, p. 479, § 147. However, lawful restrictions with respect to the use of land may be enforced in accordance with the express language of a deed providing for such condition subsequent. For a breach of such a condition, title to land may revert to the grantor when the deed clearly provides for forfeiture of the title on that account. Sec. 1109, Civ.Code; Thornton v. Middletown Educational Corp., 21 Cal.App.2d 707, 70 P.2d 234; Liebrand v. Otto, 56 Cal. 242; Johnston v. Los Angeles, 176 Cal. 479, 168 P. 1047; Firth v Los Angeles Pacific Land Co., 28 Cal.App. 399, 152 P. 935; 9 Cal.Jur. 372, sec. 223; 26 C.J.S., Deeds, p. 495, § 157, subsec. b. In the present case it is not contended the defendant maintained or operated its irrigation system during a period of at least six years prior to the commencement of this action. It is merely asserted that a portion of the machinery and the canal were used by the plaintiff himself to irrigate his own orchard. There is no evidence to support the finding of the court that the seventy-five foot strip of land was used to maintain or operate the pumping plant and irrigation system, as a system, during the entire period from "the year 1916 and continuing each year thereafter, except one year, down to and including the year 1940." The record conclusively shows that the irrigation system was not so used. The condition subsequent was therefore breached. By the express terms of the deed, the title to that strip of land thereupon reverted to the grantor.

[5] It is true that for several years after the defendant ceased to operate its irrigation system, the plaintiff, Burr. H. Mitchell, and another stockholder, who was also a director of the company, by the name of C. F. Seaver, obtained permission to use the irrigation canal and one of the pumps belonging to the defendant to irrigate their own orchards, with the express agreement that they should pay all expenses incident thereto. The plaintiff irrigated eighty acres of orchard land and ten acres of alfalfa in that manner, and Seaver irrigated one hundred and fifteen acres of his orchard land and about sixty acres of alfalfa in the same manner. The other pumps and apparatus belonging to the defendant's irrigation system were not used after 1928 in the operation of its irrigation system or for any purpose. The corporation did not contribute a dollar toward maintaining or operating its system after that time. Mitchell and Seaver expended considerable money in operating the one pump and repairing the canal to irrigate their own orchards.

[6] The only plausible defense which might have been urged against plaintiff's claim of a reversion of the title to his seventy-five foot strip of land on account of the breach of clear and explicit terms of the deed is founded on the doctrine of estoppel in pais, on the theory that the plaintiff knew the defendant's irrigation and drainage system had not been operated for a period of more than ten successive years, and that the plaintiff procured permission of the defendant to use one of the pumps and the canal during that period of time to irrigate his own orchard. It might have been contended this conduct constituted a waiver of the reversion clause of the deed. However, we think it did not necessarily create an estoppel.

[7, 8] It is true that the benefits of the provisions of a condition subsequent and of the right to reversion of the title to real property may be waived expressly or by acts, conduct and circumstances indicating that the grantor does not rely upon that covenant. Wedum-Aldahl Co. v. Miller, supra; Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 133, 200 P. 1051; 26 C.J.S., Deeds, p. 498, § 158 subsec. c; 43 A.L.R. 1053, note. However, under the facts of this case it does not appear that the plaintiff intended to waive the provisions of the condition subsequent which was contained in the deed. The defendant ceased to operate its irrigation and drainage system, and it became necessary for the plaintiff to procure water from some source with which to irrigate his orchard. He obtained permission from the defendant to use a portion of its equipment for that purpose, by paying all costs and expenses incident thereto. It may not reasonably be said this temporary and limited use of a portion of defendant's equipment constituted an operation of the system by the defendant itself, nor that it constituted a waiver of the reversionary clause of the deed.

[9] Moreover, the defendant failed to plead an estoppel. The cause was evidently not tried on the theory that an estoppel was relied upon by the defendant. The court adopted no finding in that regard. The rule is firmly established in California and in most other jurisdictions that waiver or estoppel must be pleaded to render it available as a defense. Holzer v. Read, 216 Cal. 119, 124, 13 P.2d 697; Pasadena Park Imp. Co. v. Lelande, 175 Cal. 511, 521, 166 P. 341; 10 Cal.Jur. 653, sec. 30; 19 Am.Jur. 840, sec. 184; 120 A.L.R. 8, note.

The judgment is reversed and the court is directed to render judgment quieting title in the plaintiff to the entire tract of land described in the complaint.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.

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57 Cal.App.2d 66

PODESTA v. MEHRTEN et al.

Civ. 6616.

District Court of Appeal, Third District, California.

Feb. 10, 1943.

Rehearing Denied March 11, 1943.

1. Contracts 🔑237(2)

Where original contract granted to defendant right to sell sand and gravel from certain land and to extract precious metals, and supplemental agreement recited that in consideration of mutual promises stated in original contract and work done, money expended and future work to be done and money to be expended, privileges under original contract should be extended for 50 years following any default on part of assignee of original contract, recited consideration was insufficient to support supplemental agreement.

2. Evidence 🔑215(1), 265(18)

Recital of certain specific consideration in a contract subscribed by both parties is an "admission" of the parties that such was the consideration and is "prima facie evidence" to that effect. Civ.Code, §§ 1614, 1615; Code Civ.Proc. § 1963, subd. 39.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission" and "Prima Facie Evidence".

3. Appeal and error 🔑994(3), 1012(1)
Evidence 🔑594

The trial court is the sole judge of the weight and effect of testimony and credibility of witnesses and is free to disbelieve witnesses even though they are uncontradicted, if there is any rational ground for doing so.

4. Witnesses ⚷363(1)

In passing on credibility of witnesses, the jury is entitled to consider interest of witnesses in result of case.

5. Evidence ⚷594

Although generally uncontradicted testimony may not be disregarded, the most positive testimony may be contradicted by inherent improbabilities as to accuracy contained in witness' own statement, or there may be circumstances in evidence which satisfy court of its falsity, or manner of witness in testifying may impress the court with doubt as to accuracy of statement of witness and influence it to disregard his positive testimony.

6. Contracts ⚷247

Record warranted trial court in disregarding testimony of defendant that he paid certain cash in consideration of a supplemental agreement purporting to extend privileges under original contract granting to defendant right to sell sand and gravel from land and to extract precious metals, for 50 years after any default on the part of assignee of the original contract, and in holding that the supplemental agreement was void for lack of consideration.

7. Contracts ⚷10(1)

An instrument purporting to extend privileges of original contract granting to defendant right to sell sand and gravel and to extract precious metals, for 50 years after any default by assignee of original contract, was a mere "offer" to permit defendant to dispose of sand and gravel, and was therefore merely an "option" which was a "unilateral contract" not founded on mutual promises.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer", "Option" and "Unilateral Contract".

8. Contracts ⚷10(1)

The doctrine of "mutuality of obligation" is inapplicable to a unilateral contract, since such a contract is not founded on mutual promises.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Obligation".

9. Contracts ⚷10(1)

Promises or mere offers, unilateral at first, may be enforced when "mutuality" is secured by an executed consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality".

10. Contracts ⚷10(1)

An option in the form of a unilateral contract supported by consideration is valid notwithstanding lack of mutuality.

11. Contracts ⚷47

An option which is not supported by consideration may be withdrawn at any time before acceptance.

◆

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by G. B. Podesta against Charles Mehrten and others to quiet title to realty. From an adverse judgment, defendants appeal.

Affirmed.

Jos. H. Huberty, of San Andreas, for appellants.

Gumpert & Mazzera, of Stockton, and Virgil M. Airola, of San Andreas, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment quieting respondent's title to certain real property in Calaveras County.

The facts, as shown by the record, may be summarized as follows:

On May 1, 1929, one Irving Hill, predecessor in interest of respondent, as the owner of the five parcels of real property involved in the action, entered into a contract in which appellant Mehrten was the party of the second part and appellants Bert Lyons and Gussie Lyons were the parties of the third part. Said contract granted to appellant Mehrten the right to sell at any time within fifty years from date the sand and gravel from said land at a specific price, and to extract and divide, as provided, the precious metals recovered; it permitted the construction and installation of gravel plants, structures, washing equipment and a railroad over a designated route. Said contract provided further: (1) That before the construction of the railroad, either $1,000 or $2,200 should be paid, depending upon the route selected; (2) that said railroad be completed on or before May 1, 1931; (3) that the second party deposit in a Stockton bank on or before August 1, 1930, at least $50,000 for use upon said project; (4) that the gravel plant be kept in continuous operation, or, in lieu thereof, that second party pay to first party not less than $125 per month and to third parties not less than $62.50 per month. None of the conditions aforesaid were performed by the appellant Mehrten or his assignee, Fred Beerman, and it is not disputed that said contract was subject to forfeiture and was in fact abandoned.

On May 10, 1929, said Irving Hill entered into a supplemental contract with the same parties, relating to the same property, which supplemental contract declared that the purpose of the first contract was to enable the second party, appellant Mehrten, to promote the sale of rock, sands, gravel and precious minerals, and recited further that said first contract having been assigned to Fred R. Beerman, it was possible that he might fail to carry out its terms and conditions, but that the party of first part, Hill, realizing the difficulties attendant upon such venture and being desirous of permitting the second party to promote the sale and operation of said property in the event of Beerman's default, agreed to new and different arrangements, said contract reading in part as follows: "Now, Therefore, in consideration of the mutual promises and agreements of the parties hereto, each with the other, and in further consideration of the work heretofore done by the second party, and the moneys heretofore expended by the second party, in promoting said enterprise, and in further consideration of the work to be done and moneys to be expended, by the second party, in the event that the said Fred R. Beerman hereinbefore referred to, should fail to carry out said contract of May 1st, 1929, the first party hereby gives and grants unto the second party the right and privilege for a period of fifty years, after the default of said Fred R. Beerman, or his assignee, in carrying out said contract of May 1st, 1929, within which to make sale of said gravels, rocks, sands and precious minerals, under the same terms and conditions as are contained in said agreement of May 1st, 1929, in other words, in the event that said contract of May 1st, 1929, for any reason is cancelled, and becomes no longer effective then, in that event, the second party is granted and is hereby given an additional fifty years period of time within which to make sale of said properties, for the amounts and under the same terms and conditions as are contained in said contract of May 1st, 1929, and likewise the third parties shall receive the amounts of moneys at the times and in the manner as in said contract of May 1st, 1929 contained."

The said agreement did not recite any other consideration but at the trial of the action, after the testimony was closed and argument had begun, appellants were permitted by the trial court to reopen their case, and appellant Mehrten thereupon testified that at the time said second or supplemental contract was entered into he had paid to Hill the sum of $10 as a consideration therefor. There was no other testimony as to this payment, Hill being deceased at the time of the trial.

In support of his complaint respondent introduced in evidence a deed from Irving Hill to himself, covering the property in controversy, dated November 24, 1930, and testified that he had gone into possession of said property on said date, that he had been in exclusive possession of it ever since and had paid taxes on the property ever since. Respondent also introduced in evidence a notice of rescission and termination of said agreements of May 1, 1929, and May 10, 1929, which notice was signed by Irving Hill and was served on appellants on March 3, 1932.

The deed by which respondent obtained title to the real property here involved from Irving Hill recited that it was subject to both of the contracts hereinbefore mentioned.

It is not claimed that there was any performance under the contract of May 1, 1929, nor is it contended that appellant Mehrten did anything in fulfillment or performance of the supplemental contract of May 10, 1929.

The trial court found that the agreement of May 1, 1929, was never performed by appellants or Beerman, and as to the agreement of May 10, 1929, the court found as follows: "It is true that said instrument of May 10, 1929, did not in any manner or to any extent bind the defendants, or any or either of them, to do or perform anything whatsoever for the benefit of said Irving Hill, but there was an entire lack of mutuality of obligation in said instrument and that there was no consideration of any kind or character whatsoever moving from the defendants, or either or any of them to said Irving Hill to support said written instrument."

The court found further that respondent was owner of the property involved and that appellants had no interest in said property or in any portion thereof or in any portion of any deposit of rock, gravel, sand or minerals therein or thereon. Judgment in favor of respondent was entered in accordance with said findings and this appeal is from said judgment.

Appellants attack vigorously the finding of the trial court that there was no consideration to support the agreement of May 10, 1929. Appellants assert that the undisputed evidence shows that $10 was paid to Hill for the making of the contract and that "there is no evidence to the contrary and no attempt whatsoever was made by the plaintiff and respondent to show any lack of consideration, yet the burden of showing such was upon him." Appellants cite section 1614 of the Civil Code which states that "a written instrument is presumptive evidence of a consideration" and section 1963, subdivision 39, of the Code of Civil Procedure which states with reference to presumptions "That there was a good and sufficient consideration for a written contract." Appellants also cite section 1615 of the Civil Code to the effect that the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

[1] Respondent does not dispute these well-settled principles but asserts that the consideration recited in the agreement must be deemed to be the only consideration in support of the instrument until the contrary is shown. Respondent states, and we think correctly, that the consideration recited in the agreement is not sufficient to support it and appellants do not seriously question this, but contend that the general presumption of consideration and the undisputed evidence of appellant Mehrten that he paid Hill $10 for making the contract compel a finding that there was sufficient consideration for the contract.

[2] The question presented is an unusual one and we have been unable to find any authority directly in point. However, it appears to be the rule that the recital of a certain specific consideration in an agreement subscribed by both parties is a statement or admission of the parties that such was the consideration and is prima facie evidence to that effect. In the case of Pomper v. Behnke, 97 Cal.App. 628, at page 636, 276 P. 122, at page 126, this court said: " 'The statement in the deed that a certain sum has been paid as the consideration is an admission or acknowledgment of the grantor that such is the fact, and such statement may be accepted as prima facie evidence of its truth.' 2 Devlin on Deeds (2d Ed.), § 817. Paraphrasing a statement of the late Justice Hart of this court, in an opinion written by him, viz., Kinsell v. Thomas, 18 Cal.App. 683, at page 692, 124 P. 220, 224, it may be said here: 'There is no evidence in the record rebutting the inference that the amount recited in the deed as the consideration for the conveyance to Emelia Pomper of Los Angeles in 1908, viz., the sum of $10 was the sum actually paid by her to Fritz Pomper for the realty.' "

In the case of Kinsell v. Thomas, 18 Cal. App. 683, at page 692, 124 P. 220, at page 224, the court said: "There is no evidence in the record rebutting the presumption that the amount recited in the deed as the consideration for the conveyance to plaintiff, viz., the sum of $10, was the sum actually paid by plaintiff to Joseph S. Thomas for the land and its improvements (13 Cyc. 613, and Devlin on Deeds, § 817), and it must, therefore, be assumed that that sum was the amount so paid for the land."

[3, 4] Assuming then that the recital of the consideration in the contract may be taken as evidence that such was the consideration, must it be held that the testimony of appellant Mehrten that he paid $10 to Hill for the making of the contract left no alternative for the trial court except to find that there was a sufficient consideration for the contract? We do not think so. Under well-established rules of law the trial court is the sole judge of the weight and effect of the testimony and in the instant case we believe the trial judge had a right to weigh the recital in the agreement as to what the consideration was against the testimony of appellant Mehrten that he had paid Hill $10 for making the contract.

"But," argue appellants, "the oral testimony of Mehrten, uncontroverted and undenied, was sufficient to establish payment of actual consideration," and appellants cite 10 Cal.Jur. 1143, par. 362, where it is stated, "The uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact." There are several answers to this contention. In the first place the testimony of appellant Mehrten is not "uncontradicted" but is contradicted by the recital of consideration in the contract. It is true that no witness testified contrary to appellant Mehrten on this point but it is also true that he produced no other evidence than his bare statement. Hill, the other party to the contract, was dead and could not testify. Furthermore, the court was not compelled to accept the statement of Mehrten, even though uncontradicted by any other witness, as proof of the fact. As this court said in the case of Norgard v. Estate of Norgard, 54 Cal.App.2d 82, 128 P.2d 566, at page 569:

"The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so. Davis v. Judson, 159 Cal. 121, 113 P. 147. As was said by our Supreme Court in the very recent case of Blank v. Coffin, 20 Cal.2d [457], 126 P.2d 868, 871:

" 'There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility." Section 2061, subd. 3 of the Code of Civil Procedure provides: "That a witness false in one part of his testimony is to be distrusted in others." In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal. Jur. 180, Sec. 154.' "

[5] And as was said in the case of Davis v. Judson, 159 Cal. 121, at pages 128, 130, 113 P. 147, at page 150:

"It is insisted by appellants that this testimony of Wilson stood uncontradicted, and that the court had no right arbitrarily to reject it and find to the contrary.

"While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy. * * *

"So that, within the rule as we have stated, while the trial court had the statement of Wilson that he was sure that he had obtained a deed from the trustees, and although there was no direct testimony impeaching him or contradicting his statement, still the conduct of Wilson, as disclosed by his other testimony and the other circumstances in evidence, was such that the court had a right to conclude that it was inconsistent with the execution of any conveyance to Wilson, and warranted the rejecting as improbable his statement that such a conveyance had been made. Blankman v. Vallejo, 15 Cal. [638], 645; Baker v. Fireman's Fund Ins. Co., 79 Cal. [34], 41, 21 P. 357; Chico Bridge Co. v. Sacramento Transp. Co., 123 Cal. [178], 184, 55 P. 780."

See, also, Whitaker v. Whitaker, 137 Cal.App. 396, 30 P.2d 538; Hinshaw v. Hopkins, 37 Cal.App.2d 230, 99 P.2d 283.

Applying the test of these authorities to the testimony of appellant Mehrten relating to the payment of the $10 to Hill, we believe it cannot be said that "there are no matters or circumstances which at all impair its accuracy."

It is apparent from a reading of Mehrten's entire testimony, as it appears in the transcript, that he had a poor memory as he had difficulty in recalling matters concerning which he was interrogated. At one point of his testimony he stated, "Well I am not prepared to answer, because I can't remember these things unless I write them down, and I am not sure when that was." The record also shows that it was not until the testimony was closed and argument had begun that Mehrten was put back upon the stand and testified about the payment of the $10 to Hill. There is also the fact that the contract itself, which Mehrten signed, makes a recital as to the consideration and makes no mention of the $10. These were all matters which, in our opinion, the trial court might well have taken into consideration in weighing the testimony of Mehrten, and under the rule of the authorities hereinbefore cited we believe that the trial court had a right to conclude that Mehrten was mistaken in his statement that he had paid Hill $10 for making the contract.

[6] We conclude, therefore, that the finding of the trial court that there was no consideration for the contract of May 10, 1929, is supported by the record.

[7-10] Appellants also attack the court's finding that there was a lack of mutuality of obligation in the contract. In view of our conclusion that the finding of lack of consideration is supported by the record, the question of mutuality of obligation becomes unimportant. However, as is conceded by respondent in his brief, "the instrument executed on May 10, 1929, amounted to nothing more than an offer on the part of Mr. Hill to permit and allow the appellant Mehrten to sell and dispose of the sand and gravel in question," and was, therefore, merely an option which is a unilateral contract not founded upon mutual promises. It is stated in 6 Cal. Jur., pages 213, 214, section 140, that as a unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract; that promises or mere offers, unilateral at first, may be enforced when mutuality is secured by an executed consideration, is sustained upon well-recognized principles; that an option, in the form of a unilateral contract, supported by a consideration, furnishes another illustration of an agreement which is valid notwithstanding the lack of mutuality; and that it is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it.

[11] It is not disputed that prior to the commencement of the action appellants were served with a notice of rescission of the contract and were also informed that their rights under the agreement were at an end. Appellants argue that their rights under the agreement could not be thus terminated because the rights or option granted to appellants were supported by a sufficient consideration. It is, of course, the law that where there is no consideration to support an option it may be withdrawn at any time before acceptance; and so in the instant case, if the option in question were supported by a sufficient consideration it could not have been withdrawn. But the difficulty with appellant's position on this point is that the trial court found that there was a lack of consideration and we have already held that such finding is supported by the record.

Upon the oral argument and in a supplemental brief, respondent advanced the argument that the document of May 10, 1929, did not give appellants any interest in the real property involved but was merely an authorization to appellants to make sale of the sand, gravel, rock and minerals on certain conditions, and that such an agreement is merely a personal covenant and is not a covenant running with the land. The deed to respondent states specifically that the property was conveyed to respondent subject to the agreement of Hill with appellants and it would seem to us that respondent took said property subject to whatever rights appellants had under said agreement. However, in view of the fact that there was no consideration for the contract or option and the further fact that said right or option was not exercised by appellant Mehrten before the commencement of the action, it becomes unnecessary for us to prolong this opinion unduly by a lengthy discussion of the question of whether or not the right or option granted to appellant Mehrten by said agreement was or was not a covenant running with the land.

In view of the foregoing the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

57 Cal.App.2d 86

NEFF et al. v. KERN COUNTY et al.

Civ. 2677.

District Court of Appeal, Fourth District, California.

Feb. 10, 1943.

1. Automobiles ⚿246(41)

In action for death and injuries resulting from collision between motorcycle and truck at street intersection, instruction in language of statute prohibiting operation of vehicle with defective windshield was properly refused where, under evidence, defective condition of truck windshield could not have been proximate cause of accident. Vehicle Code, § 677, St.1935, p. 224.

2. Appeal and error ⚿1064(1)

In action for death and injuries resulting from collision between motorcycle and truck at street intersection, refusal to give instruction based on statute prohibiting driving of vehicle unless properly equipped was not prejudicially erroneous where under evidence alleged defective condition of brakes of truck could not have been proximate cause of accident. Vehicle Code, § 679, St.1935, p. 225.

◆

Appeal from Superior Court, Kern County; Pat R. Parker, Judge assigned.

Action by E. T. Neff and another against the County of Kern and others to recover for death and personal injuries arising out of a collision between a truck and a motorcycle. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Brittan & Mack and Kendall & Howell, all of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents.

GRIFFIN, Justice.

This action was instituted by plaintiffs and appellants to recover damages for death and personal injuries arising out of a collision between a truck and a motorcycle. The collision occurred on February 9, 1940, about 3:30 p. m. at the intersection of Haley and Pacific Streets in Bakersfield. Haley Street runs north and south. Pacific Street runs east and west. The defendant and respondent Armand Rambaud was driving an International dump truck, owned by the defendant and respondent county of Kern, in a southerly direction on Haley Street. The deceased, William Neff, and the plaintiff and appellant Ralph Eckhardt, a minor, were riding a motorcycle east on Pacific Street. The dump truck was operated by Rambaud as the agent of the respondent county of Kern, in the course and scope of his employment, and was at the time hauling a load of sand weighing approximately four tons. The southwest corner of Pacific and Haley Streets was obscured by shrubbery and trees so that it constituted a blind corner. At the time of the collision respondent Rambaud was operating the dump truck in third gear at a rate of speed between 8 and 12 miles an hour and had been doing so for about 300 feet before entering the intersection of Haley and Pacific Streets. As Rambaud entered the intersection he looked west and observed the motorcycle, then approximately 200 feet away from his vehicle, traveling at a speed he estimated between 35 and 40 miles an hour. He then looked to his left, or east, and thereafter looked again to his right, or west, as he crossed the center of Pacific Street. He then observed the motorcycle and its two occupants about 10 to 15 feet from the intersection going at about the same rate of speed and with the riders looking back over their right shoulders. Rambaud turned his truck slightly to his left. The impact occurred immediately upon his seeing the motorcycle the second time. The point of impact was near the right front bumper and fender of the truck at a point when the truck was about 37 feet and the motorcycle was about 22 feet into the intersection. After the impact, Rambaud applied the brakes on his truck and brought it to a stop. William Neff, the deceased, age 19, and Ralph Eckhardt, age 18, were riding upon a one-seated 1929 Indian motorcycle. Both were occupying the one seat with Neff sitting in front of Eckhardt. Both had their feet upon the floorboard and each was instrumental in balancing and controlling the motorcycle. Three girls were walking west on the southerly side of Pacific Street at a point approximately halfway between the first house and the fence west of Haley Street. As the two boys on the motorcycle passed the three girls they were looking at them and continued to look at the girls over their right shoulders until the motorcycle was about to enter the intersection. The motorcycle was traveling approximately 40 miles per hour when it passed the girls and continued at the same speed up until the time of the collision. The side windows in the cab of the truck were down. After the truck had come to rest following the collision, the windows were rolled up and the truck locked by Rambaud. Rambaud testified that the windshield and the glass in the right side door were clean. The only other testimony about the condition of the windshield and door glass was that of officer Bianchi, who testified that the windshield and glass "was fairly clean"; that there was a little dirt upon the windshield; that it was not as clean as it would have been if it had just been cleaned off; that he could not say that there was enough dirt there to interfere in any degree with the vision; that he didn't get into the cab to look out. The driver of the truck testified that the windshield and glass were clean; that the glass in the side door was rolled down and that his vision was not impaired to any extent. One witness for plaintiff testified that on Monday and Tuesday the week before the accident he had driven the dump truck in question; that the brakes had been relined about 4 or 5 weeks before the accident; that if the brakes were applied lightly the brakes on the right front wheel would grab before the others caught and the truck would swerve to the right; that for a week before the accident it was necessary to hold the steering wheel to keep it from spinning "when the wheels cut to the right." There was evidence that on February 16, after the accident, a similar test was made with the same result. Other witnesses were called on behalf of the defense who testified that minor adjustments had been made on the truck on Wednesday preceding the accident and that the brakes were "okay" when he was through working on them and that he made a similar test on Monday after the accident and they were still "okay." After the jury was instructed it returned a unanimous verdict in favor of the defendants.

The only question presented on this appeal involves the refusal of the trial court to give two instructions, one in the language of section 677 of the Vehicle Code, St.1935, p. 224, that "It shall be unlawful to operate any motor vehicle upon a highway when the windshield is in such a defective condition as to impair the driver's vision"; and another in the language of Vehicle Code section 679, that "No person shall operate or move on any highway any motor vehicle * * * unless said vehicle * * * is equipped as required by this code and is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway."

[1] As to the first instruction relating to the windshield, it is apparent that the trial court did not err in holding that the evidence on that subject was not substantially sufficient to warrant giving the instruction. All the evidence shows that the motorcycle approached from the right side of the truck driver and that the window on that side was down at the time. Even had it been up, the force of the testimony supporting such an instruction was the testimony of the police officer to the effect that the glass and windshield "was fairly clean." There was no substantial testimony that the windshield was in such a defective condition as to impair the driver's vision, or that the claimed defective condition of the windshield was or could have been the proximate cause of the accident. We do not see how appellants could have been prejudiced by failure to give the proffered instruction.

[2] As to the refusal to give the next instruction based on section 679 of the Vehicle Code prohibiting the driver of a motor vehicle from driving such vehicle on a highway unless it is equipped "as required by this code" and is "in such safe mechanical condition as not to endanger * * * any person upon the highway," it must be held, in view of the evidence, that the trial court did not prejudicially err in failing to give such an instruction. All of the evidence shows that the driver of the motorcycle was not looking when his motorcycle struck the truck and at the particular moment of the impact the driver of the truck did not have time to, or at least did not apply the brakes until the vehicles collided. The evidence shows that the brakes on the truck were "effective" even after the tests were made. The most that can be said is that the truck would have veered to the right if the right front brake "grabbed" as suggested. We do not see how it could be said that this condition, assuming its existence, or the evidence here produced, when considered in connection with the Vehicle Code requirements, would constitute a failure to

equip the truck "as required by this code" or a failure to keep it in "such safe mechanical condition as not to endanger" the appellants under the facts here related, as the brakes were not used and it was not shown that their condition had anything to do with the accident. From the evidence, it appears that the driver of the motorcycle drove blindly into the truck. We do not see what difference it could have made as to the proximate cause of the accident and injury if the condition of the right front brake of the truck had been as testified to by appellants' witnesses. The refusal to give the proffered instruction under these facts cannot be held to have been prejudicially erroneous. Bender v. Perry, 37 Cal.App.2d 206, 214, 99 P.2d 319.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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57 Cal.App.2d 90

In re SHAFTER-WASCO IRR. DIST.

BOARD OF DIRECTORS OF SHAFTER-WASCO IRR. DIST. v. WESTENBERG et al.

Civ. 3069.

District Court of Appeal, Fourth District, California.

Feb. 10, 1943.

1. Waters and water courses 🔑224

Under act relating to voluntary dissolution of irrigation districts, two types of petitions for dissolution are provided, the one type being for use when district is a going concern with assets and liabilities, and the other type being for use when district has no assets or liabilities and has ceased to be a going concern. Gen.Laws 1937, Act 3876, §§ 2, 2a.

2. Waters and water courses 🔑224

The section of the act relating to voluntary dissolution of irrigation districts which waives necessity of any plan of dissolution being set forth in petition for dissolution or being adopted by board of directors of district applies only to a petition filed pursuant to section of the act relating to proceedings when district has no assets or liabilities and has ceased to be a going concern. Gen.Laws 1937, Act 3876, §§ 2, 2a, 3.

3. Waters and water courses 🔑224

Petition for voluntary dissolution of irrigation district was invalid under section of the Act relating to dissolution of irrigation district when district has no assets or liabilities and has ceased to be a going concern, where petition failed to contain signatures of two-thirds of qualified voters residing in district as required by the Act, and especially where petitions showed that there were assets to be distributed. Gen. Laws 1937, Act 3876, § 2a.

4. Waters and water courses 🔑224

The burden of establishing regularity of proceedings for voluntary dissolution of irrigation district and proper performance of all various requirements laid down in the Act was upon party asserting regularity of the proceedings and relying upon them as basis for a request for affirmative relief, since proceeding was "in rem" and jurisdiction of all persons affected was obtained by publication of a notice. Gen.Laws 1937, Act 3876, §§ 2, 4, 5; Code Civ.Proc. § 1981.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Rem".

5. Waters and water courses 🔑224

In order to establish regularity of a proceedings for voluntary dissolution of an irrigation district which was a going concern with assets and liabilities, it was essential that there be a sufficient petition. Gen.Laws 1937, Act 3876, §§ 2, 4, 5; Code Civ.Proc. § 1981.

6. Appeal and error 🔑949

The judgment of what is substantial compliance with a statute is to be exercised in the first instance by trial court, and if case is one where a requirement of statute has not been entirely disregarded, trial court's determination of the question ought to be controlling in absence of an abuse of discretion.

7. Waters and water courses 🔑224

Trial court did not abuse its discretion in determining that there was not a substantial compliance with the Act relating to voluntary dissolution of an irrigation district when district is a going concern with assets and liabilities, where it appeared that petition for dissolution failed to comply with the Act in several respects, and that such errors and omissions were in violation of substantial rights of electors and landowners of the district. Gen.Laws 1937, Act 3876, §§ 2, 4, 5; Code Civ.Proc. § 1981.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of Shafter-Wasco Irrigation District on voluntary dissolution. From a judgment refusing to confirm the dissolution proceeding, the Board of Directors of the Shafter-Wasco Irrigation District appeals. Charles Westenberg and others were respondents.

Affirmed.

See, also, 130 P.2d 755.

H. E. Schmidt, of Bakersfield, and Ernest H. Tuttle, of Fresno, for appellant.

Maddox & Abercrombie, of Visalia, for respondents.

GRIFFIN, Justice.

The Shafter-Wasco Irrigation District is one formed and functioning under the California Irrigation District Act Stats. 1887, p. 29, approved March 7, 1887; and Stats. 1897, p. 254, approved March 31, 1897; Deering's Gen.Laws, 1937, Act 3854. It embraces a large body of land in northern Kern County.

The present action was brought in an attempt to determine the validity of proceedings, to approve the proposed plan of dissolution, and to dissolve the district under the statute providing for the voluntary dissolution of irrigation districts. Stats. 1903, p. 3, as amended, Act 3876, Deering's Gen.Laws, 1937, p. 1903. The trial court decided that the dissolution proceedings were invalid.

The contestants base their contest mainly on three grounds which, for sake of clarity, may be grouped thusly: first, in respect to the sufficiency of the petition for dissolution; second, as to the validity of the election and the results thereof; and third, as to the sufficiency of the showing made concerning the proposed plan for dissolution of the district and the validity of the proceedings.

The trial court found to be untrue petitioner's allegation that "In conformity with section 2 of the California act for the voluntary dissolution of irrigation districts, a petition was duly prepared and circulated proposing the dissolution of the Shafter-Wasco Irrigation District"; but did find that the district had no outstanding bonds or coupons; that it is true that the district has indebtedness and has had indebtedness at all times material to the proceeding; that it has assets, including monies in bank, office furniture, and equipment, delinquent assessments and certificates of sale of lands sold for delinquent assessments; that the assessments unpaid on land sold to the district for unpaid assessments, together with the amount of the assessments on each parcel of land were in fact according to the list in evidence; that it is not true, as alleged, that any proper petition for the dissolution of the district was ever presented to or filed with the board of directors of the district; that it is not true that notice of the election was ever given in accordance with the provisions of the act to voluntarily dissolve irrigation districts; that it is not true that any election to dissolve the district was duly or regularly held; that it is true that the purported petition for the dissolution of the district fails to describe any lands sold to said district for assessments, the amount of such assessments on any parcel of land sold, the amount of assessments unpaid, or the amount of assessments on any lot or tract of land; that the signers of the petition failed to insert the respective dates on which they signed the same or their respective addresses; that the dissolution petition was not signed by two-thirds of the qualified electors of the district; that the dissolution petition failed to state the indebtedness of the district or its assets; that it was insufficiently signed at the time it was filed; that there was no sufficient order calling the election; and no sufficient notice; that the notice of election purported to be under section 2a of the act and failed to state any plan for the dissolution of the district; that the directors of the district never adopted any plan for the dissolution of the district; that all the purported proceedings for the dissolution of the district were and are null and void and in violation of the substantial rights of the contestants and of other electors and landowners in the district. Judgment was entered denying the relief for which petitioner prayed.

[1-3] The petition, under the act, may be one of two different types. The first type of petition is described in section 2

of the act. Its essential attributes, as applied to this case, are (1) the petition must be signed by a majority in numbers of the holders of title, or evidence of title, to real property in the district; who must also hold a majority in value of said property according to the last equalized assessment roll of the district. (2) The petition must set forth the amount of outstanding bonds, coupons, and other indebtedness, if such there be, together with the general description of the same, and the holders so far as known, showing the amount of each description of indebtedness and the ownership, so far as known, of the same. (3) The petition also must contain the estimated cost of dissolution of the district. (4) It must state the assets of the district, including irrigation system, if any, dams, reservoirs, canals, franchises, water rights, and all other assets, and it particularly requires a "detailed statement" of all the lands sold to the district for assessments, the amount of the assessments on each parcel of land sold, also all assessments unpaid, and the amount on each lot or tract of land. (5) The petition must state any plan proposed by the district's creditors to settle its indebtedness.

The second general type of petition for dissolution is described in section 2a of the act. The procedure and requirements of this type of petition differ greatly from those set forth in section 2. The petition provided for in section 2 is required in the case of a district which is a going concern, with assets and liabilities. On the other hand, the requirements of section 2a are to be followed by a district which has no assets or liabilities and has ceased to be a going concern. In such case section 2a provides that the petition for dissolution mentioned in section 2 of the act shall contain statements showing that the district has no indebtedness, no assets, and has ceased to be a going concern and has no irrigation system by which it conveys water for irrigation or domestic purposes to any of the residents of such district, and also that it is the desire of the signers of such petition to have said district dissolved. Such petition need not contain any other statement or allegation but it must be signed by two-thirds of the qualified electors residing in such district, and by the holders of title or evidence of title representing at least 50 per cent of the acreage within said district and not less than 50 per cent in value of all lands lying within the exterior boundaries of said district, and such petition so signed and containing such statements and allegations shall be sufficient. In such case, proceeding under section 2a, the plan of dissolution referred to in section 3, may be entirely omitted and it shall not be necessary for the petitioner or persons signing such petition, or for the board of directors of the district to propose any plan for the dissolution of such district or any plan for the liquidation of its indebtedness or the distribution of its assets. Reasonably construed, this last provision which waives the necessity of any plan of dissolution being set forth in the petition or being adopted by the board of directors, implies the necessity of such proposed plan being set forth in the petition where the petitioners proceed under section 2, where there are assets and liabilities subject to distribution. Under section 3 the notice of election must also set forth a brief summary of the plan proposed for liquidating its indebtedness and disposing of its assets. Section 2 provides that the petition shall state the assets and liabilities of the district together with any plan proposed to settle same, and this proposed plan "shall be included in said petition." No plan of distribution of any of the assets of the district or plan for the settlement of its liabilities was proposed or stated in the petition or notice of election. It should be here noticed that the petition for dissolution directed to the board of directors of the district consisted of 23 counterparts. All were filed on May 6, 1941. Each section thereof specified (1) that the district was theretofore formed under the irrigation district act; (2) that each of the undersigned is a member of said irrigation district, or is a qualified elector residing in said district and is the owner of the lands described opposite his name and that said lands and all of them are a part of said district; (3) that the said district has no outstanding bonds, coupons or other indebtedness; (4) that said district has no assets, so far as petitioners know, except possibly a small sum of money in bank and its office furniture; (5) that said district has no irrigation system, dams, reservoirs, canals, franchises or water rights, and that no lands have been sold to the district for assessments; (6) that following is a list of assessments unpaid, together with descriptions of the parcels of land upon which such assessments are assessed, (The petition does not set forth any such list); (7) that the estimated cost of the dissolution of the district is $600; and (8) that the undersigned pray that the district be dissolved. Opposite the names signed on the petition appears, in most instances, the address of the signer, and opposite the address under the heading "Description of Property" appears, after a majority of the signatures, a meager description of property such as "lot 9 & 10," "50 ft. lot Wasco," and "one lot in Wasco, 80 acres." In some instances there were more minute descriptions of the property given, but a majority showed no property descriptions opposite the names. After May 6, 1941, more sections of the petition were allowed to be presented at various times until there were 37 counterparts in all. There were no verifications attached to the various sections of the petition by the circulators thereof nor any other document filed attesting to the genuineness of the signatures or that the signers were property owners or registered voters in the district. The record clearly shows that the only check on the sufficiency of the signatures on the petition was made by the secretary of the district. He first typed a list of the landowners of the district as shown by the assessment book. This was the only source of information. The assessment book was made up in his own handwriting and no other handwriting appeared in the book. He did not make up the petitions, circulate them, nor see them signed, and did not know the signatures of the purported signers. The entire investigation was to compare the names appearing on the petition with the names on this typewritten list and to report the result to the board of directors. This constituted the entire effort of the board to determine the sufficiency of the signatures on the petition. There is no provision in the act requiring the signatures to be proved by the affidavits of the circulators. The clerk of the board testified that 888 signatures or names of landowners appeared on the petition out of a total of 1,751 landowners in the district, or 12 names over the required majority. There was no testimony as to the number of registered qualified electors signing the petition. From a reading of the petition under consideration it is difficult to tell whether the petitioners were proceeding under section 2 or under section 2a of the act. Qualified electors are not required to sign the petition under section 2, yet the petition recites that the signers are qualified electors residing in the district. The obvious general import of the petition is that the district has no indebtedness or assets or irrigation system. One would infer from the recitation of facts that the petitioners were proceeding under section 2a. Apparently, however, the petition is not signed by two-thirds of the qualified voters residing in said district. There are over 5,000 qualified voters in the district. The petition was signed by only 888 persons. Counsel for appellant, in his brief, confines his argument to the fact that section 2 of the act is applicable, and contends that he has fully complied with that section. It is obvious, without argument, that the signatures on the petition are insufficient under section 2a. If we proceed to discuss the sufficiency of the petition and validity of the proceedings under section 2a, we are immediately confronted with the fact, and the findings of the court supported by the evidence, that the district, at the time of the filing of the petition, did have assets, including monies in bank, office furniture, and equipment, delinquent assessments and certificates of sale of lands sold for delinquent assessments, and also certain indebtedness, and that it was a going concern. (The petition alleged that no lands had been sold to the district for assessments but the court found otherwise upon sufficient evidence.) Under these facts, it would have been necessary for petitioner to proceed under section 2 of the act. This failure to comply with section 2a, without considering the other matters pointed out, would justify the order of the trial court denying petitioners the claimed relief heretofore set forth, upon a petition based upon section 2a, mainly because of a lack of signatures and because there were assets to be distributed. We therefore must examine the petition to see if it complies with the provisions of section 2 of the act. From a careful examination it becomes immediately apparent that it does not. In the first place, the petition failed (1) to set forth the indebtedness, together with a general description of the same, showing the amount of each description of indebtedness and the ownership, so far as known. (2) It failed to state the assets of the district including water rights and all other assets. (3) It failed to set forth a "detailed statement" of all the lands sold to the district for assessments, the amount of the assessments on each parcel of land sold, and also all assessments unpaid and the amount on each lot or tract of land, which were particularly required. The petition should have stated any plan proposed by the district's creditors to settle its indebtedness or any plan proposed for the distribution of its assets. As far as the record shows no such plan was proposed and none was set forth in the petition or notice of election. It was therefore impossible for the trial court to pass upon any proposed plan as required. Section 4 of the act provides that the proceeding is one in rem; that jurisdiction of all parties interested may be had by publication of a notice of the pendency of the proceeding; that persons interested may appear and contest the validity of the proceedings already had and of "the plan proposed for the dissolution" of the district or any portion of the indebtedness "set out in said petition." Respondents, who are interested parties, filed written objections and exceptions to the proceedings, setting up the defects we have already pointed out. The action was tried by the court and it found that the errors and omissions which we have just discussed, together with the other claimed errors not necessary to further discuss, were in violation of the substantial rights of respondents and other electors and landowners of the district.

[4] The act provides that the court shall hear and determine the regularity and legality and correctness of all proceedings. In re Madera Irrigation Dist., 92 Cal. 296, 331, 28 P. 272, 675, 14 L.R.A. 755, 29 Am.St.Rep. 106; Happy Valley Water Co. v. Thornton, 1 Cal.2d 325, 330, 34 P.2d 991; Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 370, 39 P. 793; Code Civ.Proc. § 1981; People v. Selma Irr. Dist., 98 Cal. 206, 32 P. 1047; Bottoms v. Madera Irr. Dist., 74 Cal.App. 681, 242 P. 100. The action being one in rem, and the jurisdiction of all persons affected being obtained by the publication of a notice, it seems clear that the burden of establishing the regularity of the proceedings and the proper performance of all of the various requirements laid down falls upon the petitioner as the party asserting the regularity of the proceedings and relying upon them as the basis for a request for affirmative relief.

[5] In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. In re Madera Irr. Dist., supra, 92 Cal. at page 333, 28 P. 272, 14 L.R.A. 755, 29 Am.St.Rep. 106; Stumpf v. Board of Supervisors, 131 Cal. 364, 367, 63 P. 663, 82 Am.St.Rep. 350.

Appellants concede the omission of many of the requirements above discussed, but rely mainly upon section 5 of the act which provides that the court in passing upon the regularity, legality and correctness of all proceedings shall disregard an error, irregularity or omission which does not affect the substantial rights of the parties, and contend that since there is no provision requiring any proof to be made to the board of directors of the district as to the genuineness of the signatures of the petitioners, or any requirement that the circulators of the petition for dissolution must verify the signatures thereon, it was the duty of the board of directors to call the election because of the presumption that prima facie, an identity of person is to be presumed from identity of name, and that by virtue of this presumption petitioners established a prima facie showing that the persons signing the petition were not only registered, qualified electors, but also represented a majority of the property owners residing in the district.

[6, 7] Without discussing the effect of the claimed presumption in the instant proceeding, it seems clear to us that the court's conclusion that the petition was otherwise deficient is sufficient to sustain the judgment. A substantial compliance with the statute is essential. Where a statement required to be set forth is totally omitted or affirmatively misrepresented, it cannot be said that there is a compliance with the statute. The judgment of what is a substantial compliance with the statute is to be exercised in the first instance by the trial court. If the case is one where a requirement of the statute has not been entirely disregarded, its determination of the question of substantial compliance ought to be controlling in the absence of an abuse of discretion. Beck v. Ransome-Crummey Co., 42 Cal. App. 674, 184 P. 431. We see no abuse of that discretion in the instant proceeding.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 328

FOTI et al. v. MORRISSEY et al.

Civ. 13715.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1943.

Hearing Denied April 22, 1943.

1. Automobiles 🔑245(6)

Whether motorist exercised ordinary care in looking for pedestrians, or was negligent in failing to see pedestrian sooner who was crossing street about 13 feet from crosswalk, was for jury.

2. Appeal and error 🔑181, 882(3)

An appellate court will not review alleged errors occurring at trial which were not called to trial court's attention, and an appellant will not be allowed to develop issues or theories differing from those on which it was tried.

3. Appeal and error 🔑882(3)

Where charge that motorist was negligent as a matter of law in failing to travel as close to right-hand curb as practicable as required by statute was not advanced at the trial, and no evidence was addressed to that point, and no instruction was requested or given as to the law involved, charge could not be advanced on appeal. Vehicle Code, § 525, St.1935, p. 181.

4. Death 🔑58(1)

In death action, plaintiffs were entitled to benefit of presumption that deceased was proceeding in exercise of ordinary care at time of fatal accident.

5. Automobiles 🔑217(3)

Where pedestrian in crossing street was about 13 feet from crosswalk, it was his duty to yield right of way to automobile, and, when he failed to do so, he was guilty of contributory negligence precluding recovery for his death. Vehicle Code, § 561, St.1935, p. 188.

6. Automobiles 🔑246(4, 31)
Trial 🔑248

An instruction on a rule as vital as the right of way rule should not be stated in language so abstract and laconic as to leave jury free to believe that pedestrian struck outside of pedestrian crossing must have been guilty of failing to yield right of way and consequently guilty of contributory negligence, but should be stated with the explanation that motorist who is entitled to right of way, is not thereby excused from duty of exercising ordinary care.

7. Appeal and error 🔑216(2)

Where no request was made by plaintiffs for additional instructions, they could not complain on appeal of trial court's failure to give additional instructions of its own motion.

8. Automobiles 🔑246(58)

In action for death of pedestrian who was struck by automobile while he was crossing street, evidence was sufficient to justify giving of instruction relating to the crossing of a pedestrian at a point other than crosswalk.

9. Trial 🔑210(1)

Instruction that jury might consider whether a witness had been fairly dealt with by counsel or whether he was, without fault of his own, confused or embarrassed and thus placed in a light not truly representative, was not erroneous.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Carmela Foti and others against James P. Morrissey and others to recover for the wrongful death of Mitchell Foti, deceased. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

Stephen Monteleone and Otto A. Gerth, both of Los Angeles, for appellants.

Nourse & Jones and Pat A. McCormick, all of Los Angeles, for respondents.

SHINN, Justice.

In this action, brought by the widow and children of Mitchell Foti to recover damages for his alleged wrongful death, defendants prevailed in a jury trial and plaintiffs appeal. Upon the appeal it is contended that the evidence established as a matter of law the negligence of defendant James P. Morrissey, who was driving the automobile of William J. Morrissey with the latter's consent when it struck and fatally injured deceased; also that there was no evidence whatever that deceased was guilty of contributory negligence. Certain claims of error are predicated upon the giving of instructions.

At about 11 p. m. on the 28th of December, 1940, Mitchell Foti who was on his way home from work, alighted from a west-bound street car at the northeast corner of Vernon and Main Streets in the City of Los Angeles; the street car resumed its course and crossed Main Street going west; deceased also proceeded westerly across Main Street and was struck by the automobile a foot or two before he reached the middle of Main Street, receiving fatal injuries. It was raining at the time; defendant was driving north near the center of Main Street with his headlights burning and with two windshield wipers in motion on his car. Some 50 feet southerly from Vernon Avenue he slowed down from a speed of 30 miles to about 20 miles per hour, and seeing that the signal had changed from "stop" to "go" for northbound traffic, defendant drove across Vernon Avenue after the street car had crossed over. The left front fender of his car struck deceased at a point some 13 feet north of the north crosswalk of the intersection and close to the center line of Main Street; deceased was thrown slightly forward and to the left so that he fell in front of a car standing at the intersection headed south. Defendant did not see deceased until just as the car struck him, and testified that deceased was running at that time. The light thrown by the headlights of defendant's car was sufficient to enable him to see for a distance of 90 feet ahead. His car was stopped within a few feet after the impact. These were the principal facts as given in evidence and could have been accepted by the jury notwithstanding some minor contradictions and inconsistencies in the testimony.

While it is not contended that defendant was driving at an unsafe speed, it is claimed that his negligence was established by uncontradicted evidence, in that he failed to see deceased before the accident and in that he was not driving as close to the right-hand curb as practicable, within the requirements of section 525 of the Vehicle Code, St.1935, p. 181.

Defendant testified that as he started across Vernon Avenue he looked to the east and to the west for approaching traffic; that he looked at the north crosswalk and there was no one therein. The headlights of the car which was standing on the west side of Main Street north of the crosswalk were shining toward defendant. Deceased was wearing dark clothes.

[1] Whether defendant in the circumstances related exercised ordinary care in looking for vehicles and pedestrians or was negligent in failing to see deceased sooner than he did was purely a question of fact for the jury, and if they believed that the evidence failed to establish negligence in that particular, we could not disturb such finding as without support in the evidence.

It is contended that defendant was negligent as a matter of law in failing to travel as close to the right-hand curb as practicable.

Section 525 of the Vehicle Code provides in substance, in respects here pertinent, that a vehicle shall be driven as close as practicable to the right-hand curb or edge of the roadway except when overtaking or passing another vehicle proceeding in the same direction under the rules governing such movement, or in preparing to make a left-hand turn or unless the right half of the roadway is closed to traffic while under construction or repair.

[2, 3] This particular charge of negligent conduct was not advanced at the trial, no evidence was addressed to the point and no instruction as to the law involved was requested or given. It is presented for the first time upon appeal, and then in so inconspicuous a manner that it has escaped the attention of respondents. It is well settled that an appellate court will not review alleged errors occurring at the trial which were not called to the attention of the trial court, and that an appellant will not be allowed to develop issues or theories of the case differing from those upon which it was tried. Ales v. Ryan, 1936, 8 Cal.2d 82, 105, 64 P.2d 409; Hanchett v. Wiseley, 1930, 107 Cal.App. 230, 234, 290 P. 311. The rule has been applied to theories of negligence presented for the first time on appeal. Mattocks v. F. W. Woolworth Co., 1935, 8 Cal.App.2d 489, 47 P.2d 805. It should be applied here. Defendant testified that as he approached the intersection he observed a car headed south making a left-hand turn in the intersection and that he thought the driver was intending to make a U turn, which would have brought him ahead of defendant's car and traveling north on Main Street. That fact might well have influenced the course taken by defendant driver at the time of the accident. This is mentioned only as an isolated fact which might have had a bearing upon the charge of negligence now relied upon had the same charge been made or even suggested during the

trial. Other facts might have been developed to explain or excuse defendant's driving in the middle of the street had he been accused of negligence in so doing. Plaintiffs cannot take advantage of defendant's omission to acquit himself of an act now asserted to have been negligent with which he was not charged, which plaintiffs did not seek to establish by their evidence, and did not seek to have presented to the jury as an issue in the case.

[4, 5] The views we have expressed render it unnecessary to refer except briefly to the further contention that the evidence shows without conflict that deceased was not guilty of contributory negligence. No witness testified to having observed the movements of deceased from the time he alighted from the street car until he reached the point of the accident, although he was seen by one witness to be proceeding across the street in the general direction of a passenger loading zone for southbound street cars at the intersection and by another witness just before or at the time he was struck. Under those circumstances plaintiffs were entitled to the benefit of the presumption that deceased was proceeding in the exercise of ordinary care. Wiswell v. Shinners, 1941, 47 Cal.App.2d 156, 160, 117 P.2d 677. However, there was substantial evidence that he was some 13 feet north of the north crosswalk and some evidence that he was running at the time of the accident. It was his duty under the circumstances to yield the right-of-way to defendant's car, Vehicle Code, sec. 561, which he failed to do. He was therefore guilty of negligence. Vitali v. Straight, 1937, 21 Cal.App.2d 253, 68 P.2d 746. Under proper instructions as to the presumption relied upon by plaintiffs and as to the duty of deceased as a pedestrian crossing the street outside of a pedestrian crossing, the issue of contributory negligence was submitted to the jury; the implied finding that deceased was guilty of contributory negligence which proximately contributed to his injury is not without support in inferences reasonably to be drawn from the evidence and is therefore conclusive upon this court.

[6-8] The jury was instructed as follows: "If you find from the evidence that the decedent was crossing Main Street at a point other than within a cross-walk, the law required him to yield the right of way, that is, the privilege to the immediate use of the highway, to the defendant James P. Morrissey, and if you find that the decedent was crossing at such a point and he failed to yield the right of way, you will find him to have been negligent as a matter of law." The giving of the instruction is assigned as error, not because it states the law incorrectly, but because it states it too bluntly and without explanation of what would have constituted a yielding of the right of way by the decedent if he was found to have been under that duty. Our attention is called to Umemoto v. McDonald, 1936, 6 Cal.2d 587, 58 P.2d 1274; Mitrovitch v. Graves, 1938, 25 Cal.App.2d 649, 78 P.2d 227; and Watkins v. Nutting, 1941, 17 Cal.2d 490, 110 P.2d 384. It is quite true that an instruction upon a rule as vital as the right of way rule should not be stated in language so abstract and laconic as to leave the jury free to believe that a pedestrian struck outside of a pedestrian crossing must have been guilty of failing to yield the right of way and consequently guilty of contributory negligence. It is likewise true that when the right of way rule is stated in such a case it should be with the explanation that the vehicle driver who is entitled to the right of way is not thereby excused from the duty to exercise ordinary care. No request was made by plaintiffs for additional instructions and they cannot now justly complain of the failure of the court to give them of its own motion. American M. P. Co. v. Nyno Line, Inc., 1924, 70 Cal.App. 415, 423, 233 P. 366. The further contention that there was no evidence that decedent was crossing the street outside of a crosswalk, sufficient to justify the giving of the instruction, is not sustained by the record.

[9] Error does not appear in the instruction to the effect that the jury might consider whether a witness had been fairly dealt with by counsel or whether he was "without fault of his own, confused or embarrassed and thus placed in a light not truly representative." The instruction as worded applied to all of the witnesses in the case and to all of the counsel in the case, for that matter. It was given at the request of the defendants, although the jury, of course, would not have known this. It is sufficient to say that the thought conveyed by the instruction is not shown to

have been unwarranted and it is to be presumed that the trial judge wisely exercised his discretion in cautioning the jury as he did.

The judgment is affirmed.

DESMOND, P. J., and SHAW, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.

57 Cal.App.2d 54

PEOPLE v. BABCOCK.

Cr. 1814.

District Court of Appeal, Third District, California.

Feb. 9, 1943.

Criminal law ⚷1159(5)

Jury finding that defendant was sane at time of commission of robbery was binding on District Court of Appeal, although evidence of insanity was very convincing.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Max Babcock was convicted of the crime of robbery in the first degree. The jury found that he was sane at the time of commission of the offense. From the order denying a new trial and from the judgment of conviction, defendant appeals.

Affirmed.

S. E. Metzler, of Eureka, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged with and convicted of the crime of robbery of the first degree. At the trial he entered a plea of "Not guilty by reason of insanity." The jury returned a verdict finding that he "was sane at the time of the commission of the offense" with which he was charged. Defendant's motion for a new trial was denied. The court determined that his crime was that of robbery of the first degree. He was thereupon sentenced to imprisonment at San Quentin. From the order denying a new trial and the judgment of conviction the defendant has appealed.

It is contended the verdict and judgment are contrary to law and that they are not supported by the evidence.

We are persuaded that, in spite of very convincing evidence of insanity of the defendant at the time of the commission of the offense, this court is bound by the contrary verdict and judgment which were rendered in this case in view of the decisions found in People v. Chamberlain, 7 Cal.2d 257, 60 P.2d 299, and People v. O'Brien, 122 Cal.App. 147, 9 P.2d 902. In the Chamberlain case three expert medical witnesses and ten non-expert witnesses testified that the defendant was insane when he committed the homicide of which he was convicted. Chamberlain took the witness stand in his own behalf and his evidence strongly corroborated the other witnesses in that regard. There was no direct evidence to the contrary. He was found to be sane. The Supreme Court affirmed the verdict and judgment of sanity in that case, saying [7 Cal.2d 257, 60 P.2d 300]: "We cannot say that the jury, observing the defendant in these particulars during the trial, with the entire evidence adduced at the trial in their minds, aided by the presumption that the defendant was sane, did not have sufficient evidence on which to base the verdict in this case."

In the present case the evidence consists of the testimony of two medical experts and of the father of the defendant, together with a transcript of the evidence adduced at the preliminary hearing, including a lengthy examination of the defendant himself, and a transcribed statement of the defendant which was taken within a few days after the robbery occurred. The defendant's statement is clear, connected and rational. It contains no evidence of a deranged mind. In spite of the other evidence of the history of the case, together with the testimony of the medical experts, the jury may have been convinced, from the testimony adduced at the preliminary hearing and particularly from defendant's own statement that he was sane at the time he committed the robbery. Under the authorities above cited we may therefore not interfere with the finding of the jury.

The evidence shows that the defendant was a robust, healthy young man twenty-three years of age. He weighed 225 pounds. He was born in Nebraska. He had completed eight grades of school with a fair record. There is no evidence of subnormal intellect or deranged mind during his youthful days. For several years prior to the commission of the crime with which he was charged he lived with his father at Eureka, California. His mother and father had been previously divorced. His mother remarried and lived in the east. His father was a hard-working reputable citizen.

When Max Babcock was about fourteen years of age he sustained a serious injury to his spine by falling from a tree while he was playing "Tarzan" with some companions. After application of liniment and other treatment during the period of a month or so he appeared to recover from that injury. Later he avoided association with companions and lived a solitary life. He became reticent, timid, irritable and nervous. He was afflicted with insomnia. He was nevertheless obedient and industrious. He ate ravenously and worked hard. There is evidence that he often lay awake at night. He became violent and once assaulted his father without provocation, for which he later expressed regret. He was absorbed in an effort to invent a device to create perpetual motion. For that purpose he dug a well and experimented with a water-wheel, but became discouraged and blew up the well and apparatus with explosives. He bought a short-wave radio and spent much time in listening to war reports from foreign countries. He read Communistic literature, war propaganda and Hitler's "Mein Kampf." He became excited and restless. He was anxious to take an active part in the turbulence of world affairs. He acquired delusions. He said he belonged to a "gang of spies." He claimed that he knew of a rendezvous of organized saboteurs, and that, with the aid of a large sum of money and the cooperation of the officers, he might capture them. He planned a series of holdups to raise the necessary money. He bought a revolver and started on a rampage. He told his father " he had to do something" and asked him to notify the police to follow him. He went to Eugene Oregon, in July, 1941, and, going to the home of the mayor of that city, he attempted to rob him with the use of his revolver, but was frustrated. He fled in an automobile to Portland where he was arrested. After an examination he was committed as a victim of dementia praecox to the Oregon State Hospital for the Insane, but was subsequently paroled and placed in the custody of his mother. It does not appear that he was ever discharged from that institution. After several months had elapsed he returned to his home in Eureka. December 24, 1941, he armed himself with his revolver and entered several places of business in Eureka for the purpose of committing robberies. He went to the "Double-A-Bar" saloon and demanded money from the barkeeper. A bystander by the name of Edwards attacked him and Babcock shot him in the leg. He fled and went immediately to "Tiny's Lounge" where he fired two shots into the floor and demanded money from the bartender, Dick Myers, who promptly handed him $20 from the cash register. As he started to leave, a constable who was present shot him in the chest. He fell to the floor and was arrested and taken to a hospital for treatment. He recovered and was subsequently charged with robbery.

He was again examined and committed to the Mendocino State Hospital as a victim of dementia praecox. July 8, 1942, he was discharged from that institution as cured. September 1, 1942, his trial occurred. He pleaded not guilty by virtue of temporary insanity. Doctor R. B. Toller, the Superintendent of the Mendocino State Hospital, and Doctor Porter, an attending physician, both testified positively that he was insane at the time of the commission of the robbery. His father testified at length regarding the history of the case as above related. The prosecution offered no other evidence except the transcript of testimony adduced at the preliminary hearing, and the defendant's statement previously mentioned. The jury was fully and fairly instructed. The sufficiency of the instructions is not challenged. The jury returned a verdict against the defendant finding that he was sane at the time of the robbery. A motion for new trial was denied. The court determined that the crime of which he had been convicted was robbery of the first degree, and committed him to San Quentin. From the order denying a new trial and from the judgment this appeal was perfected.

Regardless of what this court may think of the sufficiency of the evidence to support the verdict and judgment in this case, we are bound by the Chamberlain and O'Brien case previously referred to and we may therefore not interfere with the determination of the jury and the trial judge regarding the defense of insanity.

The order denying a new trial and the judgment are affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.

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57 Cal.App.2d 318

STEVENS v. KELLEY.

Civ. 13781.

District Court of Appeal, Second District, Division 3, California.

Feb. 24, 1943.

Hearing Denied April 22, 1943.

1. Judgment 🔑951(4)

In illegitimate minor child's action against her alleged father for support evidence *held* sufficient to sustain defendant's plea of "former adjudication" by finding and judgment in mother's previous action against defendant for child's support that defendant was not child's father. Civ. Code. § 196a; Code Civ.Proc. § 597.

See Words and Phrases, Permanent Edition, for all other definitions of "Former Adjudication".

2. Judgment 🔑677

An illegitimate child, on whose behalf her mother brought action against alleged father for support, was "real party in interest," and child's rights, having been determined by judgment denying recovery in such action, cannot be relitigated in subsequent action on her behalf by her guardian ad litem against same defendant for support. Civ.Code, § 196a; Code Civ.Proc. § 369.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

3. Judgment 🔑660½, 664

Where defense of former adjudication is pleaded and earlier judgment established by sufficient proof, such judgment must prevail over later judgment, unless shown to be void, effectually vacated or annulled, or obtained by fraud or under other circumstances rendering it vulnerable to attack on equitable grounds.

4. Judgment 🔑485

A judgment is not subject to "collateral attack," unless void on its face.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

5. Judgment 🔑499

Whether judgment is void on its face, and hence subject to "collateral attack," must be determined from consideration of judgment roll alone, extrinsic evidence being inadmissible.

6. Infants 🔑112

The rules that judgment is not subject to "collateral attack," unless void on its face, and that question whether it is void on its face must be determined from consideration of judgment roll alone, apply to judgments for or against minors.

7. Judgment 🔑499

Extrinsic evidence cannot be received to impeach a judgment on collateral attack.

8. Judgment 🔑461(2)

Where attack on judgment is direct or of such nature as to be governed by rules relating to direct attacks, extrinsic evidence is admissible to establish any facts which will furnish basis for decree vacating judgment in equitable action for such purpose.

9. Judgment 🔑518

A "direct attack" on judgment usually refers to some proceeding in action wherein judgment was rendered, either by motion before court which rendered it or by appeal therefrom, whereas attempt to impeach judgment by matters dehors the record is a "collateral attack".

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

10. Judgment 🔑518

An attack on judgment as procured by fraud is "direct attack," since establishment of fraud shows that no judgment was rendered.

11. Judgment 🔑949(1)

Where defendant's answer set up former judgment as bar to action, plaintiff was entitled to prove, without further pleading, any facts which would establish invalidity of such judgment under equity rules. Code Civ.Proc. § 462.

12. Bastards ⚷17½

An illegitimate minor child's mother has no right to compromise child's claim against father for support by agreement with father, in absence of suit, which mother has right to bring against father and to control. Civ.Code, § 196a; Code Civ. Proc. § 372; Probate Code, § 1431.

13. Appeal and error ⚷1008(1)

In illegitimate minor child's action, by her guardian ad litem, against her alleged father for support, District Court of Appeal, for purposes of appeal from judgment for plaintiff, must give full effect to trial court's finding that neither plaintiff, her mother, nor any other person ever executed compromise of disputed claim against defendant for support. Civ.Code § 196a; Code Civ.Proc. § 372; Probate Code, § 1431.

14. Appeal and error ⚷843(2)

In illegitimate child's action by guardian ad litem against her alleged father for support, where trial court found that plaintiff was not real party in interest in previous suit against defendant by child's mother for support and that no compromise of any disputed claim of child against defendant was ever executed by any one, plaintiff's contention that judgment for defendant in such suit was invalid as entered on mother's unauthorized consent cannot be considered on appeal from judgment for plaintiff. Civ.Code, § 196a; Code Civ.Proc. § 372; Probate Code, § 1431.

15. Appeal and error ⚷909(1)

In illegitimate child's action against her alleged father for support, presumption on appeal from judgment for plaintiff is that plaintiff's mother acted in good faith, without intent to perpetrate fraud on plaintiff, in consenting to entry of judgment for defendant in prior suit brought against him by mother for child's support. Civ.Code, § 196a.

◆

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Patricia Louise Stevens, also known as Patricia Louise Lewis, a minor, by her guardian, J. J. McElligott, against Robert Leslie Kelley for support and counsel fees. Judgment for plaintiff, and defendant appeals

Reversed.

Sprague, Hunt & Sprague, Richard W. Sprague, and Wm. M. Rains, all of Los Angeles, for appellant.

Clifford W. Twombly, of Arcadia, and Francis D. Adams, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

It is provided by section 196a of the Civil Code that "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, or by a guardian ad litem appointed upon the written application or with the consent of his mother; * * *."

Invoking this statutory right, plaintiff Patricia Louise Stevens, by her guardian ad litem, brought the present action against Robert Leslie Kelley, alleging herself to be the child of defendant and Alyce B. Lewis Snyder, who were never married to each other, seeking judgment against defendant for her support and also fees for her counsel. The issue of paternity was submitted to a jury, which rendered a special verdict in plaintiff's favor. The court made findings covering the remaining issues and awarded plaintiff $125 per month and certain other support until her majority, and the further sum of $7,500 as attorney's fees. Defendant was ordered to give security for the payment of the support money in an amount to be fixed by the court; he appeals from the judgment.

[1] By answer defendant pleaded a former adjudication as a defense to the action; the court held that the judgment rendered in the former action did not constitute a bar to the present one and that the issue of paternity was not res judicata. This finding presents the determinative question upon the appeal.

The former action was brought by plaintiff's mother, then Alyce B. Lewis. The complaint therein alleged that Robert Leslie Kelley was the father of Patricia, who was at the time of the institution of the suit three months and twenty days old; that the mother and defendant were not married to each other, and other facts showing the necessities of the child and the ability of defendant to support her. By the prayer of her complaint Alyce B. Lewis sought a judgment declaring that Patricia was the child of the defendant and herself and requiring defendant to pay for the child's support $250 per month or such sum as might be deemed proper. Defendant answered that complaint, denying its allegations generally and specifically; the case went to trial before the Superior Court of Los Angeles County on April 20, 1934, plaintiff Alyce B. Lewis appearing at the trial by her counsel (one of whom, incidentally, is now acting as counsel for plaintiff herein) and defendant appearing in person and by counsel. Upon the conclusion of the trial the court made and entered findings and judgment to the effect that defendant is not the father of Patricia and denying plaintiff any recovery upon her complaint. This judgment became final.

Prior to the trial of the present action, when the issue of paternity was submitted to a jury, certain other proceedings had been had therein. Some months before the jury trial, and before the same judge, the special defense of res judicata had been tried under the provisions of section 597 of the Code of Civil Procedure, by which the court is given discretion to try issues raised by certain special defenses, among which is the defense of former adjudication, before trial of the remaining issues. Upon this preliminary trial defendant offered and there was received in evidence the judgment roll in the former action. Plaintiff herein then offered and there was received in evidence over objection of defendant a document reading as follows: "I, the undersigned, Alyce B. Lewis, do hereby retract all and singular, and each and every allegation of my complaint in the above entitled matter, the same having been verified by me on the 7th day of September, 1933, and filed in the office of the County Clerk of the above entitled Court on the 11th day of September, 1933, and I hereby consent and agree that this retraxit shall be a bar to the institution or prosecution of the said action or of any other action, against the defendant herein upon any of the issues contained within and pleaded in said action. This retraxit is intended to constitute and allow a permanent, irrevocable and final determination of the aforesaid action in favor of the defendant. In Witness Whereof, I have hereunto affixed my signature this 3d day of March, 1934. Alyce B. Lewis. Approved: Francis D. Adams (s) De Forrest Home (s) Attorneys for Alyce B. Lewis. [Here follows acknowledgment.]" Also an agreement reading as follows:

"In the Superior Court of the State of California in and for the County of Los Angeles

"Alyce B. Lewis, Plaintiff, v. Robert Leslie Kelley, Defendant. No. D 114985

"Agreement

"We, the undersigned, and each of us, do hereby consent that the above entitled matter may proceed to trial, determination and judgment in our absence, but whether present or absent at the trial in the within action, we consent and stipulate that judgment may be made and entered in favor of the defendant, and hereby waive findings of fact and conclusions of law, and hereby further waive the right to move for a new trial and consent that if motion for new trial should be made following judgment in favor of the defendant, that said motion for new trial may be denied, and further hereby waive the right to appeal from a judgment in favor of the defendant, and consent that the judgment in favor of the defendant shall forthwith, upon the filing of this stipulation, be and become final.

"We, the undersigned, further state that the signature of Alyce B. Lewis, plaintiff, is made and given after consultation with and upon the advice of her counsel of record herein.

"Dated: March 3rd, 1934.
"Alyce B. Lewis (s)
"Alyce B. Lewis
"De Forrest Home (s)
"Francis D. Adams (s)
"Attorneys for Plaintiff."

Defendant's objection which was overruled was upon the ground, among others, that the evidence was offered in support of a collateral attack upon the former judgment and that the court could not consider on such attack anything not contained in the judgment roll in the former action. Plaintiff herein then offered to prove that the sum of $2,500 had been paid by defendant to Alyce B. Lewis, plaintiff in the former action; defendant objected to the evidence upon the same grounds urged against the admission of the documentary evidence, which objection was overruled. Thereupon it was stipulated, defendant reserving his objection to the evidence, that the sum of $2,500 had been paid by defendant to said Alyce B. Lewis. At the conclusion of this hearing (as recited in the findings in the present action) a minute order was made reading as follows: "In this cause heretofore submitted July 2, 1940, the court now renders its decree and order as follows: Judgment for the plaintiff on the affirmative defense that this action is barred by a prior judgment (attorneys notified)." Thereafter the court made a similar order following the reopening of the case for further evidence. Plaintiff made a motion to set the case for trial, which defendant opposed upon the ground that there had been no decision upon the special defense of res judicata; the objection was overruled and the case was set for trial.

Upon the trial before a jury defendant objected to the introduction of any testimony, upon the ground that no decision had been rendered by the court upon the special defense of res judicata, since no findings and conclusions had been signed and filed pursuant to section 632 of the Code of Civil Procedure, which objection was overruled. Following the taking of evidence before the jury on plaintiff's behalf upon the issues of paternity, the necessities of plaintiff and the ability of defendant to support her, no testimony upon these issues being introduced by defendant, the judgment roll in the former action was offered in evidence as first recited herein and plaintiff objected thereto upon the grounds that the judgment was one of compromise and therefore not admissible and that the court had so decided, which objection was sustained; defendant then moved for a directed verdict and following the rendition of the verdict moved for judgment notwithstanding the verdict, which motions were denied. The court made extensive findings, certain of which will be noticed in our discussion of the matters to which they relate.

We have concluded that the plea of former adjudication was sustained by the proof which was received upon the trial of that issue and that findings and judgment herein should have been in favor of defendant upon that defense.

Plaintiff, in her endeavor to defend the present judgment, advances two legal propositions, either of which, she contends, is sufficient for the purpose. The first is that plaintiff herein was not a party to the former action; the second one is that if she was a party to that action the judgment is not binding upon her because the case was compromised without the consent of the court in which it was tried.

[2] The court found that plaintiff herein was not the real party in interest in the former action; this finding was in error. Section 196a of the Civil Code authorizes the mother of an illegitimate child to sue the father for the child's support. The authority of the mother to sue is equal to that of a guardian ad litem or a general guardian. The former action was brought on behalf of the child and she was the real party in interest. That the Code section means exactly what it says has been held in Gambetta v. Gambetta, 1916, 30 Cal.App. 261, 157 P. 1141; Fernandez v. Aburrea, 1919, 42 Cal.App. 131, 183 P. 366; McLain v. Meadows, 1919, 44 Cal.App. 402, 186 P. 411; Mathews v. Hornbeck, 1927, 80 Cal.App. 704, 252 P. 667; and Kyne v. Kyne, 1940, 38 Cal.App.2d 122, 100 P.2d 806. Plaintiff's rights, having been determined in an action in her behalf brought by her mother, cannot be again litigated in an action brought by her guardian ad litem. Section 196a is in harmony with section 369 of the Code of Civil Procedure, which provides that a person expressly authorized by statute may sue without joining with him the persons for whose benefit the action is prosecuted. It was not necessary that the child be named as a party plaintiff in the former action.

[3] If the present judgment were allowed to stand, we would have two judgments of the same court, adjudicating identical rights between the same parties in interest, the second the exact opposite of the first. Both cannot be valid. Where the defense of former adjudication was pleaded and the earlier of the judgments was established by sufficient proof, it had to prevail over the later judgment unless it was shown (1) to be void, (2) to have been effectually vacated or annulled, or (3) to have been obtained by fraud or under other circumstances which would have rendered it vulnerable to attack upon equitable grounds.

[4-6] Two rules of law bear upon the question of validity, namely, unless a judgment is void on its face it is not subject to collateral attack, and whether it is void on its face must be determined from a consideration of the judgment roll alone, extrinsic evidence being inadmissible. Kaufmann v. California Mining, etc., Syn., 1940, 16 Cal.2d 90, 91, 104 P.2d 1038; In re Estate of Keet, 1940, 15 Cal.2d 328, 333, 100 P.2d 1045; Security-First Nat. Bank v. Superior Court, 1934, 1 Cal.2d 749, 753, 37 P.2d 69; Feig v. Bank of Italy, etc., Ass'n, 1933, 218 Cal. 54, 57, 21 P.2d 421; Capital Bond, etc., Co. v. Hood, 1933, 218 Cal. 729, 731, 24 P.2d 765; Sacramento, etc., D. Dist. v. Superior Court, 1925, 196 Cal. 414, 429, 430, 238 P. 687; Crouch v. H. L. Miller & Co., 1915, 169 Cal. 341, 343, 146 P. 880; Brush v. Smith, 1903, 141 Cal. 466, 469, 75 P. 55. The foregoing rules apply to judgments in favor of or against minors. Joyce v. McAvoy, 1866, 31 Cal. 273, 283, 89 Am. Dec. 172.

The judgment roll is complete and it shows a judgment which is not void on its face.

[7, 8] The next question is as to the nature of plaintiff's attack upon the judgment. If it was a collateral attack, plaintiff's evidence, consisting of the retraxit, the agreement, and the fact that plaintiff's mother received $2,500 from defendant, was incompetent, since extrinsic evidence cannot be received to impeach a judgment upon a collateral attack. If it was a direct attack or, to be more exact, if it was an attack of such a nature that it was governed by the rules relating to direct attacks, extrinsic evidence was admissible to establish any facts which would furnish the basis for a decree vacating the judgment in an equitable action brought for that purpose. 15 Cal.Jur. 14; Jeffords v. Young, 1929, 98 Cal.App. 400, 404, 277 P. 163; Carpentier v. City of Oakland, 1866, 30 Cal. 439, 443; Spencer v. Vigneaux, 1862, 20 Cal. 442, 449.

[9, 10] We are of the opinion that under the pleadings plaintiff was in a position to make a direct attack upon the judgment and that the extrinsic evidence offered by plaintiff would have been admissible in support of a direct attack. What plaintiff endeavored to do is another matter and remains for further discussion. We shall take up first the state of the pleadings to see what was in issue and whether plaintiff's attempted attack was collateral or direct. As stated in Parsons v. Weis, 1904, 144 Cal. 410, at page 415, 77 P. 1007, at page 1009, "When we speak of a direct attack upon the judgment, we usually refer to some proceeding in the action in which it was rendered, either by a motion before the court which rendered it, or an appeal therefrom; whereas, an attempt to impeach the judgment of [by] matters dehors the record is a collateral attack. See, also, Eichhoff v. Eichhoff, 107 Cal. 42, 40 P. 24, 48 Am.St.Rep. 110. An attack upon a judgment on the ground that it was procured by fraud is a direct attack, since the establishment of the fraud shows that no judgment has been rendered." See, also, Lieberman v. Superior Court, 1925, 72 Cal. App. 18, 35, 236 P. 570.

[11] There was no pleading on plaintiff's part which alleged facts which would invalidate the judgment, but that was unnecessary. Defendant in his answer set up the former judgment as a bar to the present action. Under section 462 of the Code of Civil Procedure all new matter in the answer was deemed to be controverted. That section has been given a liberal interpretation. In Watson v. Poore, 1941, 18 Cal.2d 302, 316, 115 P.2d 478, under similar circumstances, the plaintiff was allowed to prove that a deed relied upon as a defense to the action was procured by fraud; in Feig v. Bank of Italy, etc., Ass'n, 1933, 218 Cal. 54, 21 P.2d 421, the plaintiff was allowed to prove facts to overcome the effect of a judgment pleaded in the answer, the court saying (218 Cal. at page 57, 21 P.2d at page 422): "It is well settled that a plaintiff, without further pleading, may offer evidence in avoidance of new matters set up in the answer or tending to overcome matters disclosed by the defendants' evidence admitted under the denials contained in the answer." In Taylor v. Taylor, 1923, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074, in an action for partition brought by the wife, the husband by answer pleaded a divorce decree rendered by a Nevada court as an estoppel to the action of the wife. The latter sought to avoid the effect of the decree by proof that it had been fraudulently obtained, under section 462 of the Code of Civil Procedure. The court there said (192 Cal. at page 81, 218 P. at page 760, 51 A.L.R. 1074): "If a replication were permissible, plaintiff, by such a pleading, could

have set up the facts constituting the fraud alleged to have been committed by the defendant; but, under our system of pleading, a replication to the answer has no place. It is supplied by operation of law through the application of section 462 of the Code of Civil Procedure, which provides that the statement of any new matter in the answer, in avoidance of constituting a defense, must, on the trial, be deemed controverted by the opposite party. Ordinarily, when a cause of action or a defense rests upon fraud, the facts constituting the fraud must be pleaded. But the necessity of proving fraud may appear only after the answer of the defendant is in. In such case, a plaintiff may introduce on the trial evidence which countervails or overcomes any new matter as if it were inserted in a replication and pleaded with all the precision and fullness which the strictest rules of law require." Other cases to the same effect are collected in 21 Cal.Jur. 165. Plaintiff, without further pleading, was entitled to prove any facts which, under the rules of equity, would establish the invalidity of the judgment.

[12-14] She attempted to show that the judgment was not binding upon her because it was entered upon the consent of her mother and that the mother had no authority to give such consent. This was in the nature of a direct attack. In support of this contention plaintiff relies upon section 372 of the Code of Civil Procedure and section 1431 of the Probate Code. At the time of the judgment the former section authorized a guardian or guardian ad litem of a minor to compromise actions for or against the minor with the consent of the court in which they were pending; the latter section authorized the father of a minor in some cases and the mother in others to compromise disputed claims of a minor for money against third persons, after filing a verified petition with and receiving the approval of the superior court of the county in which the minor resides. There is no Code section which specifically denies the mother of an illegitimate child authority to compromise claims of the child in an action for support brought by the mother on behalf of the child against the alleged father. She has no right to compromise her child's claim by agreement with the alleged father in the absence of a suit which, as we have seen, she has the right to bring and control. Fernandez v. Aburrea, supra, 42 Cal.App. 131, 183 P. 366. But whether the above Code sections apply to such a suit need not be decided. At the outset of the inquiry upon this phase of the case we encounter two findings in the present action which are destructive of this theory of invalidity. The first of these findings is that plaintiff was not the real party in interest in the former suit. Of course if this finding had been sustained by the evidence it would have been a complete answer to the contention that plaintiff's claim had been improperly compromised. Although maintaining stoutly that this finding was correct, plaintiff proceeds to ignore it and assumes facts to the contrary of the finding. The next finding reads as follows: "* * * there has never been executed by the mother of the plaintiff herein, or by any other person or persons, a compromise of any disputed claim, the property of this plaintiff, * * * nor have any moneys allegedly received by any person upon any such disputed claim, the property of this plaintiff, or in compromise thereof, been paid or delivered to any person for or on behalf of this plaintiff." Plaintiff does not challenge this finding but ignores it altogether. For the purposes of this appeal we must give full effect to the finding. It necessarily follows that plaintiff's mother did not compromise plaintiff's claim for support in the former action and that there was nothing to be presented to the court for approval. Before the question we are discussing would appear for decision, the two findings we have mentioned would have to be the other way around.

[15] The next possible theory which could have been developed under the pleadings is that the former judgment was the result of fraud perpetrated upon plaintiff by her mother. No such theory was advanced at the trial and it is not suggested here. We mention it only because it could have been made an issue under the pleadings if plaintiff had seen fit to do so and not because there was any evidence tending to show fraud. The presumption is that plaintiff's mother acted in good faith and it is significant that her motives have not been impugned. The finding that she did not compromise any claim of the plaintiff suggests that defendant may have been willing to pay $2,500 in order to obtain a judgment declaring that he is not the father of plaintiff and would not have been willing to pay any sum to or for the use of plaintiff under circumstances that would have admitted his paternity. The mother acted upon the advice of counsel, one of whom as we have stated now represents plaintiff.

It is not at all surprising that no charge of actual fraud on the part of plaintiff's mother was made in the present action.

As the finding that plaintiff was not the real party in interest in the former action is contrary to the undisputed facts and as the other findings we have discussed furnish no support for the conclusions of law, the judgment must be reversed.

Other points urged by appellant relating to alleged irregularities of procedure, to the allowance of counsel fees, and to the requirement for the giving of security require no attention.

The judgment is reversed.

PARKER WOOD, J., and SHAW, Justice pro tem., concur.

Hearing denied; CURTIS, CARTER, and TRAYNOR, JJ., dissenting.

21 Cal.2d 537

GUDGER v. MANTON et al.

L. A. 17852.

Supreme Court of California.

Feb. 9, 1943.

As Modified March 4, 1943.

1. Libel and slander 🔑130

One publishing, without privilege or justification, untrue matter disparaging another's property in land, chattels or intangibles under circumstances which would lead reasonable man to foresee that third person's conduct as purchaser or lessee thereof might be determined by such publication is guilty of "slander of title" or "wrongful disparagement of title" and liable for owner's pecuniary loss caused by resulting impairment of vendibility.

See Words and Phrases, Permanent Edition, for all other definitions of "Slander of Title" and "Wrongful Disparagement of Title".

2. Execution 🔑171(4)
Libel and slander 🔑132
Quieting title 🔑7(4)

The levy and recording of writ of execution on husband's separate realty for satisfaction of judgment against wife constituted basis for disparagement of title action by husband and a cloud on his title, removable by action to quiet title, or grounds for injunctive relief, as lien must be "false", that is, without legal foundation, for elements of tort of "wrongful disparagement of title" to exist.

See Words and Phrases, Permanent Edition, for all other definitions of "False Lien".

3. Evidence 🔑5(2)

It is matter of common knowledge that recorded writ and notice of execution on husband's separate realty for satisfaction of judgment against wife would have an effect on prospective purchaser of, and merchantability of title to, such realty.

4. Torts 🔑4

"Malice implied in law" is mere legal fiction, while "actual malice" denotes ill will or desire to do harm for satisfaction of doing it or conduct amounting in effect to same thing.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Malice" and "Malice Implied in Law".

5. Libel and slander 🔑139

In husband's action for slander or wrongful disparagement of his title to separate realty by levy and recording of writ of execution thereon for satisfaction of judgment against wife, burden was on plaintiff to prove that publication of disparagement was without privilege and made with actual malice.

6. Libel and slander 🔑131

Actual malice in publishing disparagement of title to realty may indicate lack of privilege or justification, in which case cause of action for damages exists, if other elements of tort are present.

7. Libel and slander 🔑131

One publishing matter falsely disparaging another's property in land, chattels or intangibles is liable for damages, though he did not intend to influence third person's conduct as purchaser or lessee of thing in question, neither knew nor believed disparaging matter to be false, and did not publish it from ill will toward owner or desire to cause him loss.

8. Libel and slander 🔑131

Malice, constituting element of slander of title, may be "express" or "implied", and implication of malice in law is proper, in absence of privilege or justification, if other necessary elements are present, or actual malice may in some cases show lack of privilege.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Malice" and "Implied Malice".

9. Appeal and error 🔑1122(5)

In action for slander or wrongful disparagement of title to realty, finding of malice in law is merely "conclusion of law", and may be made by Supreme Court on appeal, as well as by trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

10. Libel and slander 🔑131

To recover damages for slander or wrongful disparagement of title to realty, there must be circumstances deemed in law to show lack of privilege, lack of good faith, or actual malice.

11. Appeal and error 🔑854(1)

A judgment may be affirmed on appeal on any theory supported by evidence and trial court's findings.

12. Libel and slander 🔑136

A levy of execution on husband's separate realty to satisfy judgment against wife is not absolutely "privileged publication" of disparagement of husband's title as being an "act in due course of judicial proceeding", as such levy is merely endeavor to collect judgment rendered in such proceeding and acts of public officials involved are purely "ministerial". Civ.Code, § 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Act in Due Course of Judicial Proceeding", "Ministerial Act" and "Privileged Publication".

13. Libel and slander 🔑136

The recording of execution on husband's realty to satisfy judgment against wife was not a "communication to a person interested" within statute defining "privileged publication" disparaging title to property as one made in communication without malice to person interested therein by one also interested, standing in such relation to person interested as to afford reasonable ground for supposing innocent motive, or requested by person interested to give information. Civ.Code, §§ 47(3), 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Communication to a Person Interested".

14. Libel and slander 🔑136

A claimant of property in land is conditionally privileged to disparage or justified in disparaging another's property therein by honest and good-faith assertion of inconsistent legally protected interest in himself.

15. Appeal and error 🔑1122(1)

In husband's action for slander or wrongful disparagement of his title to realty by levy and recording of execution thereon to satisfy judgment against wife, evidence and trial court's findings *held* to require findings by Supreme Court, on appeal from judgment for plaintiff, that execution was not levied or maintained in exercise of good faith or in honest belief that plaintiff's wife had interest in property and that defendant's acts were not justified or privileged. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

16. Principal and agent 🔑92(1)

An agent's act in scope of his employment is act of principal.

17. Attorney and client 🔑29
Libel and slander 🔑139

In husband's action for slander or wrongful disparagement of title to his separate realty by levy and continuance of execution thereon to satisfy foreign judgment against his wife, evidence *held* sufficient to support trial court's conclusion that nonresident defendant, who acted as judgment creditor's attorney in obtaining judgment, acted as principal, not merely as such creditor's forwarding attorney or agent employing subagent, in engaging California attorneys to collect judgment, so as to render such defendant responsible for acts of local attorneys in commencing action on judgment and levying and recording writ.

18. Attorney and client 🔑29, 104

A nonresident attorney, employing California attorneys to collect foreign judgment against resident of state, is responsible for local attorneys' acts, within scope of their authority, in levying execution on realty belonging to judgment debtor's husband only, and their knowledge of such levy and taking of plaintiff's deposition denying judgment debtor's interest in realty is imputed to such nonresident attorney.

19. Principal and agent 🔑159(1)

A principal is liable for tort committed by agent within scope of his employment and with principal's authority, though agent's acts are wilful or malicious.

20. Attorney and client 🔑29
Libel and slander 🔑139

In husband's action for slander or wrongful disparagement of his title to realty by levy of execution thereon to satisfy foreign judgment against his wife, correspondence between judgment creditor's nonresident attorney and California attorneys employed by such nonresident to collect judgment *held* insufficient to show that local attorneys were unconditionally discharged before execution was levied by them, so that nonresident attorney was not relieved from liability as principal for their acts.

21. Attorney and client 🔑76(1)

While an attorney may be discharged at any time, failure to have substitution of another attorney made in action is factor to be considered in determining whether there was a dismissal.

22. Principal and agent 🔑19

When principal and agent relationship is shown to have been created for indefinite length of time, there is presumption in favor of its continuance. Code Civ.Proc. § 1963(32).

23. Libel and slander 🔑139

In husband's action for slander or wrongful disparagement of his title to realty by levy of execution thereon to satisfy foreign judgment against his wife, evidence that plaintiff received offers of $32,500 and $35,000 for realty from persons ready, able and willing to purchase it, that they failed to buy it because of execution lien, and that property could not have been sold for more than market value of $16,500 when execution was released two months after such offers, was sufficient to support award of $16,000 damages.

24. Appeal and error 🔑994(3), 1012(1)

The witnesses' credibility and weight of evidence are exclusively within province of trier of facts.

25. Libel and slander 🔑139

An owner of realty, title to which was wrongfully disparaged by levy of execution thereon to satisfy judgment against his wife, was entitled to recover damages in amount of difference between amounts offered for realty by persons who failed to purchase it because of execution lien and market value thereof when execution was released two months after offers were made.

26. Appeal and error 🔑1073(7)

Where sales of realty were lost because of disparagement of title thereto by levy of execution thereon to satisfy judgment against owner's wife and market value thereof declined during continuance of such disparagement, party liable therefor was not injured by fixing of damages in amount of difference between sums offered for realty by prospective purchasers and value of property when execution was released.

27. Libel and slander 🔑139

The proper measure of damages for slander or wrongful disparagement of title to realty is amount which will compensate owner for all detriment proximately caused thereby. Civ.Code, § 3333.

28. Damages 🔑62(3)

A real estate owner, damaged by loss of sales of realty because of wrongful disparagement of title thereto by levy of execution thereon to satisfy judgment against his wife, was not bound to mitigate damages by communicating to prospective purchasers fact of release of execution.

29. Libel and slander 🔑135

A landowner's disclosure to prospective purchasers of land that execution thereon to satisfy judgment against his wife had been levied and recorded did not constitute such publication of matter disparaging title to realty as to bar owner's recovery of damages for such disparagement, as real publication was recording of execution.

30. Torts 🔑12

An action lies for inducing breach of contract by resort to unlawful means, such as libel or slander.

31. Libel and slander 🔑135

A landowner's disclosure to prospective purchasers of land that execution thereon to satisfy judgment against his wife had been levied and recorded, thereby disparaging his title, was not republication constituting "proximate cause" of injury from such disparagement, as real publication was recording of execution.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Francis A. Gudger against Mabel Manton, Lucile Pugh, and others to quiet title and recover damages for slander or wrongful disparagement of title to realty. Judgment for plaintiff, and defendant Pugh appeals.

Affirmed.

Prior opinion, 123 P.2d 635.

Harry G. Sadicoff, Wilbert C. Hamilton, and John F. Hoornaert, all of Los Angeles, in pro. per., and Harold A. Fendler, Bertin A. Weyl, Jr., Craig & Weller, and Paul A. Amos, all of Los Angeles, for appellant.

Eckman & Lindstrom, Ralph G. Lindstrom, Arthur W. Eckman, and Robert L. Moore, all of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff and respondent, Francis Gudger, was awarded compensatory damages in the sum of $16,000 in an action for slander of title to real property against all of the defendants, except defendant, Harry G. Sadicoff, judgment being given in favor of him. Defendant Pugh alone prosecutes this appeal therefrom.

In 1932, defendant Manton obtained a judgment for $40,166.45 in New York against plaintiff's wife arising out of a premarital tort. Appellant Pugh, a New York attorney not admitted to practice in California, was Manton's counsel in that action. Her compensation arrangement was a 40 per cent contingent fee contract. The judgment being unpaid, appellant, without Manton's knowledge, communicated with defendants, Hamilton and Hoornaert, California attorneys, with regard to the collection of the judgment and on December 6, 1934, requested them to immediately institute proceedings for the collection of the judgment; plaintiff and his wife were then residing in Los Angeles. Appellant agreed to pay defendants Hamilton and Hoornaert 20 per cent of her 40 per cent contingent fee. Following communications between appellant and Hamilton and Hoornaert, and on January 7, 1935, the latter commenced an action in Manton's name in California on the New York judgment against plaintiff's wife. After appellant had communicated with Hamilton and Hoornaert with reference to the return of the papers with a bill for their services, the latter obtained the entry of a default judgment against plaintiff's wife. Thereafter, in 1938, said defendants, Hamilton and Hoornaert, through defendant Sadicoff, an attorney at law, had levied and recorded a writ of execution upon all interest of plaintiff's wife in certain described real property standing of record in plaintiff's name. Plaintiff was not disturbed in his possession. Plaintiff's wife had no interest in the property, it being plaintiff's separate property. The instant action followed in January, 1938, in which plaintiff sought to quiet title to the real property and for damages for the levy and continuance of the execution on his property. He prevailed in both claims, the latter being here in dispute insofar as appellant is concerned. The execution was released by defendants in February, 1939, after the commencement of this action.

[1] The judgment here under attack rests upon the theory of a slander by appellant of the title of plaintiff's property, or more accurately the wrongful disparagement of plaintiff's title thereto to his injury. At the outset it is helpful to have before us an accurate definition of that tort. It may be best stated as follows: "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." Restatement, Torts, § 624. The amplification and application of that rule to the facts in the instant case will hereafter appear.

[2, 3] With that rule in mind we turn to appellant's contention. She asserts that the levy of and recording of a writ of execution upon the real property of another, not a party to the judgment, does not constitute a lien nor cloud upon the title, and where the judgment debtor has no interest in the property, no right of the owner thereof is affected, and therefore it cannot be the basis for a disparagement of title action; that a levy of execution under such circumstances is not a cloud on the title such as is removable by an action for that purpose or grounds for injunctive relief; and that the levy was only upon the right, title and interest if any, which plaintiff's wife had in the property, and did not purport to cloud plaintiff's title if his wife had no interest therein. The fallacy of that argument is plain. If a lien were in fact legally created by the levy then the levy would be justified; there would be no falsity and thus no disparagement of title within the definition. Of necessity, in order that the elements of that tort may exist, the lien must be false, that is without legal foundation. Under appellant's reasoning a disparagement of title action never would lie for the recording of an instrument affecting another's title. It has been held that the recording of a document making a false claim to real property may constitute the publication of the disparaging matter in the tort in question; naturally the document could not in fact or law constitute a meritorious legal claim to the property. Coley v. Hecker, 206 Cal. 22, 272 P. 1045, involved the recording of an abstract of judgment after an undertaking staying execution pending an appeal had been filed; Fearon v. Fodera, 169 Cal. 370, 148 P. 200, Ann.Cas.1916D, 312, 313, con-

cerned a deed by one having no interest in the property; Ezmirlian v. Otto, 139 Cal. App. 486, 34 P.2d 774, involved the recordation of an assignment of royalties when the one causing the recording had no interest in the property. The recording of the notice of the execution necessarily embraced the imputation that plaintiff's wife had the whole or a part interest in plaintiff's property, and that such interest was subject to the execution levy. Otherwise there would have been no reason for recording the writ and notice of execution. Such instruments on record had all the appearance of an assertion by defendants of a claim to an interest in the property, and as a matter of common knowledge would have an effect upon a prospective purchaser of the property and the merchantability of the title. He would naturally assume that plaintiff's title was not merchantable, as it was encumbered by a lien to an indefinite extent. Defendants as reasonable persons should have reasonably foreseen that such would be the effect of their action. The essence of the matter is that there has been an actionable disparagement of title if the plaintiff has been proximately damaged thereby. The question of damages is hereafter discussed. Appellant refers to several cases from other jurisdictions apparently contrary to the views herein expressed, but we are not inclined to agree with the holdings therein. If the matter is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title where it is so understood by the recipient. Restatement, Torts, § 629. As we have seen, the reasonable imputation of the recording was a claim of an interest adverse to plaintiff's title. Whether a cloud on the title in the technical sense existed was immaterial. While it is true the execution claimed only such interest as plaintiff's wife had in the property, the only reasonable implication is that in fact the wife did have an interest in the property and a lien thereon was claimed.

[4-8] It is asserted that there was no evidence or finding of malice on the part of appellant. In discussing that issue it is necessary to clarify the meaning to be given to particular terms. There has been considerable confusion and lack of rationalization flowing from the use of the term malice. It arises chiefly from the failure to clearly distinguish between malice implied in law and actual malice. The former is a mere legal fiction, while the latter denotes ill will or the desire to do harm for the satisfaction of doing it or conduct which in effect amounts to the same thing. Actual malice becomes important on the question of punitive damages, or the availability of certain conditional privileges. In the instant action no punitive damages were awarded; therefore the issue of actual malice is not important in that respect. The discussion here is concerned with the right to recover compensatory damages. In the definition heretofore given of the tort, disparagement of title, it will be noted that the publication of the disparagement must be "without privilege." That phrase may be well amplified by adding thereto or "without justification." The burden of proof of that lack of privilege is upon the plaintiff in the tort here discussed as is actual malice, if that term be employed, and the existence of the circumstances necessary to create the privilege is one of fact. Restatement, Torts, §§ 651, 652. Actual malice may under proper circumstances indicate a lack of privilege or justification and a cause of action exists if the other elements of the tort are present. See in a somewhat similar situation, Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 36, 112 P.2d 631. The rule has been concisely stated: "One who publishes matter disparaging to another's property in land, chattels or intangible things is subject to liability under the rule stated in section 624 (set forth, supra). Although he (a) did not intend to influence a third person's conduct as purchaser or lessee of the thing in question; neither knew nor believed the disparaging matter to be false; did not publish the matter from ill will toward the other or a desire to cause him loss." Restatement, Torts, § 625.

True, it has been said or intimated that malice is an essential element in slander of title. Fearon v. Fodera, supra; Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 13 L.R.A. 707, 25 Am.St.Rep. 151; McDaniel v. Baca, 2 Cal. 326, 56 Am.Dec. 339; Kendis v. Cohn, 90 Cal.App. 41, 265 P. 844; Ezmirlian v. Otto, supra; Coley v. Hecker, supra. That malice may, however, be express or implied. Fearon v. Fodera, supra; Kendis v. Cohn, supra; see cases collected 129 A.L.R. 179. And, if there is an absence of privilege or justification, and the other elements necessary are present, an implication of malice in law is proper, if that term is used, or actual malice may in some cases show lack of privilege. There is nothing substantially contrary to those rules on the facts presented in Fearon v. Fodera, supra, or McDaniel v. Baca, supra. In those cases the circumstances established that the publication of the disparaging matter was privileged or justified. In Ezmirlian v. Otto, supra, there was no privilege or justification. The question in the instant case becomes therefore, whether the defendants were without privilege or justification, it being undoubted that the publication was false as plaintiff's wife had no interest in his property.

[9, 10] First, however, appellant complains that there was no finding of malice, but as we have seen, such a finding, if malice in law is meant, would be merely a conclusion of law and this court may make such a finding as well as the trial court. There must, of course, be found present, circumstances which are deemed in law, a lack of privilege, or, as will be hereafter discussed, in connection with privilege, a lack of good faith or actual malice.

[11] Also in connection with the findings it is asserted that because the plaintiff's complaint alleged malice and the case was based upon the theory of malice, there must be a finding thereon. Suffice it to say a judgment may be affirmed on appeal if any theory finds support in the evidence and findings, and further, we have heretofore seen that actual malice is not necessarily essential.

[12] This brings us then to a consideration of whether or not there was a privilege or justification, or whether there was actual malice which would affect the privilege. Appellant contends that the levy of the execution was absolutely privileged as being an act in the due course of a judicial proceeding. Civ.Code, § 47. The levy of a writ of execution is not an act in the course of a judicial proceeding. It is merely an endeavor to collect a judgment rendered in the judicial proceeding, and the acts of the public officials involved are purely ministerial. In Coley v. Hecker, supra, this court stated that the wrongful recording of an abstract of judgment was not a malicious abuse of process, but rather was a slander of the owner's title in the same category as a forged deed.

[13] The privilege stated in section 47 (3) of the Civil Code is invoked. "A privileged publication is one made—* * * 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." Section 48 of the Civil Code states that malice is not inferred in the cases where the privilege in question is involved. That privilege is a qualified or conditional one. 16 Cal. Jur. 67. Here there was in reality no communication to plaintiff as a person interested. The recording of the execution was notice to all persons of a claim of interest by defendant Manton for the benefit of the latter, the same as a publication in a newspaper of a libel concerning a private person. Surely that would not be considered a communication to the victim as a person interested within the meaning of the rule of privilege here in question, although in a sense the victim would be interested in what the publication of the libel contained. Subdivisions 2 and 3 of the above-quoted portion of section 47 are likewise inapplicable because they are predicated upon a communication to the person interested, the communicant being one other than the person interested.

[14] A rival claimant of property is conditionally privileged to disparage or justified in disparaging another's property in land by an honest and good-faith assertion of an inconsistent legally protected interest in himself. See Thompson v. White, 70 Cal. 135, 11 P. 564; Restatement, Torts, § 647. The levy of an execution is an assertion of a claim to an interest in that it is a lien on the property levied upon. Therefore, if in the instant case defendants acted in good faith, that privilege defeats plaintiff's action. Actual malice has a bearing upon the question of good faith.

[15] In the findings of the court there is no express finding of lack of good faith, or of actual malice either of which would destroy the privilege or justification here discussed. There is evidence, however, which points unerringly to a lack of good faith on defendants' part. Plaintiff is not liable for the New York judgment against plaintiff's wife or the California judgment obtained thereon; plaintiff's wife had no interest in his property upon which the execution was levied and recorded at the instance of defendants on September 16, 1938; on September 21, 1938, plaintiff demanded a release of the execution and informed de-

fendants that plaintiff's wife had no interest therein, giving defendants every cooperation in making an investigation, but defendants refused to release it; plaintiff was examined under oath on October 9, 1938, in connection with third party claimant proceedings and it was unequivocally shown that his wife had no interest in the property; a release was refused although Sadicoff, the attorney who obtained the levy for Hamilton and Hoornaert informed the latter that the execution was not proper, advised a release of the execution and withdrew from the case; defendants made no further investigation thereafter, except to examine plaintiff's safe deposit box on November 5, 1938, but they still refused to release the levy until February 15, 1939; after the commencement of this action, deeds by which plaintiff's wife conveyed the property to him were found in the box; they were given in order that no doubt would exist that the property belonged to plaintiff as his separate estate, inasmuch, as it was acquired during marriage; in appellant's letter to defendants Hamilton and Hoornaert in reference to their employment for the enforcement of the New York judgment in California, she stated: "I also wish to pass on to you certain information which I received some time ago from my representatives in Tennessee concerning the financial condition of *Miss Rambeau's husband, Francis A. Gudger* (plaintiff therein). I am informed that he is *extremely wealthy,* having personal property in the neighborhood of $200,000 in addition to various realty holdings. He has an estate at Ashville, N. C. and a winter home at Sebring, Florida. Of course, while the property of the husband is not subject to this judgment, nevertheless *the husband's social and financial position is a factor to be considered.*" (Emphasis added.) And "You can see from what I told you in my letter of January 10th, about her husband's financial standing and holdings—his Florida and Ashville estates, *they* could well afford to pay this judgment." (Emphasis added.) The only reasonable conclusion is that although plaintiff was not liable on the judgment and his wife had no interest in his property, an endeavor was to be made to use an execution affecting plaintiff's property as a weapon, effective by reason of its effect on his social and financial standing, to cause him to pay his wife's obligation. That certainly established a lack of good faith. True, there is evidence that defendant Hamilton believed that plaintiff's wife had an interest in his property. In plaintiff's deposition in the third party claimant proceedings he stated that he had made investments of his wife's funds in securities which he took in his name, deeds were found in a safety deposit box conveying the property from plaintiff's wife to him and dated after the California judgment was obtained, the property was acquired after plaintiff's marriage, from which it might be believed that it was plaintiff's wife's property and he took title thereto in his name. However, by reason of the foregoing persuasive evidence and the findings of the trial court in favor of plaintiff on the other issues, we are convinced that this court should make a finding, that the execution was not levied or maintained in the exercise of good faith or in the honest belief that plaintiff's wife had an interest in the property, and that defendants' acts were not justified or privileged. Pursuant to power granted under the Constitution and statutory law of this state, Cal. Const., art. 6, § 4¾; Code Civ.Proc., § 956a, a jury having been waived such finding is hereby made in order to affirm the judgment.

[16, 17] It is contended by appellant that there is no evidentiary support for the findings connecting her with the tort; that she was merely a forwarding attorney, an agent for defendant Manton, the judgment creditor in the New York and California judgments, and thus not responsible for the acts of defendant attorneys in California, there being no showing that incompetent subagents were knowingly chosen by her. Those issues turn chiefly upon the evidence.

The findings of the trial court were that defendants (plural) did the various things such as having the execution levied and maintained. If the conduct of the defendants California attorneys was in a capacity as her agents then the findings are sufficient, inasmuch as the act of an agent in the scope of his employment is the act of the principal.

The evidence is sufficient to establish that appellant was acting in the capacity of a principal rather than merely as the agent of defendant Manton in engaging the California attorneys Hamilton and Hoornaert to enforce Manton's New York judgment against Mrs. Gudger. She was Manton's counsel in the New York action. She stated in her letter of December 6, 1934, written to Hamilton and Hoornaert, in regard to the collection by them of the New York judgment from Mrs. Gudger that the matter was to be handled on the basis of 20 per cent of her fee in the case which she was "handling on a 60-40 basis, 40% being my contingent fee," and Hamilton and Hoornaert were to be paid from her fee; her client Manton was not to pay any part of it. This indicates that she was employing Hamilton and Hoornaert on her own behalf rather than on behalf of Manton. Although she had a contract with Manton retaining her in the action, she had not heard from her for some time and Manton had no knowledge of her negotiations with the California attorneys. But in February, 1935, she wrote of "our client" and that the client instructed her to sever the relations. In negotiations carried on with other California counsel she stated "I have an interest in the judgment." In August, 1938, she wrote to Sadicoff "In the first place I have a *substantial interest in the judgment and in any moneys collected thereon* by reason of my having taken the case on a contingent fee basis and have made many disbursements which have not been repaid." (Emphasis added.) She had or claimed to have an attorney's lien on the New York judgment for her fee. It is clear that the evidence was sufficient to support the conclusion that appellant was acting as a principal, as well as an agent for Manton, rather than as merely a forwarding attorney or agent employing a subagent in engaging Hamilton and Hoornaert to collect the judgment. There is conflicting evidence such as appellant not being a party to the action in California on Manton's New York judgment, and that defendant Hamilton contacted Manton with reference to collection of the judgment, but such conflicts have been resolved against appellant by the trier of fact. The negotiations with Manton may fairly be said to have been for the purpose of obtaining additional authority from one who was in reality merely a coprincipal. It follows that the authorities relied upon by appellant with relation to the nonliability of an agent for the acts of a subagent or of a forwarding attorney for the acts of the attorney to whom the matter is sent are not pertinent. Appellant was more than a mere subagent or forwarding attorney.

[18, 19] The evidence establishes that appellant was responsible for the acts of the defendants California attorneys. It is true that she had no personal knowledge of the levy of the execution by those defendants, or the taking of plaintiff's deposition in the action in California on the New York judgment in which he denied that Mrs. Gudger had any interest in the property, or the contents of the safety deposit box used by him and his wife, and that no demand was made upon her personally for a release of the execution. However, if the California attorneys, defendants, were acting within the scope of their authority she is responsible for their acts and their knowledge is imputed to her. She employed them to collect the New York judgment which would naturally include the levy of execution. There is evidence from which it may be inferred that she authorized defendants, her agents, to use the levy of the execution to force plaintiff to pay the judgment against his wife although he was not liable thereon and his wife had no interest in his property. That was evinced by her letter to Hamilton on January 10, 1935, in which she stated she was informed that plaintiff was extremely wealthy and that "of course, while the property of the husband (plaintiff) is not subject to this judgment, nevertheless, the husband's social and financial position is a factor to be considered," and later, on January 22, 1935, she wrote: "You can see from what I told you in my letter of January 10th, about her (Mrs. Gudger's) financial standing and holdings—his Florida and Ashville estates, they could well afford to pay this judgment." Evidence to the contrary merely creates a conflict with which we are not concerned. The argument of appellant to the effect that a principal is not liable for the commission by his agent of a malicious tort or, of slander of title, where it is necessary to show lack of good faith or justification, is beside the point, because the conduct of the agent in the instant case was embraced within the scope of the authority conferred by the principal when the agency was created. If a tort is committed by an agent within the scope of his employment and with the authority of his principal, the latter is liable even though the acts are wilful or malicious. See Deevy v. Tassi, 21 Cal.2d 109, 130 P.2d 389, decided October 30, 1942.

[20, 21] Appellant claims that even if the California attorneys were her agents for whose acts she was responsible, they had been discharged before the execution was levied. She refers to correspondence she had with the defendants, California attorneys, after the latter had been employed and had commenced action in California on the New York judgment. In reply to a letter from Hamilton to appellant concerning the collection of the judgment, the latter wired to the former on February 2, 1935, that unless Hamilton could obtain a better offer than $20,000 in settlement of the judgment "kindly return papers with your bill." On the same date appellant wrote to Hamilton stating the telegram had been sent, but continuing also to discuss the collection of the judgment. On February 4, 1935, Hamilton wrote to appellant acknowledging the receipt of the telegram, and stating that he would endeavor to make a satisfactory settlement, but if he could not, he would commence supplementary proceedings against Mrs. Gudger, to which appellant telegraphed: "Letter 4th Received Client's Instructions Contained In My Telegram Second Please Follow Stop." On the same date Hamilton's letter to appellant stated: "I do not understand from your telegram of February second that you wish the papers returned to you without permitting me to be in a legal position to try to collect this money. If you do, I will gladly return them to you together with my bill for services rendered.

"If I am permitted to secure this judgment and endeavor to collect the monies, and if I am unable to collect the same I would certainly not expect any fee whatsoever. I feel that my securing the judgment here would place me in a position to collect if Miss Rambeau is working.

"If, however, you desire to cancel your instructions in reference to the suit, please advise me and I will be more than glad to cooperate with you. I would, however, appreciate a letter from you explaining your position fully so that there may be no misunderstanding, as I am more than anxious to comply with your requests and do just what you desire." He then referred to the telegram of February 2, 1935, requesting the return of the papers, and stated that if appellant wanted them returned he would do so with a bill for his services. On February 11, 1935, appellant wrote to Hamilton stating that as the latter thought the judgment would be hard to collect, her client, (Manton), felt it was useless for him to proceed further and accordingly the client instructed her to wire for the return of the papers with his bill. On February 14, 1935, Hamilton wrote appellant that the California judgment had been entered against Mrs. Gudger and he was returning the papers and expressed his regret that he was not to have the opportunity to collect the judgment; he fixed his fee at $200. The judgment was obtained on February 14, 1935. May 1, 1935, Hamilton by letter stated that in compliance with instruction the judgment had been lying dormant, and requested authority of appellant to accept an offer in respect to the judgment as follows: "As the judgment now stands it amounts to $48,296.76 plus $11.00 costs. The judgment is NOT to be satisfied, but I wish you to authorize me to collect the money on the judgment, remit one-half of the amount collected to your office and apply the total amount collected against the judgment. I am to be permitted to retain one-half of the amount collected, a goodly portion of which must necessarily be paid out for the information I am receiving.

"I have been assured by the source of my information that in this manner the judgment can be collected and you will receive approximately $25,000.00. This will not in any manner, shape or form be a settlement of the judgment, but by running executions it is possible that we may secure the total amount of the judgment over a short period of time and may be able to get it all at one time. The execution will be run immediately upon receiving authorization from you." On May 11, 1935, appellant replied to the May 1st letter stating: "I have carefully noted what you say with regard to levying execution. It appears from the contents of your letter that many levies may be necessary.

"What will insure collection after the first execution is levied?

"Can you clarify this?

"If so, kindly advise."

[22] Other correspondence followed. Hamilton receiving no replies from appellant, he wrote to Manton for authority to collect the judgment. A reasonable inference can be drawn from that evidence that Hamilton and Hoornaert had not been unconditionally discharged. The clear implication therefrom is that the relationship still continued. There are also other factors to be considered. Hamilton's bill of $200 was never paid, appellant giving as the reason that he was to take it out of what he collected. Appellant never had Hamilton and Hoornaert substituted out

of the action as attorneys. While an attorney may be discharged at any time, the failure to have the substitution made is a factor to be considered in determining whether there was a dismissal. Appellant testified that she sent a form of substitution to Manton and received it back, and that she sent it to Fendler (a counsel in California with whom she corresponded) to get Hamilton's signature. Although appellant called Hamilton from New York on the telephone and was later in Los Angeles, Hamilton testified: "Q. Did Miss Pugh ever say to you that she considered you discharged in the case? A. No, sir. * * * A. There was, from start to finish of this case never any change in the percent fee coming to Mr. Hoornaert and myself, other than the 10%. The balance of the fee was to be paid out for information, as was well discussed with Miss Pugh." Appellant's testimony on the subject was vague and contradictory. When a principal and agent relationship has been shown to have been created to exist for an indefinite length of time there is a presumption in favor of the continuance of the relationship. United States Farm Land Co. v. Darter, 42 Cal.App. 292, 183 P. 696; Code Civ.Proc. § 1963(32); 3 C.J.S., Agency, § 316.

[23, 24] Appellant attacks the findings on damages asserting that the evidence is insufficient to support them. The court found that during the early part of December, 1938, plaintiff had two bona fide offers of $32,500 and $35,000 respectively, for the purchase of one of the parcels of plaintiff's property upon which the execution had been levied by purchasers ready, able and willing to purchase the property; the offers included the furniture in the house on the property valued at $2,500; that the purchasers would have purchased the property but for the execution lien; that since the date of the release of the execution in February, 1939, the property could not have been sold for a price in excess of $16,500, the market value thereof. Damages in the sum of $16,000 were awarded. One of the prospective purchasers was Mr. Ibbett. It appears that on December 5, 1938, he made a written offer of $35,000 for the property providing plaintiff was in a position to give him "vacant possession and full title within * * * 48 hours." It cannot be said that the offer was impossible of performance because of the shortness of time inasmuch as plaintiff testified he could vacate within the period, and if he had clear title he would be in a "position" to deliver such title. Thus, Ibbett was ready and willing to purchase the property. That he was able is established by the evidence. He testified that his father was going to pay for a house for him and he would contribute part; that his father had substantial means and that he had $10,000 to $15,000 cash of his own. He was earning $25,000 per year. He did not buy the property because of the execution lien. The other prospective purchaser, Mrs. Beadles, upon being quoted a price of $35,000 by plaintiff, offered $32,500 which plaintiff said he would accept. She had securities worth several hundred thousand dollars. When informed by plaintiff of the execution, the transaction was dropped. Appellant's contention, that the offers were not bona fide and that there was no ability on the part of the purchasers to make the purchase, are largely directed at the credibility of the witnesses. While the evidence on this point could be more satisfactory, we are satisfied that it was sufficient. The credibility of witnesses and weight of the evidence are matters exclusively within the province of the trier of fact. Appellant relies upon such cases as Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St. Rep. 87, and Merzoian v. Kludjian, 183 Cal. 422, 191 P. 673, as showing that the evidence was insufficient to show the ability of the prospective purchasers to fulfill their offer, because Ibbett particularly was relying upon receiving money from his father. Each case must be determined upon its particular facts, and here, Ibbett showed that he as well as his father had financial means, and that his father had agreed to purchase a home for him. The evidence was sufficient. In Russell v. Ramm, 200 Cal. 348, 353, 254 P. 532, 534, this court said: "As to the principles of law laid down in Merzoian v. Kludjian, supra, it may be conceded that these were correct as applicable to the facts of that case, but the rule therein declared, which would require a would-be purchaser of property to make a showing, either that he had the purchase price on hand in the form of money or that he had consummated such a loan upon his available properties or securities in anticipation of the preparation and execution of the formal contract of purchase as would enable him

to comply with its terms in advance of its execution, would be to lay down too drastic a rule governing business transactions of the kind presented in the instant case."

[25] Appellant questions the measure of damages applied by the court. The damages were predicated upon loss of sales of the property by reason of the levy of the execution, the court finding that bona fide offers were made in December, 1938, and that there was a decline in the market value of the property between then and February, 1939, at which time the execution was released, and its reasonable value at the latter time was $16,500. One offer was for $35,000 from which a deduction of $2,500 for the value of the furniture leaves $32,500. The latter figure less $16,500 leaves $16,000, the damages awarded. Appellant claims that the damages should have been the difference between the market value of the property at the time of the offers of purchase and the amount offered rather than between the amount offered and the market value at the time the execution was released. The value of the property is fixed, however, as of the time the execution was released, and during that time, from December, 1938, to February, 1939, the title to the property was affected by the execution. Under these circumstances we find no error in the assessment of damages.

[26, 27] Where, as here, there have been losses of sales and a decline in the market value of property thereafter during the continuance of the disparagement of title (the execution lien here), defendant has not been injured when the court in fixing the damages selects the difference between the amount offered at the sales and the value of the property at the time the execution was released. That rule takes into consideration the effect of the defect in the plaintiff's title with relation to the fluctuation in the value during that time. Those principles have been applied in wrongful attachment cases. See Keystone Pipe & Supply Co. v. Crabtree, 174 Okl. 562, 50 P.2d 1086; Nixon v. First State Bank, 60 Tex.Civ.App. 7, 127 S.W. 882; Hoover v. First Nat. Bank, Tex.Civ.App., 192 S.W. 1149; 7 C.J.S., Attachment, § 559. In Heath v. Lent, 1 Cal. 410, there was no loss of sales by reason of the wrongful attachment and the court seems to reason that the wrong did not cause the depreciation in the value of the property, and there being nothing to show that plaintiff's loss of his opportunity to sell during the continuance of the levy had affected him. In the tort in question the proper measure of damages is the amount which will compensate for all detriment proximately caused thereby. Civ.Code, § 3333.

[28] Appellant contends that plaintiff failed to mitigate damages referring to a failure on the latter's part to communicate to the prospective purchasers the release of the execution. There was no obligation upon plaintiff's part to do so under the circumstances. After all attempts to obtain a release of the execution from defendants had failed, plaintiff commenced his action in January, 1939. The execution was levied in September, 1938, and not released until February, 1939.

The damages were clearly the proximate result of the disparagement of title by defendants. Ibbett, one of the prospective purchasers, testified: "Q. And would you have purchased it if you could have had clear title? A. Yes." The other, Beadles, a lifelong friend of plaintiff, did not purchase the property after being informed by plaintiff of the execution. That the title to property would not be marketable by reason of the execution, is apparent. See Miller v. Price, 103 Cal. App. 650, 654, 284 P. 1035.

[29-31] Appellant contends, however, that in an action for slander of title where the plaintiff refuses to sell the property because of the defect, the defendant is not liable; that plaintiff in advising the prospective purchasers of the execution was publishing the disparaging matter, which publication was the proximate cause of plaintiff's injury. With respect to Ibbett, he testified that he would not buy the property unless the title was clear. With the execution recorded there was an apparent defect. In regard to Beadles, plaintiff told her he would not sell because he could not give a clear title. She was a lifelong friend and certainly plaintiff was justified in not concealing the existence of the execution. He might well be committing fraud if he did not divulge the information or represent that the title was clear. He was justified in his dealing with prospective purchasers in advising them of the state of his title. That would not con-

stitute a publication which would bar him from recovery. The real publication, as we have seen, was the recording of the execution. Regardless of whether plaintiff had informed the purchasers of the execution, it was a matter of record, and it would in practically all instances be discovered by the prospective purchaser before the transaction was completely consummated. In Burkett v. Griffith, supra, the court was not concerned with a recorded instrument affecting the title. Further, it seemed persuaded that where a binding contract exists between the purchaser and plaintiff, and the disparaging matter induced the purchaser to breach his contract rather than preventing him from agreeing to purchase, the plaintiff had an adequate remedy against the purchaser. That reasoning is no longer valid inasmuch as an action will lie for inducing the breach of a contract by a resort to unlawful means such as libel or slander. See Imperial Ice Co. v. Rossier, supra. Nor is the case one where a republication by the plaintiff rather than defendants' publication is the proximate cause of the injury. The real publication here was the recording of the execution by defendants, a factor not involved in the ordinary case of libel and slander. A policy fostering the exercise of good faith and fair dealing would require the owner of property to inform a purchaser of what the record showed, although he would in all probability discover it in any event. In effect, plaintiff was placed in a position where good conscience would compel him to reveal the existence of an apparent defect in his title. It would not be questioned that a publication in a newspaper of the fact of the recording would not render the publisher liable to the owner of the property.

For the foregoing reasons, the findings are amended by adding thereto that the levy and maintenance of the execution by the defendants were without privilege or justification and not in good faith or in an honest belief that plaintiff's wife had an interest in the property on which the execution was levied.

The judgment is affirmed.

GIBSON, C. J., and SHENK, and TRAYNOR, JJ., concurred.

EDMONDS, J., did not participate herein.

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21 Cal.2d 609

SILBERMAN v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18516.

Supreme Court of California.

Feb. 17, 1943.

1. Workmen's compensation ⚷208

To establish legal relation of "special employer" and "special employee" as a basis of a compensation award, it must appear that either by terms of contract or during course of its performance employee of an independent contractor came under control and direction of other party to contract as a special employee and suffered injury as result of such direction and control.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employee" and "Special Employer".

2. Workmen's compensation ⚷208

Contractor who had primary obligation of removing street car rails from city street and of delivering them to steel company and who furnished trucks for such delivery and agreed to compensate subcontractor engaged in removing rails for expense of loading rails on trucks, had "authoritative control" and not mere "suggestive control" over employees of subcontractor engaged in loading rails and was properly held liable as a "special employer" on compensation award to employee of subcontractor injured while loading such rails.

See Words and Phrases, Permanent Edition, for all other definitions of "Authoritative Control" and "Suggestive Control".

CURTIS and EDMONDS, JJ., dissenting.

In Bank.

Proceeding by L. H. Silberman to review an order of the Industrial Accident Commission awarding compensation to Irvin Clark and holding petitioner liable therefor as special employer, and Mills Construction Company as general employer.

Award affirmed.

Joseph H. Dasteel, of Los Angeles, for petitioner.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

SHENK, Justice.

The Industrial Accident Commission held the petitioner, Louis H. Silberman, liable as the special employer of Irvin Clark, a laborer who was injured while engaged in loading rails onto a truck. Mills Construction Company was held liable as general employer of Clark. On this proceeding in review the petitioner seeks the annulment of the award against him as special employer on the sole ground that there is no substantial evidence to support the commission's finding of special employment.

On or about June 18, 1941, the petitioner entered into a written contract with the city of Pasadena whereby he agreed to remove streetcar rails from certain streets in the city and to repave the portions of the street from which the rails had been removed. On June 25, 1941, the petitioner entered into a written sub-contract with Theodore Cohn, doing business as the Mills Construction Company, under which the latter agreed to remove the rails from the streets in accordance with the contract between the petitioner and the city of Pasadena.

The petitioner sold the rails to the Dulien Steel Company and agreed to deliver them F.O.B. truck at the place where the rails were taken up. The contract between the petitioner and the Mills Company contained no provision with reference to the loading of the rails on the trucks. A dispute arose between them on this point, and it was orally agreed that the Mills Company would obtain the services of men to load the rails on the trucks to be supplied by the petitioner, and that the petitioner would reimburse the Mills Company for the cost of loading the rails on the trucks, including wages, liability, compensation and unemployment insurance, gas, oil and overhead.

The Mills Company began the work of excavating and removing the rails on or about July 1, 1941. In the course of the work and on October 30, 1941, a foreman of the Mills Company, telephoned an employment agency to secure a laborer. Irvin Clark was sent and was told to report to the superintendent of the Mills Company. Upon reporting for work and not finding the superintendent, he was directed by the foreman to begin loading rails on a truck. Clark had been working at the task assigned him less than one hour when a rail slipped and fell on his leg, causing the injury for which he claimed compensation. He was paid for one day's work by the Mills Company which in turn billed petitioner for the amount.

The petitioner contends that the work of Clark vas undertaken by him merely as one of the obligations of the Mills Company under the terms of the subcontract; that his services were not subject to the direction or control of the petitioner; that no right to direct or control Clark's activities was reserved to the petitioner and that the only obligation which the petitioner assumed was to pay for his services.

[1] The rule generally is stated in Stacey Bros., etc., Co. v. Industrial Acc. Comm., 197 Cal. 164, 239 P. 1072, as follows: "To establish the legal relation of special employer and special employee it must appear that either by the terms of the contract or during the course of its performance the employee of the alleged independent contractor came under the control and direction of the other party to the contract and suffered injury as the result of such direction and control."

In Campbell on Workmen's Compensation, volume I, section 457, it is said: "The requisites for imposing liability upon both general and special employer are: (1) a loaned employee situation, in which an employee of one is sent to perform labor for another; (2) a common or joint participation in this work and benefit to each for the rendition; (3) some power, not necessarily complete, of direction and control over details in each." It has been held that the payment of wages is not of itself sufficient to establish that the recipient thereof is the servant of the one paying the same. Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 262 P. 757. But in addition to that circumstance the commission points to other facts from which it is claimed reasonable inferences may be drawn to establish the relationship of special employment.

[2] It is first pointed out that under his contract with the city the petitioner was obligated to remove the rails from the streets completely. Whether the Mills Company, under the subcontract, was required to load the rails on to trucks was a subject of dis-

pute which resulted in the petitioner's assuming the cost of that work. The petitioner then, under a separate contract with the Dulien Steel Company, bound himself to deliver the rails on board the trucks. From all that was done it may fairly be inferred that the job of loading the rails on the trucks was the petitioner's job.

It is next pointed out that for the purpose of seeing that the Mills Company carried out its part of the contract the petitioner kept a representative in the person of David S. Friedner at the place where the work was being performed. Mr. Friedner testified that he was assigned to the job by the petitioner as a "peace-maker for all concerned"; that it was his duty to pay attention to the requests of the city in the performance by the Mills Company of its contract, as those requests were communicated to him by the city's representative; that when he was notified "of anything that the city might require that is not done in order" he would "suggest" to Mr. Urban, the superintendent of the Mills Company, what the city required, and that he occasionally watched the loading of the rails and counted them. Mr. Charles T. Schultz, a city street inspector, testified that whenever he failed to get results from the Mills Company's foreman he would inform Mr. Friedner of his requirements and would be assured by Mr. Friedner that "he would have it taken care of."

It is urged by the petitioner that the evidence of his control of the activities of the Mills Company and its employees shows a lack of authoritative control and no more than suggestive control; and that a certain measure of suggestive control by an independent contractor may be exercised without becoming liable as a special employer, citing Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342. The argument may have some force with reference to right of control, exercised or reserved, on the part of the petitioner over operations under the subcontract having to do with the removal of the rails from their embedded positions in the street and the repavement of the surface. But with reference to the performance of the task of furnishing trucks and loading them with the rails, which was ultimately the petitioner's obligation, the evidence of control puts on a more authoritative aspect. Mr. Campbell also observes (vol. I, § 463) that it is frequently a difficult question whether the contractor "has overstepped that indefinite boundary from mere suggestive into authoritative control." Here the measure of control which the petitioner as the responsible party had the right to exercise over men doing the work which he was bound to do under his contract with a third party was much more than suggestive, in fact it could be no less than authoritative. The issue of control was the crucial one in the proceeding before the fact finding body and it may properly be said that the commission was justified in resolving it against the petitioner.

The award is affirmed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

CURTIS, Justice (dissenting).

The majority opinion holds that petitioner Silberman, as the special employer, is jointly liable with the Mills Construction Company, the general employer, for injuries sustained by an employee of the general contractor.

It was the duty of Silberman to load the rails, referred to in the opinion, after they were removed from the streets of the city of Pasadena. The Mills Construction Company agreed to load the rails and Silberman agreed to pay the company the entire expense incurred by it in doing said work, including the wages of the men employed, "liability, compensation insurance, wage tax and overhead fees for handling this material." The company hired Clark and all other men on the job, paid them their wages, and took out compensation insurance covering them. Silberman paid the company in full for these charges. He had no control over any of the employees of the company. As stated by the commission in its answer: (page 6) "For the purpose of seeing that the Mills Construction Company carried out its end of the contract, the petitioner (Silberman) kept a representative in the person of David S. Friedner at the place where the work under the contract was being performed." But neither Silberman nor his representative had any control over any of the company's employees. The representative was simply to see that the company performed its contract.

This court has held "* * * that for liability to attach to the special employer the injured person must have been at the time of the accident subject to the direction and control of such special employer, for it is this right to control and direct the activities of the employee that gives rise to the status of special employer." Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 55, 262 P. 757, 758.

The commission found that Mills Construction Company was insured and that Silberman was not insured. He evidently acted upon the assumption that as long as he was paying the Mills Construction Company for insuring the men employed by it on the job, it was not necessary for him to pay double insurance. As a result of the opinion, Silberman, although he has paid for full compensation insurance to protect the employees of the company, nevertheless is still held personally liable for injuries sustained by one of them.

In my opinion the award against Silberman should be annulled.

EDMONDS, J., concurred.

21 Cal.2d 561

In re PERKINS' ESTATE.

MIDDLEBROOK v. PERKINS.

L. A. 17928.

Supreme Court of California.

Feb. 11, 1943.

Rehearing Denied March 11, 1943.

1. Appeal and error 🔑335

Appeal by deceased's sister, "administratrix of the estate of" deceased, from a decree of distribution of deceased's estate, was not dismissed under principle that an administratrix may not appeal from a decree of distribution, since designation of sister as administratrix would be considered as descriptio personae.

2. Executors and administrators 🔑315(1)

Where deceased's stepson in his objections to petition for distribution of deceased's estate alleged that deceased's entire estate was the separate property of her deceased husband, who was stepson's father, and came to deceased by gift, descent or bequest from her deceased husband, proceeding was not a "proceeding to determine heirship" of stepson, and hence order therein was not required to be limited to that issue. Probate Code, §§ 228, 229.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding to Determine Heirship".

3. Courts 🔑202(5)

The test to be applied in determining whether motion for a new trial will lie in a particular probate proceeding is whether the law expressly authorizes an issue of fact to be framed in such a proceeding. Probate Code, §§ 1020, 1231.

4. Executors and administrators 🔑314(11)

Effective resistance to an application for final distribution of a deceased's estate requires written objections and, at least where issues of fact are formed in that way, any party may demand a jury trial, and hence after verdict and judgment any party may move for a new trial. Probate Code, §§ 1020, 1231.

5. Executors and administrators 🔑314(11)

Where deceased's stepson in his objections to petition for distribution of deceased's estate alleged that deceased's entire estate was the separate property of her deceased husband, who was stepson's father, and came to deceased by gift, descent or bequest from her deceased husband, motion for new trial by stepson after judgment was entered that he was not entitled to any part of deceased's estate, was authorized, and he was not required to appeal. Probate Code, §§ 1020, 1231.

6. Executors and administrators 🔑314(11)

The statute requiring an order granting a new trial on ground of insufficiency of the evidence to so specify was not applicable, where court on motion for new trial on petition for distribution of estate of deceased merely changed certain findings and modified judgment, since court's action was equivalent to denying the motion for new trial. Code Civ.Proc. §§ 657, 662.

7. Descent and distribution 🔑5

Where deceased was domiciled in the state at the time of her death, her estate, consisting entirely of personalty, was subject to laws of succession of the state.

8. Descent and distribution 🔑1

Since the right of inheritance is not an inherent or natural right but one existing only by statutory authority, the law of succession is entirely within the legislature's control.

9. Descent and distribution 🔑1

The designation of heirs and proportions of ancestor's estate which they shall receive are subject to the legislative will.

10. Descent and distribution 🔑68

Until death of ancestor, heir's right of inheritance is not a "vested right" but a mere "expectancy".

See Words and Phrases, Permanent Edition, for all other definitions of "Expectancy" and "Vested Right".

11. Descent and distribution 🔑14
Husband and wife 🔑274(1)

Statutes regarding succession to community property, where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue, are not limited in scope to community property, and provide that on death of survivor of marriage intestate and without issue, property shall go to family or families of spouse or spouses through whose efforts estate was accumulated. Probate Code, §§ 228, 229.

12. Husband and wife 🔑274(1)

Under statutes regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue, lineal descendant of predeceased spouse succeeds to all property of surviving spouse in which predeceased spouse owned an interest, and if there are no lineal descendants of either spouse, the property then is to be divided equally between the respective families of the two spouses by whose efforts it was accumulated. Probate Code, §§ 228, 229.

13. Descent and distribution 🔑14

If property originally comes to predeceased spouse by acquisition before marriage or by gift, devise or bequest subsequent to marriage, such property should descend, on death of surviving spouse, entirely to family of predeceased spouse, rather than to family of surviving spouse under statutes regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue. Probate Code, §§ 228, 229.

14. Husband and wife 🔑274(1)

Statutes regarding succession to community property, where there is no issue and regarding succession to separate property of a deceased spouse having no issue, are applicable to all properties subject to probate proceedings in California regardless of its prior status in a foreign jurisdiction, and implicit in that construction is the reclassification, for the purpose of succession only, of property acquired in a foreign jurisdiction in accordance with community property law of the state. Probate Code, §§ 228, 229.

15. Husband and wife 🔑274(1)

Under statutes regarding succession to community property, where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue, the issue or kindred of the predeceased spouse are statutory heirs of the surviving spouse, and their rights under those statutes do not vest until the surviving spouse's death. Probate Code, §§ 228, 229.

16. Descent and distribution 🔑14

Where widow died intestate and without issue, leaving personalty which came to her by gift, descent, devise or bequest from property of her predeceased husband while resident in another state, son of the predeceased husband by a former marriage, rather than widow's surviving sisters, inherited the property. Probate Code, §§ 228, 229.

17. Husband and wife 🔑274(1)

Proceeds of life policies and proceeds of group policy, one-half of the premiums of which were paid by insured's employer, were a "gift" to insured's widow within meaning of statutes regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue. Probate Code, §§ 228, 229.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

TRAYNOR, J., GIBSON, C. J., and CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Ella Wallace Perkins, deceased. Clifford L. Perkins filed objections to a petition for distribution of the estate. The court overruled the objections and entered judgment that Clifford L. Perkins was not entitled to any part of the estate. Thereafter, on motion for new trial, the court entered a judgment ordering distribution of all of the estates to Clifford L. Perkins, except $4,313, and Lillian Middlebrook as administratrix, etc., appeals, and Clifford L. Perkins moves to dismiss the appeal.

Motion to dismiss appeal denied, and judgment affirmed.

Rehearing denied; GIBSON, C. J., and CURTIS and TRAYNOR, JJ., dissenting.

George Appell and Harry A. Mock, both of Los Angeles, for appellant.

C. H. Hartke and Freeman R. Brant, both of Los Angeles, for respondent.

EDMONDS, Justice.

The probate court overruled the respondent's objections to a petition for distribution of the estate of Ella Wallace Perkins and entered judgment that he is not entitled to any part of her estate. Thereafter, on the respondent's motion for a new trial, it entered another judgment which ordered distribution of all of the decedent's estate, except $4,313, to him. This judgment followed the terms of "modified findings of fact" and "modified conclusions of law." The case is here upon a notice of appeal by "Lillian Middlebrook, administratrix of the estate of" Mrs. Perkins, reciting that she appeals from the modified judgment, except that portion of it which orders distribution of the $4,313 to herself and her two sisters, and "from that certain motion for new trial granted in said estate." From this notice it appears that the appeal is directed to a minute order made by the probate court following the hearing of the respondent's motion.

The question for decision concerns the character of the property left by Mrs. Perkins. The respondent claims all of her estate as separate property of her deceased husband which she acquired by gift from him. By its second judgment the probate court sustained the respondent's contention as to all of her property except a portion valued at $4,313, which had come to her by bequest.

Ella Wallace Perkins died intestate in this state leaving three sisters, Lillian Middlebrook, Rose Dunlap Franklin, and Jessie W. Chapman, as her sole survivors. Forty-two years before, she had married Wallace T. Perkins and, prior to his death in 1931, they resided in the state of New York. There were no children of the marriage. Clifford L. Perkins, the respondent, is the son of Wallace T. Perkins by a prior marriage.

Mr. Perkins had remarried in 1897. He was then in the banking business in Denver. In 1904, he and his wife removed to New York, where he became an executive officer of one of the large banks there. The record includes no evidence of any property he had either when he married Ella W. Perkins or when they became residents of New York. But the testimony shows that after he went there as a successful banker he bought life insurance and also stock in a number of corporations. The certificates representing this stock were either issued in his name or in the name of his wife. As his secretary expressed it: "When Mr. Perkins acquired his own holdings, he would either purchase some in smaller amounts for Ella, or he would ask for a transfer or division of the amount that he bought, some in his name and a smaller amount in hers."

It appears that during this time the salary of Mr. Perkins was $40,000 per year and that his income from dividends and investments amounted to as much more. His salary checks and the checks representing his income from other sources were deposited in a bank account from which he paid both his living expenses and for the securities which he bought from time to time. He procured insurance of $90,000 upon his life. The policies representing this insurance named his wife as the beneficiary of $30,000, his son as the beneficiary of the same amount and a friend as the beneficiary of the remainder. Of this insurance, $10,000 was obtained under a group policy issued to the bank of which Mr. Perkins was an officer. One-half of the premiums on the group policy were paid by the bank; all of the other premiums were paid by Mr. Perkins from his income.

Shortly after the death of her husband, Mrs. Perkins came to California bringing with her about $19,000 in cash and some stock and bonds. There is evidence to the effect that while a resident of Los Angeles she made a number of investments. She had inherited $765.01 in 1918, and in 1933 she received a legacy of $3,548.15.

Following the death of Mrs. Perkins, Lillian Middlebrook was named as administratrix of her estate. In due time the administratrix filed her first and final account, together with a petition for distribution of the estate to herself and her two sisters. The respondent filed written objections to the petition for distribution, claiming the entire estate under section 229 of the Probate Code as the separate property of Mrs. Perkins' predeceased spouse. Upon a hearing the probate court ruled against the respondent and decreed distribution to the three sisters of the decedent. No appeal was taken from this decree and the administratrix distributed the estate in accordance with its terms and procured her discharge.

Within the statutory time therefor, the respondent moved the court to grant a new trial. Upon the submission of this motion, the court filed "modified findings of fact and conclusions of law" reciting that the entire estate of Ella W. Perkins, except the sum of $4,313, was her separate property acquired by gift from Wallace T. Perkins. As a conclusion of law the court found that the respondent is entitled to all of the estate except that amount. A "modified judgment" in accordance with this decision was thereupon entered.

The appellant presents several points as grounds for reversal of the order granting a new trial and of the judgment. First, she contends, since the nature of the proceedings before the probate court was to determine the heirship of the respondent, the order should have been limited to that issue. A second point is that an appeal is the only remedy for one dissatisfied with a decree of distribution, and that a motion for a new trial after such a decree is unauthorized and improper. Her third contention is that assuming the motion for a new trial was proper, the failure of the court to comply with the requirement of section 657 of the Code of Civil Procedure that the order granting a new trial upon the ground of insufficiency of the evidence must so specify in writing, is ground for reversal of the judgment. Finally, the appellant urges that the money received by Ella W. Perkins as the proceeds of insurance upon the life of her husband was not a gift to her within the meaning of section 229 of the Probate Code. In this connection she asserts that the removal of Mrs. Perkins to California did not change the legal character of the money which was paid to her in New York.

The respondent takes the position that an administratrix is not a party aggrieved by the judgment, hence the present appeal should be dismissed. Upon the merits, he argues that the court acted entirely within its powers in granting the motion for a new trial and modifying its findings and judgment to accord with the evidence and the law governing the rights of the parties.

[1] Considering first the respondent's contention that the appeal should be dismissed, the record shows that it was taken by "Lillian Middlebrook, administratrix of the estate of" Mrs. Perkins. Although it is a fundamental principle that an administratrix may not appeal from a decree of distribution, this court, looking to the interests of the parties to litigation as of primary importance, has very liberally construed such a notice as one in which the designation of administratrix may be considered as descriptio personae. In re Estate of Strong, 10 Cal.2d 389, 74 P.2d 231. Notwithstanding the fact that in other papers presented by the appellant in connection with the present appeal it is stated that she is appealing "as said administratrix," the rule of the Strong case will be applied in the interests of justice.

[2] Turning to the points urged by the appellant, the statement that the purpose of the proceeding in the probate court was to determine the heirship of the respondent is incorrect. In his objections to the petition for distribution, he alleged the facts regarding his parentage and "that the entire estate of * * * Ella Wallace Perkins was the separate property of * * * Wallace T. Perkins * * * and came to * * * [her] by gift, descent or bequest from * * * [him]." Answering these objections the administratrix admitted the relationship of the respondent, but she specifically denied that the property owned by Mrs. Perkins at the time of her death was the separate property of Mr. Perkins, or that it came to his wife by gift, descent or bequest. The issues, therefore, presented for determination by these allegations concern only the legal character of the property owned by Mrs. Perkins at the time of her death.

[3-5] The point raised concerning the motion for a new trial requires a construc-

tion of section 1231 of the Probate Code, which reads: "A motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried." Section 1020 of the same code provides that any person interested in the estate may resist an application for distribution. In construing the predecessor sections of sections 1231 and 1020 (Code Civ. Proc., §§ 1714, 1665, 1668) this court held that the test to be applied in determining whether the motion will lie in a particular probate proceeding is whether the law expressly authorizes an issue of fact to be framed in such a proceeding. It has been held that a party to a probate proceeding is entitled to a trial by jury when there is statutory authority for the formation of issues of fact upon the question to be determined. Carter v. Waste, 159 Cal. 23, 112 P. 727; In re Estate of Baird, 173 Cal. 617, 160 P. 1078; O'Brien v. Nelson, 164 Cal. 573, 129 P. 985; In re Estate of Sutro, 152 Cal. 249, 92 P. 486, 1027; and In re Estate of Wickersham, 138 Cal. 355, 70 P. 1076, 71 P. 437. In deciding these cases, the court found the necessary statutory authority in the language of section 1668 of the Code of Civil Procedure, reading: "At the time fixed for the hearing * * * any person interested in the estate may appear and contest the petition by filing written objections thereto." That section has since been repealed, but the Probate Code, now in effect, makes provision for an application to distribute the estate of a decedent, which is to be heard upon notice. "Any person interested in the estate or any coexecutor or coadministrator may resist the application." § 1020, Prob.Code. Although this language is not as definite as that which was used in section 1668 of the Code of Civil Procedure, effective resistance to an application for final distribution requires written objections, and, at least where issues of fact are formed in that way, as they were in the present case, any party may demand a jury trial and, after verdict and judgment, make a motion for a new trial.

[6] The appellant's contention that the trial court committed reversible error by not making a written order specifying the insufficiency of the evidence as a ground for its decision upon the motion for a new trial has no factual basis to support it. This statutory requirement becomes important only if the motion is granted. When, upon such a motion, the court follows the procedure authorized by section 662 of the Code of Civil Procedure, and either changes the findings or modifies the judgment without reopening the case for further proceedings and the taking of additional evidence, no new trial is allowed. Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138; Wyman v. Monolith Portland Cement Co., 3 Cal.App.2d 540, 39 P.2d 510; De Arman v. Connelly, 134 Cal.App. 173, 25 P.2d 24; Moore v. Levy, 128 Cal.App. 687, 694, 18 P.2d 362.

But, it may be argued, the form of the minute order made by the court following the hearing of the respondent's motion for a new trial compels a contrary conclusion. This order recites that it is granted insofar as certain findings of fact and conclusions of law are concerned; that these findings and conclusions of law and the judgment are modified and changed to provide that the entire distributable estate, less the sum of $4,313.16, be distributed to the respondent, and that otherwise the motion for new trial is denied. Nevertheless, the action of the court was to deny the motion. A similar situation was presented in Bureau of Welfare, etc. v. Drapeau, 21 Cal.App.2d 138, 68 P.2d 998, where it was held that an order in substantially the same terms as the one now before the court was, in effect, a ruling denying the motion and granting alternative relief. The same construction has been placed upon other orders in this form. Roraback v. Roraback, 38 Cal.App.2d 592, 101 P.2d 772; Garcia v. Bechtol, 134 Cal.App. 615, 25 P.2d 987.

The merits of the controversy between the parties turn upon the question as to whether sections 228 and 229 of the Probate Code apply to property acquired in a common-law property state by one who was domiciled in that state. At the time of Mrs. Perkins' death, these sections read as follows: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse * * * such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation * * *." §

228. "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest * * * such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation * * *." § 229.

[7-10] Mrs. Perkins concededly was domiciled in California at the date of her death. Her estate, consisting entirely of personalty, consequently was subject to the laws of succession of this state. Since the right of inheritance is not an inherent or natural right but one which exists only by statutory authority, the law of succession is entirely within the control of the Legislature. In re Estate of Phillips, 203 Cal. 106, 263 P. 1017; In re Watts' Estate, 179 Cal. 20, 175 P. 415; McCaughey v. Lyall, 152 Cal. 615, 93 P. 681; In re Estate of Bump, 152 Cal. 274, 92 P. 643; In re Estate of Porter, 129 Cal. 86, 61 P. 659, 79 Am.St.Rep. 78; In re Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788; In re Estate of Donnelly, 125 Cal. 417, 58 P. 61, 73 Am.St.Rep. 62; Sharp v. Loupe, 120 Cal. 89, 52 P. 134, 586; In re Wilmerding's Estate, 117 Cal. 281, 49 P. 181; Childs v. Gross, 41 Cal.App.2d 680, 107 P.2d 424; In re Estate of Stewart, 30 Cal.App.2d 594, 86 P.2d 1071. The designation of heirs and the proportions which they shall receive are subject to the legislative will (Estate of Stanford, supra; In re Wilmerding's Estate, supra), and until the death of the ancestor, the right of inheritance is not a vested one but a mere expectancy. In re Estate of Loyd, 170 Cal. 85, 148 P. 522; In re Estate of Clark, 94 Cal.App. 453, 271 P. 542; In re Estate of Warner, 6 Cal.App. 361, 92 P. 191.

[11-13] Sections 228 and 229 together provide for the succession of all property in which the predeceased spouse had some interest. Their scope is not limited to community property, and they have been construed as providing that upon the death of the survivor of the marriage, intestate and without issue, the property should go to the family or families of the spouse or spouses through whose efforts the estate was accumulated. In re Estate of Rattray, 13 Cal.2d 702, 713, 91 P.2d 1042; In re Estate of Putnam, 219 Cal. 608, 611, 28 P.2d 27; In re Estate of McArthur, 210 Cal. 439, 445, 292 P. 469, 72 A.L.R. 1318; In re Estate of Mercer, 205 Cal. 506, 511, 271 P. 1067; In re Estate of Hill, 179 Cal. 683, 688, 178 P. 710; In re Estate of Brady, 171 Cal. 1, 4, 151 P. 275. By these sections, the court has said, the Legislature intended that a lineal descendant of the predeceased spouse should succeed to all property of the surviving spouse in which the predeceased spouse owned an interest; if there were no lineal descendants of either spouse, the property should then be divided equally between the respective families of the two spouses by whose efforts it was accumulated. If, however, the property had originally come to the predeceased spouse by other means than his efforts during the existence of the marriage, such as acquisition before marriage, or by gift, devise, or bequest subsequent to the marriage, then the Legislature intended that such property should descend, upon the death of the survivor, entirely to the family of the predeceased spouse. See cases cited supra.

[14] The only way in which that legislative purpose may be given effect is by applying sections 228 and 229 to all property subject to probate proceedings in California, regardless of its prior status in a foreign jurisdiction. Implicit in this construction, of course, is the reclassification, for the purposes of succession only, of property acquired in the foreign jurisdiction in accordance with the community property law of California. Although this court in In re Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343, held that section 164 of the Civil Code was unconstitutional insofar as it purported to reclassify the property of a spouse who acquired it in a common-law state and later brought it to California, the decision was expressly limited to a reclassification duriny the lifetime of the spouse. Such a change in the incidents and rights of the husband and wife in the property acquired by either of them, said the court, would constitute a disturbance of a vested right, and prior decisions concerning the effect of the statute prevented a determination that it was "part of our succession laws and hence valid as a statute of succession."

[15, 16] Under sections 228 and 229 of the Probate Code, the issue or kindred of the predeceased spouse are statutory heirs of the surviving spouse, and their rights under those sections do not vest until the death of the latter. In re Estate of Watts,

179 Cal. 20, 23, 175 P. 415; In re Estate of Bixler, 194 Cal. 585, 595, 229 P. 704. The property acquired outside of this state during the marital relation is subjected to the laws of succession of California by the fact that, at the time of the death of the surviving spouse, he or she was domiciled within its borders; it may therefore be reclassified under the law of the domicile. In re Estate of Allshouse, 13 Cal.2d 691, 91 P.2d 887, this court held that, under section 229 of the Probate Code, the origin of an estate may be traced into a foreign jurisdiction and the California classification of property applied to the property there acquired. But the decision was qualified by the requirement that the nature of the foreign ownership must be substantially the same as that which the property would have if acquired in this state. Upon a reconsideration of the reasoning of that case, it seems obvious that the limitation of section 229 to property, which, in the foreign jurisdiction, had substantially identical incidents to the classifications of property in a community property state has no reasonable foundation and is not consistent with the legislative intent expressed in sections 228 and 229 of the Probate Code. As those statutes affect succession only, their purpose is fully carried out if the probate court distributes the property upon the basis of its classification had it been acquired in California. Applying that rule, it is unnecessary to determine whether the property owned by Wallace T. Perkins at the time of his death would have been community or his separate property if it had been acquired in California. The respondent, as his son, is entitled to all of the estate of Mrs. Perkins which came to her by gift, descent, devise or bequest from the property of her predeceased husband reclassified as either his separate property or that of the community.

[17] A further question concerns the manner in which Mrs. Perkins acquired the property which is to be distributed by the probate court. The record shows, without contradiction, that she had no gainful occupation and no independent income. Her husband made repeated gifts of securities to her. Proceeds of his life insurance policies were also a gift to her within the meaning of sections 228 and 229 of the Probate Code. See Estate of Rattray, supra, disapproving In re Estate of Miller, 23 Cal.App.2d 16, 71 P.2d 1117, and In re Estate of Lissner, 27 Cal.App.2d 570, 81 P.2d 448. The fact that one of these was a group policy and that one-half of the premiums were paid by his employer does not place that policy in any different category from the others. Such a payment of premiums by the employer was merely another and additional form of compensation for the services of the husband.

This evidence fully supports the trial court's findings that the entire estate of Mrs. Perkins, except the sum of $4,313.16, came to her by gift from her previously deceased husband. In view of the fact that the property owned by Mrs. Perkins at the time of her death was appraised at approximately $14,000, probably less than one-third of the amount she received by gift from her husband and the court allowed her kindred the full amount of the two legacies which came to her from other persons, the division was favorable to them.

The judgment is affirmed.

SHENK, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. The question at issue is not the wisdom of Probate Code sections 228 and 229 or the power of the Legislature to control the succession to property but the applicability of these sections to property acquired by a husband and wife in a common-law state and brought to this state by the surviving spouse who dies intestate here. Their applicability depends neither upon their wisdom nor the range of legislative power but upon whether the Legislature has exercised its power in this particular legislation. Yet the majority opinion gives no heed to the language of Probate Code sections 228 or 229, the provisions of the Civil Code defining community property and separate property, or the decisions of this court interpreting those definitions. Its reasoning is that there is a legislative purpose to give the property to the family of the spouse through whose efforts it was accumulated, and that this purpose can be fulfilled only by applying sections 228 and 229 to all property subject to probate proceedings in California irrespective of its previous character in a foreign jurisdiction. This reasoning admittedly involves a reclassification, for the purposes of succession, of property acquired by a husband and wife while domiciled in a foreign jurisdiction. The majority opinion points to no statutory provisions calling for such a reclassification but attempts to fill the gap by the declaration that such a reclassification is implicit in its own construction of the scope of the legislative purpose. It has thus construed the legislative purpose to extend beyond the legislative language and then read into the language an implication that alone would make possible the execution of the enlarged purpose.

Were the legislative purpose as extensive as the majority opinion construes it to be, its accomplishment would hardly be left to the chance of an implication indirectly arrived at. The Legislature's silence is particularly significant in view of its past activity in bringing within the community property laws property acquired by husbands and wives while domiciled beyond the state's borders. See In re Estate of Frees, 187 Cal. 150, 201 P. 112; In re Estate of Drishaus, 199 Cal. 369, 249 P. 515; In re Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343. Sections 228 and 229 expressly refer to community property and separate property, terms peculiar to community property laws, and make no provision for translating into these terms property acquired under other laws.

If the property acquired by Mrs. Perkins as gifts from her husband and as beneficiary of his life insurance policies was not community property when she acquired it, or was not transformed into community property when she brought it to California, its succession is not controlled by section 228 of the Probate Code. If it was not separate property of the husband when Mrs. Perkins acquired it from him, section 229 of the Probate Code cannot govern its succession. In other words, if her absolute ownership under the laws of New York was not modified when she became domiciled in this state, her sisters are entitled to succeed to her estate under section 225 of the Probate Code.

At the time of Mrs. Perkins' death section 228 read as follows: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse * * * such property goes in equal shares to the children of the deceased spouse * * * and if none, then one-half of such community property goes to the parents of the decedent * * * and the other half goes to the parents of the deceased spouse * * *." Section 229 read as follows: "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, * * * such property goes * * * to the children of the deceased spouse * * * and if none, then to the parents of the deceased spouse * * *."

These sections embody laws of succession and relate to classifications that existed, during the lives of the spouses. See W. W. Ferrier, Jr., Rules of Descent Under Probate Code, §§ 228 and 229, 25 Cal.L. Rev. 261. They do not define community property or separate property for purposes of succession; they do not even come into operation until the character of the property has been determined under the appropriate statutes governing the classification of property as community or separate. They govern the succession only of what "was community property" and what "was separate property" during the lives of its owners. The meaning of those terms, and therefore the scope of the sections, can be found only in the definitions in sections 162, 163 and 164 of the Civil Code. If the property is not encompassed by these sections it cannot be regarded as having been community property or the separate property of a predeceased spouse, and sections 228 and 229 can have no application.

Sections 162 and 163 of the Civil Code provide that all property owned by either spouse before marriage or acquired afterwards by gift, bequest, devise or descent, together with the rents, issues, and profits thereof is his or her separate property. Section 164 provides that all other property acquired after marriage by either spouse or both is community property.

These sections could not transform the property in question into community property while it was being acquired by the husband in New York. Nor was the property converted into community property when Mrs. Perkins became domiciled in this state. The provision in section 164 that personal property acquired while the spouses were domiciled elsewhere is community property when it would not be the separate property of either if acquired while domiciled in this state was held unconstitutional in In re Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343. This case also held that section 164 could not be considered a statute of succession and that its definition of community property did not apply, even for purposes of succession, to property that persons acquired while domiciled in another state. In that case Mr. and Mrs. Thornton came to California with personal property that they acquired while domiciled in Montana. Upon Mr. Thornton's death his wife claimed one-half the property under Probate Code, section 201 providing that "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse." In holding that Civil Code section 164 could not transform the property into community property the court denied Mrs. Thornton's claim to one-half the property under Probate Code, section 201. Justice Langdon dissented on the ground that Probate Code section 201 used the term community property as defined in Civil Code section 164, and as broadened by that definition was constitutional. In the present case Mr. Perkins never came to California with Mrs. Perkins so that there is even greater reason than in Estate of Thornton for holding that the property brought into this state was not community property. Since Civil Code section 164 does not extend, for purposes of succession under Probate Code section 201, to property acquired in another state, it cannot be so extended for purposes of succession under Probate Code section 228 without an outright repudiation of Estate of Thornton.

Whatever the merits of the majority and dissenting opinions on the highly controversial issues in Estate of Thornton, the Legislature took account of the decision and qualified its effect by adding section 201.5 to the Probate Code providing: "Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse * * *." This section is based on the theory that succession to property acquired by a husband and wife before they were domiciled in this state should be subject to the rule governing the succession to property acquired by spouses domiciled here. It applies only in the case of a surviving spouse and does not extend to such cases as the present one involving heirs other than a surviving spouse. The Legislature was apparently not then ready to devise a provision comparable to section 201.5 that would apply to such situations.

Although the estate in question had its source in Mr. Perkins's marital earnings it was never community property. Since it was not community property when acquired and was not converted into community property when Mrs. Perkins became domiciled here, Probate Code section 228 cannot govern its succession.

Likewise section 229 does not govern its succession. That section does not bring the property within its purview, for the term "separate property" is but a differentiation from the term "community property" in section 228. It is well established that the two sections are interdependent and must be construed together. In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; In re Estate of Simonton, 183 Cal. 53, 190 P. 442. Section 229 envisages "separate property" as that acquired other than by marital earnings and the fruits thereof envisaged by section 228. Estate of Rattray, supra; In re Estate of Hill, 179 Cal. 683, 178 P. 710. When the property in question was acquired by Mr. Perkins in New York it could no more be classified as "separate property" than as "community property" under the laws of this state. As a nonresident who never came to California he was untouched by its laws. He never owned, and therefore never gave community property in the sense of section 228, or separate property in the sense of section 229. In defining "separate property of the husband" section 163 of the Civil Code, in contrast to section 164, does not purport to include property acquired by an owner while domiciled in another state. There is therefore less reason to hold that it includes such property in its definition for purposes of succession under Probate Code section 229 than there would have been to hold in Estate of Thornton, supra, that such property could be included in the definition in Civil Code section 164 for purposes of succession under Probate Code section 201. Even if Civil Code section 163 could be given an extraterritorial operation, the property in question as marital earnings would not meet the requirements of separate property set forth in that section. To treat such earnings as if they were separate property would do violence to the scheme of succession embodied in Probate Code sections 228 and 229, which contemplates that in the event both spouses die without lineal descendants, marital earnings are to be inherited equally by the respective families of the two spouses by whose efforts it was accumulated. In re Estate of Hill, 179 Cal. 683, 178 P. 710.

In re Estate of Allshouse, 13 Cal.2d 691, 91 P.2d 887, 891, holding that Probate Code section 229 did not apply to the succession of property that had its source in marital earnings in another state, this court declared: "But the facts of the present case afford no basis for application of the rule. The husband stayed in Missouri and there made provision for his wife and for respondent in contemplation of the operation of the property laws of that jurisdiction. There was no change of marital domicile; no change of situs of the property. The assets were still in Missouri at the time of the husband's death, and they there passed into the ownership of the widow. The widow's act in later establishing a domicile in this state, subjecting her property to its laws, should not have the retroactive effect of a prior act of the husband which would have changed the nature his own ownership. In short, to reclassify the husband's Missouri holding would be for this state to reach beyond its borders and impose its substantially different classification upon both a former owner and a former ownership which obtained in a foreign jurisdiction. This may not be done.

"Respondent, therefore, is not entitled by virtue of section 229, supra, to distribution of the division of property here under discussion. And as there is no California statute of succession which provides that the estate of a widow which originated in transfers to her of property held by her previously deceased husband in common law sole ownership shall revert to the husband's line, an estate derived from such source and brought into California by the widow, who here died intestate and without issue, is her separate property, having for purposes of application of the laws of succession the same status as the separate property of one who has never married. It follows that the portion of decedent's estate which comes within this classification is distributable under section 225 of the Probate Code."

Likewise in the present case the only ownership with which this court is concerned is that of the widow, who as a single person first brought the property within California law after her husband's death. The ownership of the property by the predeceased spouse and its then classification terminated before the property was brought to California. The ownership and classification of the personal property before it was brought to California by the widow was sole ownership of an unmarried person and had thereafter in California the same status as the property of one who had never married.

Respondent argues that under the law of New York the husband's rights in the property at the time of acquisition were equivalent to the rights of a California husband with respect to separate property in California, and that section 229 should govern the succession of the property as it would separate property in California. The property, however, would not be the husband's separate property had he acquired it while domiciled in this state, but on the contrary would be community property because it represented marital earnings. It is a strange construction that interprets the term "separate property" in a California statute to include the very kind of property it was designed to exclude. Under respondent's theory the terms "separate property" and "community property" would apply to property of California husbands and wives as the California statutes contemplate, but in their proposed application to the property of non-residents the term "separate property" would be made to include property that would be regarded as community property in the case of residents. Confusion and inconsistency would inevitably attend any attempt to translate the property rights of nonresident husbands and wives in a common-law state in terms of the property classifications of a community property state.

The majority opinion having read into Probate Code sections 228 and 229 a legislative intent to reclassify property acquired outside the state proceeds to overrule Estate of Allshouse, supra, which would govern this case, on the ground that it is not consistent with the attributed intent. It has gone far afield to avoid the facts that California classifications do not apply to property acquired by husbands and wives while domiciled outside the state and that provisions for the reclassification of property acquired in foreign jurisdictions do not include the rules embodied in sections 228 and 229. It has gone so far afield as to formulate a statute of succession that the Legislature itself did not undertake to formulate when it had occasion to do so. Whatever the court's view of the wisdom of the rules of succession prescribed by the Legislature, it is timely to recall that they are not immutable, and that the task of their periodic revision falls properly to the Legislature. In re Estate of De Cigaran, 150 Cal. 682, 688, 89 P. 833; In re Estate of Nigro, 172 Cal. 474, 477, 156 P. 1019.

The judgment should be reversed.

GIBSON, C. J., and CURTIS, J., concurred.

21 Cal.2d 579

MIDDLEBROOK v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 18000.

Supreme Court of California.

Feb. 11, 1943.

1. Certiorari 🔑49

Though it is the duty of court or officer to whom a writ of certiorari is directed, to prepare a return, it is incumbent on petitioner to see that return is made, and to accomplish that petitioner may, if necessary, invoke aid of court which issued writ to compel compliance with its requirements.

2. Certiorari 🔑49

It is as much the duty of a petitioner for writ of certiorari to furnish record to be reviewed as it is the duty of an appellant to have a transcript before the court.

3. Certiorari 🔑57

On certiorari, court is limited to a review of the properly authenticated record of the proceeding,

4. Certiorari 🔑60

Where no return was filed in original certiorari proceeding in the Supreme Court to review order of probate court, and petitioner offered no excuse for lack of a record, writ was discharged and proceeding dismissed.

In Bank.

Original certiorari proceeding by Lillian Middlebrook, individually, and and as administratrix, etc., against the Superior Court of Los Angeles County and others to review an order made by the court in the matter of the estate of Ella Wallace Perkins, deceased, requiring administratrix to repossess property which had been delivered to administratrix and others pursuant to court's judgment which was later modified and which was thereafter affirmed by the Supreme Court. Clifford L. Perkins, the real party in interest, moved to discharge the writ and dismiss the proceeding on ground that no return had been filed.

Writ discharged, and proceeding dismissed.

See, also, 120 P.2d 661.

George Appell and Harry A. Mock, both of Los Angeles, for petitioner.

C. H. Hartke and Freeman R. Brant, both of Los Angeles, for respondents.

EDMONDS, Justice.

In an original proceeding a writ of certiorari was issued to review an order made by the probate court in the matter of the estate of Ella Wallace Perkins, deceased, requiring the administratrix to repossess property which had been delivered to her, Rose Dunlap Franklin and Jessie W. Chapman pursuant to a judgment which was later modified and has now been affirmed. In re Perkins' Estate, 21 Cal.2d 561, 134 P.2d 231. Upon the day set for hearing the matter, Clifford L. Perkins, the real party in interest, moved to discharge the writ and dismiss the proceeding upon the ground that no return had been filed, and consequently there is nothing before the court to review.

[1-3] Although it is the duty of the court or officer to whom a writ of certiorari is directed to prepare a return, yet it is incumbent upon the petitioner for the writ to see that the return is made. To accomplish this, he may, if necessary, invoke the aid of the court which issued the writ to compel compliance with its requirements. As the person interested in having the action of the inferior tribunal reviewed, it is as much the duty of the petitioner to furnish the record to be reviewed as it is the duty of an appellant to have a transcript before the court. I. X. L. Lime Co.

v. Superior Court, 143 Cal. 170, 76 P. 973; Goodrich v. Superior Court, 92 Cal.App. 695, 268 P. 669; James v. Police Court, 39 Cal.App. 362, 178 P. 867. For on certiorari, the court is limited to a review of the properly authenticated record of the proceeding. Borchard v. Board of Supervisors, 144 Cal. 10, 77 P. 708; Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am.St.Rep. 350; Goodrich v. Superior Court, supra; Donovan v. Board of Police Commissioners, 32 CalApp. 392, 163 P. 69.

[4] The petitioner has neither complied with this fundamental rule of procedure nor offered any excuse for the lack of a record. The writ must therefore be discharged and the proceeding dismissed.

It is so ordered.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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21 Cal.2d 636

PANOS v. GREAT WESTERN PACKING CO.

L. A. 18479.

Supreme Court of California.

Feb. 23, 1943.

1. Judgment 🔑540

Doctrine of "res judicata" rests upon ground that party to be affected, or some other with whom he is in privity, has litigated or has had an opportunity to litigate same matter in former action in court of competent jurisdiction and should not be permitted to litigate it again to the vexation of his opponent.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment 🔑540, 634

In applying doctrine of res judicata, distinction must be recognized between effect of judgment operating by way of estoppel in a later action upon a different cause of action and a judgment operating by way of bar against a second action upon the same cause of action.

3. Action 🔑1

The "cause of action" is simply the obligation sought to be enforced.

See Words and Phrases, Permanent Edition, for all other definitions of "Cause of Action".

4. Judgment 🔑597

Where plaintiff was injured on defendant's premises when struck by a large chunk of meat on a trolley, plaintiff suffered but one injury and had but one "cause of action", and under doctrine of "res judicata" plaintiff, after an adverse judgment in first action, was barred from bringing a second action against defendant to recover for such injury on allegations charging negligence which differed from negligence charged in first action.

5. Judgment 🔑597

A single tort can be foundation for but one claim for damages.

6. Judgment 🔑715(2)

Where plaintiff in prior action against defendant for injuries sustained on defendant's premises alleged that injuries were caused by act of third person and that defendant was negligent in allowing such third person to be present, judgment in prior action was "res judicata" of subsequent action against same defendant for same injuries notwithstanding allegation that injuries resulted from act of defendant.

7. Judgment 🔑597

Plaintiff in second action for injuries allegedly caused by defendant's negligence cannot escape bar of adverse judgment in former action by urging that during prosecution of former action he was unaware of ground of negligence relied on in second action or that he was prevented from proving such ground of negligence because it was not within allegations of former complaint.

8. Judgment 🔑660

Where a court prevents litigation of matters which inhere to cause of action on ground that they are not pleaded, plaintiff's remedy is either to seek to amend or to have ruling, if erroneous, corrected by appropriate proceeding for review.

9. Judgment 🔑660

An erroneous judgment is as conclusive as a correct one.

In Bank.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Tom Panos against the Great Western Packing Company to recover for injuries. From a judgment for defendant on a special plea of res judicata, plaintiff appeals.

Affirmed.

Prior opinion, 126 P.2d 889.

Romaine Hogan, of Los Angeles, for appellant.

Jennings & Belcher, Stevens Fargo, and Louis E. Kearney, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an action for damages for personal injuries received by plaintiff on December 6, 1939, while he was on defendant's premises to make a purchase. The injuries resulted when he was struck by a large piece of meat which was being conveyed on an overhead trolley. Two months after the accident plaintiff instituted a prior action for damages for the injuries suffered, naming as defendants, among others, Wilson Lee and the Great Western Packing Company, defendant herein. In that action it was alleged that Lee, also on defendant's premises to purchase meat, had negligently pushed the meat over the trolley causing it to strike plaintiff. Liability was there sought to be fastened on defendant under allegations charging that it had negligently permitted Lee to come upon its premises and take possession of a large parcel of meat and to so use the trolley as to injure plaintiff. On July 24, 1940, judgment was entered for the defendants. No appeal was taken from the judgment entered in the prior action and it is now final.

On November 28, 1940, four months after entry of such judgment, plaintiff commenced the present action against defendant alone to recover damages in the same amount and for the same injuries. In this second action, plaintiff sought to recover under allegations that defendant itself had negligently operated the trolley so as to cause the meat to contact him to his injury. Defendant specially pleaded the prior judgment as a bar to the prosecution of this action. Pursuant to the provisions of section 597 of the Code of Civil Procedure, this issue was first tried and the trial court found in accordance with the allegations of the special defense and entered judgment for the defendant.

Plaintiff stipulated before the trial court that the accident referred to in this and in the prior action "are one and the same accident," that the judgment in the prior action was a judgment on the merits before a court having jurisdiction thereof and that the prior judgment had become final.

[1, 2] The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation. In applying the doctrine the cases recognize a distinction between the effect of a judgment operating by way of *estoppel* in a later action upon a *different* cause of action and one operating by way of *bar* against a second action upon the *same* cause of action. Sutphin v. Speik, 15 Cal.2d 195, 201, 99 P.2d 652, 101 A.L.R. 497; Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916; Horton v. Goodenough, 184 Cal. 451, 461, 194 P. 34; and authorities collected in 15 Cal.Jur. 136, sec. 189; 30 Am.Jur. 912, sec. 167; 2 Freeman on Judgments, p. 1425, sec. 676. This distinction entails important consequences in the determination of what matters were adjudicated by the former judgment, and the failure to observe it has been the occasion of confusion and error. As stated in 2 Freeman on Judgments, supra, "A prior judgment can operate as a complete bar to a second action only on the theory that it is a conclusive adjudication * * * as to every matter that might be urged in support of the latter. * * * Under such circumstances, in view of the rule and policy of the law which forbids a party to split his claim, the judgment is deemed to adjudicate, for purposes of the second action, not only every matter which was, but also every matter which might have been urged in support of the cause of action or claim in litigation. Where the cause of action in the second action is the same as that in the first action, a final judgment in the latter upon the merits is a complete bar to the maintenance of the second action." To the same effect see

Restatement of the Law of Judgments, section 63, comment a.

[3-5] In an effort to avoid application of this settled doctrine to the facts of this case, plaintiff contends that the present litigation is based upon a cause of action separate and distinct from that underlying the prior litigation because the negligence charged to defendant in this action differs from the negligence charged against it in the prior action. In so contending, plaintiff misconceives the nature of his cause of action. The cause of action is simply the obligation sought to be enforced. Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 84 Am.St.Rep. 53; Hellman v. Los Angeles Ry. Corp., 135 Cal.App. 627, 632, 27 P.2d 946, 28 P.2d 384. The negligence of defendant alleged in the prior action and that alleged against it in this action represent but different invasions of plaintiff's primary right and different breaches of the same duty that it owed to him. There was one injury and one cause of action. A single tort can be the foundation for but one claim for damages. Beronio v. Southern Pac. R. Co., 86 Cal. 415, 421, 24 P. 1093, 21 Am.St.Rep. 57; Triano v. F. E. Booth & Co., 120 Cal.App. 345, 347, 8 P.2d 174; Hellman v. Los Angeles Ry. Corp., supra; Miller v. Spokane Int. Ry. Co., 9 Cir., 293 F. 748, 750; Hennessy v. Chicago B. & Q. R. Co., 24 Wyo. 305, 157 P. 698, 700; Moore v. Chattanooga Elec. R. Co., 119 Tenn. 710, 109 S.W. 497, 501, 16 L.R.A.,N.S., 978; Ogden v. Chicago, R. I. & P. R. Co., 131 Mo.App. 331, 111 S.W. 516, 517; 2 Freeman, supra, secs. 610, 682.

In the Triano case, supra, the plaintiff in a second action urged, as here, that one theory or ground of defendant's negligence had not been litigated in a prior action. It was held that when plaintiff "elected to try his case on one theory of liability, he was barred from again trying it upon another ground. To tolerate the practice contended for would prolong litigation indefinitely." [120 Cal.App. 345, 8 P.2d 175.] See, also, Quirk v. Rooney, 130 Cal. 505, 62 P. 825.

The subject is adequately summarized in the Restatement, supra, as follows: "Where an action is brought to recover damages for injury to the person or property of the plaintiff caused by the defendant, and the plaintiff in his complaint alleges certain negligent acts of the defendant, and at the trial he is unable to prove these negligent acts and a verdict and judgment are given for the defendant, the plaintiff is precluded from maintaining a subsequent action based upon the same injury, although in that action he alleges other acts of negligence. There is in such a case a single cause of action, based upon the primary right of the plaintiff to be free from injury to his person or property and a violation by the defendant of that right through his failure to use proper care. The plaintiff is not permitted to maintain successive actions for the same injury by alleging different acts of negligence on the part of the defendant. It is immaterial that in a subsequent action he alleges acts of negligence which he was not permitted to prove in the prior action because they were not alleged in his complaint in that action." See, also, Van Horne v. Treadwell, 164 Cal. 620, 622, 130 P. 5; In re Estate of Bell, 153 Cal. 331, 340, 95 P. 372; Sullivan v. Triunfo G. & S. Min. Co., 39 Cal. 459, 465; 2 Freeman, supra, 1178, secs. 553, 554.

[6-9] The trial court therefore correctly concluded that the judgment in the prior action is a bar to the prosecution of this action against the same defendant for the same injuries. The authorities also establish that plaintiff cannot escape such bar by urging that during prosecution of the prior action he was unaware of the ground of negligence relied on here. Quirk v. Rooney, supra, 130 Cal. 510, 62 P. 825; Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 512, 258 P. 387; Restatement, supra; 2 Freeman, supra, 553. Nor may he avoid the bar of the prior judgment by urging that he was there prevented from proving the ground of negligence because not within the allegations of his former complaint. Where the court prevents the litigation of matters which inhere in the cause of action, on the ground that they are not pleaded, plaintiff's remedy is either to seek to amend or to have the ruling, if erroneous, corrected by appropriate proceedings for review. An erroneous judgment is as conclusive as a correct one. Lamb v. Wahlenmaier, 144 Cal. 91, 95, 77 P. 765, 103 Am.St.Rep. 66; Reed v. Cross, 116 Cal. 473, 486, 48 P. 491; Little v. Smith, 47 Cal.App. 8, 189 P. 1059; 2 Freeman, supra, 1489, sec. 705 and authorities there collected. Such a situation is distinguishable from that presented in the cases relied on by plaintiff where in the prior action certain issues either were with-

drawn or reserved for future litigation. Little v. Smith, supra, 47 Cal.App. 11, 189 P. 1059.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

21 Cal.2d 602

ROSECRANS et al. v. PACIFIC ELECTRIC RY. CO. et al.
L. A. 18171.

Supreme Court of California.
Feb. 17, 1943.

1. Deeds 🔑145

As breach of condition subsequent involves a forfeiture, a clause in deed imposing obligations or restrictions on grantee will be construed as a "covenant" rather than a "condition subsequent" when that can reasonably be done, but such construction will not be given contrary to parties' intention.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Subsequent" and "Covenant".

2. Deeds 🔑155

Where words employed show unmistakable intention on part of grantor to create condition subsequent, it will be upheld.

3. Deeds 🔑155

The use in deed of words such as "upon the express condition that" are appropriate to create a "condition subsequent".

4. Deeds 🔑155

Evidence of intention to create a "condition subsequent" is found in a provision of deed for forfeiture and right of re-entry, or power of termination.

5. Railroads 🔑72(1)

A clause of deed that right of way was granted upon express condition that grantee should maintain a daily electric railway service, that each of conditions stated was declared to be a condition and not a personal covenant, and that upon breach right of way should revert to grantor was a "condition subsequent" rather than a "covenant".

6. Railroads 🔑72(1)

A deed for right of way purposes, providing that land was to revert to grantors upon grantee's failure to "establish and maintain" a daily electric railway service and that the conditions were made binding upon the grantee, "his heirs and assigns forever", required perpetual use of right of way for passenger train service.

If the conditions are to be binding "forever", it indicates that compliance must be had with the condition in question forever or perpetually. To "maintain" means to hold or keep in any particular state or condition, not to suffer to fail or decline. The word "establish" carries with it the implication of originating with a view to its permanent existence, and to "establish and maintain" embraces a continuing obligation.

See Words and Phrases, Permanent Edition, for all other definitions of "Establish", "Establish and Maintain", "Forever" and "Maintain".

7. Railroads 🔑72(1)

The clear intention of parties to deed for right of way purposes requiring railroad to maintain perpetual electric railway service cannot be brushed aside by invoking rule that conditions are to be construed against one relying thereon. Civ.Code, §§ 1069, 1442.

8. Railroads 🔑72(1)

In ascertaining whether deed for right of way purposes requires railroad to perpetually maintain the railroad service, each case must be determined on its particular facts.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by William S. Rosecrans and others against the Pacific Electric Railway Company to quiet title to certain lands and rights of way which had been conveyed for railroad purposes, and to compel defendants to reconvey the lands and rights of way to plaintiffs. From a judgment of dismissal entered upon an order sustaining a demurrer to their complaint, plaintiffs appeal.

Reversed.

For prior opinion see 126 P.2d 404.

Paul Overton and J. G. Leovy, both of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and Randolph Karr, all of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs appeal from a judgment of dismissal entered upon an order sustaining a demurrer to their complaint.

Plaintiffs are the successors in interest of Carl F. and Lillian T. Rosecrans, husband and wife, who were the grantors in a deed dated September 17, 1907, which conveyed to H. E. Huntington, the predecessor of defendant, Pacific Electric Railway Company, a corporation, a right of way for a railroad across the real property therein described. It is stated in said deed that for the consideration of $1 and other valuable consideration, the grantors grant to the grantee the right of way for a railway; that the grant is given and accepted "upon the following conditions" which are "hereby made to be binding upon" the grantee "his heirs and assigns forever." The conditions are that the grantee or his assigns shall construct and operate an electrical railway on a specified grade over the right of way and have it completed on or before January 1, 1908; that the right of way shall be fenced by the grantee at the request of the grantor, leaving or making such openings as are necessary for street crossings; that street crossings of a specified character shall be provided and maintained; that no excavations are to be made on the land adjoining the right of way except for street crossings; that excavated material shall be removed; that culverts shall be constructed; that the grant is made upon the "express condition" that the grantee shall stop passenger cars for the discharge and reception of passengers at indicated points; that no structure for the employees or tenants of the grantee shall be maintained on the right of way. Then appears the condition alleged to have been broken. It reads: "The aforesaid right of way is granted upon the further *express condition* that second party or his assigns shall establish *and maintain* over the railway to be constructed as hereinbefore provided, a daily service of not less than 18 local passenger cars or passenger trains each way; and that second party or assigns shall on each and every day run not less than 18 local passenger cars or passenger trains each way over said railway, and from each end of said railway to the other." (Emphasis added.) With reference to a breach of the conditions it is stated: "Each of the conditions hereinbefore stated as conditions upon which the aforesaid right of way is granted, *is hereby declared to be a condition and not a personal covenant,* and said right of way is granted upon said conditions, and the breach by second party or assigns of any of said conditions will render the conveyance null and void, and upon such breach the right of way hereby granted shall revert to first party his heirs or assigns, and upon such breach, first party, his heirs or assigns shall have the right to enter upon said right of way and take possession thereof.

"Each of the aforesaid conditions is made for the benefit of first party, his heirs and assigns, and shall bind second party, his heirs and assigns and the right of way hereby granted." (Emphasis added.)

Plaintiffs' action is one to quiet their title against defendants, alleging that defendants and their predecessors had operated an electric railway on the right of way from 1908 to 1940, but since said time defendant Pacific Electric Railway Company has failed to operate or run passenger trains and cars on the railway or right of way and has refused upon demand to do so.

[1-5] The above-quoted clause in the deed which is here involved, is clearly a condition subsequent rather than a covenant. It is true, that as the breach of a condition subsequent involves a forfeiture, a clause in a deed imposing obligations or restrictions on the grantee, will be construed as a covenant rather than a condition subsequent when that can reasonably be done. Graner v. City of Sacramento, 2 Cal.2d 432, 41 P.2d 543; McBride v. Freeman, 191 Cal. 152, 215 P. 678. However, such construction will not be given contrary to the intention of the parties. Knight v. Black, 19 Cal.App. 518, 126 P. 512. Where the words employed show a clear and unmistakable intention on the part of the grantor to create a condition subsequent it will be upheld. Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann. Cas.1912D, 1190; Firth v. Los Angeles Pacific Land Co., 28 Cal.App. 399, 152 P. 935. The use of the words such as "upon the express condition that" are appropriate to creat a condition subsequent. Victoria

Hospital Assoc. v. All Persons, 169 Cal. 455, 147 P. 124. And likewise, evidence of the intention to create a condition subsequent is found in a provision for forfeiture and right of re-entry or power of termination. Fitzgerald v. County of Modoc, 164 Cal. 493, 129 P. 794, 44 L.R.A.,N.S., 1229. In the instant case not only was the clause involved stated to be an express condition, but right of re-entry was given, it was expressly stated that the clause was a condition and not a personal covenant, and the granting clause stated that the right of way was granted for an electric railway. The clause did therefore constitute a condition subsequent. See Parsons v. Smilie, 97 Cal. 647, 32 P. 702; Fitzgerald v. County of Modoc, supra; Miller v. Shaw, 50 Cal. App. 702, 195 P. 743; Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047; Firth v. Los Angeles Pacific Land Co., supra; Title Guarantee & Trust Co. v. Garrott, 42 Cal.App. 152, 183 P. 470; Romero v. Department of Public Works, 17 Cal.2d 189, 109 P.2d 662.

In support of the judgment defendants invoke the rule that a condition involving a forfeiture should be strictly construed against the one relying upon such condition. Civ.Code, §§ 1442, 1069; Michaelian v. Elba Land Co., 76 Cal.App. 541, 245 P. 476; Conner v. Lowery, 94 Cal.App. 323, 271 P. 118; Victoria Hospital Assoc. v. All Persons, supra; Behlow v. Southern Pacific R. R. Co., 130 Cal. 16, 62 P. 295; Hasman v. Elk Grove Union High School, 76 Cal. App. 629, 245 P. 464. And that in light of that rule the deed must be construed to mean that the above-quoted condition was satisfied by the furnishing of the passenger service for over 30 years as shown by the complaint, and therefore, the condition did not require a perpetual use of the right of way for passenger service.

[6, 7] We believe that the solution of the problem depends upon the correct interpretation of the condition in the light of the deed as a whole in order to ascertain the intention of the parties. Looking at the face of the deed alone there are several factors which clearly indicate an intention that the service required by the condition was to be maintained perpetually. There are many things to be done or not done by the grantee as heretofore outlined. They are of a nature which are clearly of benefit to the grantors. A comprehensive scheme is set forth with relation to the operation of the railroad, the maintenance of the right of way, and the relation of the right of way to the adjoining property such as grades, street crossings, culverts and the like. It indicates a definite plan embracing future contingencies. The plan contemplates permanency in the improvement and use of the right of way, rather than mere temporary expediency. Under such circumstances it is not to be supposed that it was intended that the conditions need be complied with for any such limited period as 10, 20 or 50 years. A railroad is of a permanent character. Likewise, its effect upon the property adjoining the right of way is wide reaching and permanently affects the nature of the development of that property, its value, and population trends. The condition in question requires that the specified passenger service must be both established and maintained. Effect should be given to both of those words. Even if establishment be construed to mean merely to commence, mere commencement will not suffice to satisfy the condition. It must also be maintained. The initial construction of the railroad is required in other clauses of the deed. It is specified that the grantee "shall build, construct and operate a first class electrical railway * * * and have said railway constructed, and completed on or before" January 1, 1908. Another clause requires the stopping of passenger cars at points designated by the grantors and "that said cars or trains shall so stop as long as second party or assigns shall operate the * * * railway." The railway is still being operated, and hence the passenger trains must still make the designated stops. Of course, passenger trains cannot be stopped if none are run. It will be remembered that the deed states that the right of way is given and accepted upon the following conditions (the clause here involved being one of such following conditions), which are thereby made binding upon the *grantee "his heirs, and assigns* forever." Some significance may be given to the use of the word "forever" in addition to tenure. If the conditions are to be binding "forever," it indicates that compliance must be had with the condition in question "forever" or perpetually. Other words are also significant. To maintain means "To hold or keep in any particular state or condition; * * * not to suffer to fail or decline"; (Webster's New International Dictionary, 2d Ed.) When the passenger service has been discontinued by defendant, it has suffered or

permitted it to fail contrary to its obligation to maintain it. The word "establish" carries with it the implication of originating with a view to its permanent existence. People v. Superior Court, 10 Cal.2d 288, 295, 73 P.2d 1221. To establish and maintain embraces a continuing obligation. Piper v. Choctaw Northern Townsite & Imp. Co., 16 Okl. 436, 85 P. 965, 966. In the light of the deed as a whole those words should be given that meaning. To construe the condition otherwise would be contrary to the clear and plain intention of the parties; such intention may not be brushed aside by invoking the rule that conditions are to be construed against the one relying thereon.

[8] Reliance is placed upon the case of O. T. Johnson Corp. v. Pacific Electric Railway Co., 19 Cal.App.2d 306, 65 P.2d 368, 370. There the clause provided that upon the completion of the railroad and the commencement of the operation of passenger trains thereon, regular passenger trains shall be operated at certain specified minimum intervals. There was no requirement contained in the documents there involved that passenger service be established and maintained. The language there employed together with the other clauses may have been susceptible of the construction placed upon it by the court that perpetual passenger service was not required. In the instant case the proper construction of the instrument here involved leads to the conclusion that there was express provision for perpetual passenger service. The rule there announced is that "an agreement to devote land to a particular use" does not imply "an agreement to perpetually devote it to that use." In the instant case we have more than that. No hearing was sought in this court after the decision in the Johnson case and we do not regard it as a controlling authority. In Hasman v. Elk Grove Union High School, supra, the clause merely provided that the land should be used for maintaining a high school thereon. The words employed in the deed in the instant case were not used, nor were the other above discussed factors present. Furthermore, the court reasoned that the deed did not provide for reversion upon discontinuance of the use but only upon failure to so use it. That reasoning is rendered doubtful by the decision of this court in Romero v. Department of Public Works, supra. In Booth v. County of Los Angeles, 124 Cal.App. 259, 260, 12 P.2d 72, the clause merely provided that the conveyance was made for the purpose of a road, to revert if not so used. Manifestly, that case is distinguishable. Other cases are collected in 7 A.L.R. 817, but each case must be determined on its particular facts. The commentator's note in 7 A.L.R. 817, reads that "in the *absence* of a specified term * * * or of *express and suitable* words showing an intention that performance shall be perpetual * * * a condition subsequent for the maintenance of a railroad * * * is * * * complied with by a performance covering a term of years." Here appropriate words in the light of the deed as a whole, were used. The basis of the decisions in the abovementioned cases is not clear. Some seem to be on the basis of an interpretation of the deed, others on the proposition that compliance for several years is a substantial performance of the condition, and yet others on a combination of the two. The most rational ground would seem to be an interpretation of the clause itself, because once it is interpreted, and hence has an unquestioned meaning, the matter of performance need not be complicated by the question of substantial or nonsubstantial performance. If the language is interpreted to mean that the condition need not be complied with perpetually but only for a reasonable time, there would be no question of substantial performance. The only remaining issue is what constitutes a reasonable time. If mere use for the purpose specified in the condition is the correct construction, then there is no issue of reasonable time inasmuch as a day's use might suffice.

Defendant discusses, as bearing upon the issue here involved, the public nature of the service rendered by a railroad company, the public interest involved, its right as a public utility to continue to use the right of way, the right of eminent domain implicit therein, and action by government regulatory bodies in reference to its operations, and the impossibility of it performing the condition because of such regulation. Those are matters of defense to be asserted by defendant if desired. We are not now required to and do not here pass upon their merit or soundness. The appeal is from a judgment entered after demurrer sustained and it cannot be said that merely because defendant railroad company is still operating that those questions must now be determined. We hold only that the complaint states a cause of action in view of the provisions of the deed there pleaded.

The judgment is reversed.

SHENK, CURTIS, TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

21 Cal.2d 640

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. RIVERSIDE COUNTY.

L. A. 17896.

Supreme Court of California.
Feb. 24, 1943.

Taxation 🔑183

Where metropolitan water district, composed of member municipalities and a municipal water district, was organized for purpose of developing, storing and distributing water for domestic and municipal uses and the metropolitan water district owned real estate outside its boundaries, such real estate was subject to taxation, since the metropolitan water district was a "municipal corporation" within constitutional amendment under which property of a municipal corporation located outside of the municipal corporation is subject to taxation. Gen.Laws 1937, Act 9129; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Corporation".

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In Bank.

Appeals from Superior Court, Riverside County; O. K. Morton, Judge.

Consolidated actions by the Metropolitan Water District of Southern California against the County of Riverside to recover ad valorem taxes paid under protest. Demurrers to the complaints were sustained without leave to amend and from judgments entered thereon, plaintiff appeals.

Affirmed.

For prior opinion of District Court of Appeals, see 124 P.2d 363.

James H. Howard, of Los Angeles, Arthur A. Weber, of Santa Monica, and Ray W. Bruce, Charles C. Cooper, Jr., and Donald M. Keith, all of Los Angeles, for appellant.

Harry W. Horton, of El Centro, Thomas C. Boone, of Modesto, A. L. Cowell, of Stockton, Ronald B. Harris, of Fresno, C. F. Metteer, of Sacramento, W. H. Jennings, of La Mesa, Maurice M. Myers, of Oceanside, Arvin B. Shaw, Jr., and C. F. Culver, both of Los Angeles, M. B. Wellington, of Santa Ana, M. I. Church and Kenneth K. Wright, both of Los Angeles, and George Clark, of Berkeley, amici curiae, for appellant.

Earl Redwine, County Counsel, and William O. Mackey, Ass't to County Counsel, both of Riverside, for respondent.

GIBSON, Chief Justice.

The Metropolitan Water District of Southern California, composed of thirteen member municipalities and a municipal water district, was organized under the Metropolitan Water District Act (Deering's Gen.Laws, Act 9129, Stats.1927, p. 694) for the purpose of developing, storing and distributing water for domestic and municipal uses. In the performance of its functions, it has acquired and devoted to such uses real property situated in the county of Riverside. This property is outside the boundaries of plaintiff district and was subject to tax by defendant county when it was acquired. Defendant has levied and collected taxes upon the property which plaintiff paid under protest and now seeks to recover in these consolidated actions. Demurrers to the complaints were sustained without leave to amend and plaintiff appeals from the judgments entered thereon.

The question is whether the property of plaintiff, located outside of its boundaries, and which was subject to tax at the time it was acquired, is taxable by defendant county in which the property is situated. The parties are in agreement that the determination of this question turns upon whether plaintiff district is a municipal corporation within the meaning of section 1, article XIII of the state Constitution, which provides that property "such as may belong to the United States, this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, *except such lands and the improvements thereon located out-*

side of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation * * *." (Italics ours.)

The exception contained in the italicized portion of the section was added by amendment in 1914. As disclosed by the printed argument submitted to the voters, the inducing cause of the amendment was the acquisition of large real property interests in Tuolumne, Mono and Inyo Counties for reservoir purposes by the two largest cities of the state. The purpose of the amendment was to protect and conserve the revenues of the invaded territory. Turlock Irr. Dist. v. White, 186 Cal. 183, 184, 185, 198 P. 1060, 17 A.L.R. 72.

Having the object of the amendment in mind, we are satisfied that the words "municipal corporation," as used in the constitutional provision, should be construed to include a district such as plaintiff which is made up of several municipalities and a municipal water district. It would be unreasonable, in our opinion, to interpret the constitutional provision as permitting cities to unite in a metropolitan water district and thereby take from the tax rolls of another county property which the constitutional provision prohibits them from so taking as individual municipalities. What cannot be done directly may not be done indirectly.

The case of Morrison v. Smith Bros., 211 Cal. 36, 44, 45, 293 P. 53, 56, tracing the history of the development of the type of water district here involved, states that "from 1911 to date, there has been developed a new type of public corporation, resembling in many respects municipal corporations proper, and radically different in nature from irrigation and reclamation districts. The case of Henshaw v. Foster, supra [176 Cal. 507, 169 P. 82], clearly recognized the distinction, holding that such quasi-municipal corporations were municipal corporations within the meaning of article 11, section 19, of the state Constitution. * * * In the Orosi case, supra [In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004], the court again found a distinction between irrigation districts and quasi-municipal corporations. The court there pointed out that the purposes and means of operation are different." In the Morrison case, supra, the water district was trying to avoid a tort liability on the ground that it was not a municipal corporation, but the court held that "it would certainly be an anomalous situation if a municipality engaged in a proprietary function, such as running, operating or constructing water works, would be liable for the torts of its agents, but if that same municipality should join with other municipalities and organize a municipal utility district it would thereby immunize itself from all such liability. Such a rule does not appeal to our sense of justice nor to our reason."

An equally anomalous situation would prevail if we were to hold under section 1, article XIII of the Constitution that property owned by a single municipality in another county is subject to taxation but property owned by a district such as plaintiff, formed by the uniting of several municipalities and a municipal water district, is not subject to such taxation.

It is significant, too, that in a prior proceeding instituted in this court plaintiff alleged itself to be a municipal corporation. Metropolitan Water District v. Superior Court, 2 Cal.2d 4, 6, 37 P.2d 1041, 1043. That was a mandamus proceeding brought by plaintiff to require the superior court judges of Riverside County to vacate a voluntary order disqualifying themselves to sit in condemnation cases brought by the district in that county. Plaintiff there contended that the disqualification imposed by subdivision 6 of section 170 of the Code of Civil Procedure was limited to public agencies similar in character to irrigation, reclamation, levee, swamp land and drainage districts and was without application to a "municipal corporation," which it alleged itself to be. In support of this contention plaintiff there cited many cases distinguishing its type of district from the other districts just mentioned and also cited numerous cases classifying municipal and metropolitan water districts as *quasi*-municipal corporations. This court held that inasmuch as plaintiff "more closely resembles a municipal corporation than it does a state agency such as irrigation and reclamation districts," the disqualification of judges imposed by the code section was without application. It was pointed out that any other conclusion would result in the anomaly of the judges being qualified to act in suits brought by the municipalities composing the district, but being disqualified to act if the same municipalities "act through a common instrumentality or agency."

Plaintiff is chiefly composed of municipalities and its purposes are municipal. It has been held that "The supplying of water for domestic uses within municipalities has grown of recent years to be one of the most common and well-recognized forms of municipal activities." City of Pasadena v. Chamberlain, 204 Cal. 653, 663, 269 P. 630, 634. We conclude, therefore, that the words "municipal corporation," as used in the constitutional provision, were intended to include a district of the type of plaintiff, whether for descriptive purposes it be designated a municipal corporation in the technical sense, a *quasi*-municipal corporation (which plaintiff here concedes itself to be), or a public corporation for municipal purposes. This being so, the real property owned by plaintiff outside its boundaries and within the defendant county is subject to taxation by defendant.

The case of Turlock Irr. Dist. v. White, supra, relied on by plaintiff may be distinguished. As indicated by the title of the case, an irrigation district was there involved. In view of the distinction recognized in the cases to exist between such a district and a municipal corporation or a district similar to the plaintiff herein, it was unnecessary to the decision of that case that it be held that the words "municipal corporation" appearing in the constitutional provision were used "in the strict technical sense." The quoted language was used in Laguna Beach County Water Dist. v. County of Orange, 30 Cal.App.2d 740, 745, 746, 87 P.2d 46, 49, in support of the conclusion that the *county* water district there involved did "not fall within the technical definition of a municipal corporation." Neither the Turlock nor the Orange County case may be accepted as an authoritative determination that a metropolitan water district such as plaintiff is not a "municipal corporation" as that phrase is employed in the constitutional provision. Any suggestion to the contrary in either of such cases is disapproved.

Our conclusion makes for uniformity and obviates the anomaly contended for by plaintiff that for certain purposes, such as liability for torts and qualification of judges to try condemnation cases, metropolitan water districts are to be treated in the same category as municipal corporations, and for other purposes such as taxation they are to be placed in a different category.

The judgments are affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and SPENCE, J. pro tem., concurred.

21 Cal.2d 580

REYNOLDS v. REYNOLDS.

L. A. 17925.

Supreme Court of California.

Feb. 16, 1943.

1. Process 🔑70

The statute providing that service of papers may be made upon the clerk where a nonresident appearing party has no attorney and that where such party has an attorney, service must be upon his attorney is constitutional. Code Civ.Proc. § 1015.

2. Divorce 🔑309

Where trial court secured jurisdiction over defendant in divorce action involving custody and maintenance of minors, defendant by discharging his attorney and moving out of the state, could not avoid trial court's continuing jurisdiction to change from time to time its orders for support of such minors. Civ.Code §§ 138, 139; Code Civ.Proc. §§ 1014, 1015.

3. Divorce 🔑309

In divorce suit by wife moving to increase allowance of divorce judgment for support of parties' minor children, service of moving papers on member of dissolved law firm which had represented defendant on trial was sufficient, notwithstanding that defendant had discharged such law firm and moved from the state, where record showed such firm as counsel of record for defendant. Code Civ.Proc. §§ 284, 285, 1014, 1015.

4. Attorney and client 🔑76(1)
Process 🔑72

A client may discharge his attorney at any time, but during the course of a proceeding service of papers on the client's attorney of record where service upon the attorney is proper binds the client until the attorney is discharged or substituted out of the case. Code Civ.Proc. §§ 284, 285, 1014, 1015.

5. Process ⚷72

In determining whether service of papers on a party's attorney of record to a proceeding binds the party, trial court is concerned, not with whether the party is represented by attorney but whether he has an attorney of record, whether change in attorneys has been made and whether notice thereof has been given. Code Civ. Proc. §§ 284, 285, 1015.

6. Attorney and client ⚷76(4)

The authority of an attorney ordinarily ends with entry of judgment, except for the purpose of enforcing it or having it set aside or reversed.

7. Divorce ⚷289

A divorce judgment, insofar as it relates to custody and maintenance of minor children, is not "final" but as to such matters the litigation is pending and the statute authorizing service upon a nonresident party by serving his attorney of record applies as well after, as before, entry of judgment. Code Civ.Proc. § 1015; Civ.Code §§ 138, 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

8. Process ⚷72

An "attorney of record" upon whom service of papers may be made for a nonresident party is the person whom the client has named as his agent upon whom service of papers may be made. Code Civ. Proc. § 1015.

See Words and Phrases, Permanent Edition, for all other definitions of "Attorney of Record".

9. Divorce ⚷303(3), 309

Under statute providing that service of papers may be made upon a nonresident party by serving his attorney of record, defendant in divorce action involving custody and maintenance of minors had burden to keep an attorney of record or to make arrangements for notice with the clerk after discharging his attorney and moving out of the state. Code Civ.Proc. § 1015.

10. Divorce ⚷312

In divorce suit by wife moving for allowance of suit money to present appeal from order increasing allowance in judgment for support of parties' minor children, where defendant had discharged his attorney of record and moved from the state and had employed attorneys who appeared specially to challenge trial court's jurisdiction on allowance motion and who filed notice of appeal from allowance order, service of moving papers and papers with respect to the appeal on defendant's counsel of record at time of service was valid as service on defendant. Code Civ.Proc. § 1015.

11. Divorce ⚷312

Where defendant husband appealed from order increasing allowance of judgment for support of parties' minor children, plaintiff wife was entitled, upon a proper showing, to suit money to present her side of the case on appeal and to be represented by counsel.

12. Army and navy ⚷34

The section of the Soldiers' and Sailors' Civil Relief Act prohibiting entry of judgment against defaulting defendant until appointment of an attorney to represent him unless plaintiff files an affidavit that defendant is not in military service was designed to protect a defendant in military service who does not appear by insuring appointment of an attorney to represent him and does not apply when defendant has appointed his own attorneys to protect his interest. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A. Appendix, § 520.

13. Army and navy ⚷34

Where defendant made a special appearance to contest jurisdiction of trial court on the wife's motion for order increasing allowance in judgment for support of parties' minor children and limited the authority of his attorneys to that issue, there was no "default of any appearance" by defendant within section of Soldiers' and Sailors' Civil Relief Act prohibiting entry of judgment against a defendant in the military service on default of any appearance until appointment of attorney to represent him, etc. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A. Appendix, § 520.

See Words and Phrases, Permanent Edition, for all other definitions of "Default of Any Appearance".

14. Army and navy ⚷34

Under section of Soldiers' and Sailors' Civil Relief Act prohibiting entry of judgment against defaulting defendant until appointment of attorney to represent him unless plaintiff files affidavit that defendant is not in military service, trial court is not required to disregard defendant's appointment of attorneys and his decided course of action and to appoint another attorney to embark upon another course of action on his behalf. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A. Appendix, § 520.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; William S. Baird, Judge.

Action for divorce by Helene Louise Reynolds against Jacob George Reynolds. Judgment for plaintiff and from orders increasing an allowance to plaintiff for support of the plaintiff's two minor children and allowing plaintiff attorney's fees and costs for defending appeal from the order increasing allowance, defendant appeals.

Affirmed.

For prior opinion, see, 128 P.2d 172.

Freston & Files, Gordon L. Files, and Ralph E. Lewis, all of Los Angeles, for appellant.

Leonard Comegys, of Los Angeles, for respondent.

TRAYNOR, Justice.

An interlocutory judgment of divorce, entered on October 24, 1933, gave custody of the two minor children to the wife and ordered defendant to pay $40 monthly for their support. A final judgment was entered on October 29, 1934. The pleadings on behalf of defendant and the stipulation to set the case for trial were signed "Loucks and Phister, Attorneys for Defendant." On October 30, 1940, plaintiff's attorney mailed to Loucks and Phister an order to show cause and notice of motion for modification of the interlocutory decree to increase the allowance from $55 per month to which it had previously been raised, to $116 per month. The affidavit of service states that these papers were "addressed to the attorneys of record for said defendant at the office address of said attorneys, as follows: Loucks and Phister * * * San Pedro, California." An affidavit shows that copies of the papers were also sent by registered mail to the defendant at Fort Des Moines, Iowa, where he was then stationed as an officer of the United States Army. Attached to this affidavit is a registry return receipt signed by defendant acknowledging delivery in Iowa on November 4, 1940. On the day appointed for a hearing, a special appearance was made by defendant's counsel of record on these appeals for the sole purpose of objecting to the jurisdiction of the court on the grounds that defendant, a nonresident, had not been personally served with notice within this state, that E. O. Loucks had not been counsel for defendant for more than three years, and that service by mail upon his firm was ineffective. In an affidavit filed in support of this objection defendant stated that E. O. Loucks did not represent him after April 7, 1937, and that he wrote to Loucks on October 20, 1937, discharging him as his attorney. An affidavit by Loucks fully corroborated defendant's affidavit and stated that on October 31, 1940 (the day on which the notice of motion presumably was received), Loucks wrote plaintiff's counsel that his relationship as attorney for defendant officially terminated in October, 1937. The court ruled that it had jurisdiction, and the hearing on the motion was continued. When the matter again came on for hearing defendant offered affidavits showing that although the name "Loucks and Phister" had been signed to the pleadings in the case in 1934, E. O. Loucks was in fact the only person whom defendant had authorized to represent him, and that the firm of Loucks and Phister had dissolved in February, 1937. The trial court refused to consider these affidavits and after the overruling of renewed objections to the jurisdiction of the court, defendant's counsel took no further part in the proceeding. The court heard plaintiff's testimony and granted the motion, and the first of the present appeals was then taken. Plaintiff thereupon made a motion for an order requiring defendant to pay her $650 to defray costs and attorney's fees on the appeal from the support order. This notice was served upon Freston and Files, the attorneys who appeared specially at the hearing of the previous motion and who took the appeal from the support order. At the hearing on the motion for attorney fees, Freston and Files again appeared specially to object to the jurisdiction of the court and presented an affidavit that they had no authority to do more. The court ruled that it had jurisdiction, and counsel took no further part in the proceedings. The court granted the motion and defendant's second appeal followed.

[1, 2] The first question is whether the service of the notice and order to show cause upon the attorneys who represented the defendant in the divorce action was valid as a service upon attorneys then of record. After appearance in an action a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Code Civ.Proc., § 1014. Section 1015 of the Code of Civil Procedure provides: "When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party" except certain papers not here involved. This provision is clearly constitutional, for it is established that the Legislature may provide that once the court has jurisdiction over the subject matter of a proceeding and over the person of the party affected, it may bind such person by orders made after he has left the state. Adam v. Saenger, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649; Michigan Trust Co. v. Ferry, 228 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867. It is conceded that the court secured jurisdiction over the defendant in the divorce action in 1933 involving the custody and maintenance of minors, and since it has continuing jurisdiction to change from time to time its orders for their support (Civ.Code, §§ 138, 139), it follows that a party cannot avoid such jurisdiction by discharging his attorney and moving out of the state. Moore v. Superior Court, 203 Cal. 238, 242–245, 263 P. 1009.

[3-9] Defendant contends that it is a question of fact whether a party has an attorney within the meaning of section 1015 of the Code of Civil Procedure, and that if the evidence shows conclusively that the attorney has been discharged service of notices upon him is ineffectual for any purpose. The facts parallel in all essential respects the facts in the Moore case, where the court set forth reasons that convincingly support the validity of the service in the present case. The court stated, however, that it would seem to be a question of fact whether a party was represented in such a proceeding by an attorney of record. This statement was unnecessary to the decision, for the proceeding was in certiorari and the holding was that even if the trial court had committed error a writ of review would not lie. A client may of course discharge his attorney at any time (see 3 Cal.Jur. 628, 635), but during the course of a proceeding service of papers on the attorney of record, where service upon the attorney is proper, binds the client until the attorney is discharged or substituted out of the case in the manner provided by law. Grant v. White, 6 Cal. 55, 56; Scarpel v. East Bay Street Rys., 42 Cal.App.2d 32, 115 P.2d 862. The court is concerned in such cases not with whether the client is represented by an attorney, but whether he has an attorney of record, whether any change in attorneys has been made as provided in section 284 of the Code of Civil Procedure, and whether notice thereof has been given as provided in section 285 of that code. The authority of an attorney, however, ordinarily ends with the entry of judgment, except for the purpose of enforcing it or having it set aside or reversed. See 3 Cal.Jur. 668. Nevertheless the judgment of divorce insofar as it relates to the custody and maintenance of minor children is not final. As to those matters the litigation must be regarded as still pending (Rosher v. Superior Court, 9 Cal.2d 556, 560, 71 P.2d 918; Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862; Avila v. Leonardo, 53 Cal.App.2d 602, 608, 128 P.2d 43), and the provisions of section 1015 apply as well after as before the entry of the judgment. Moore v. Superior Court, 203 Cal. 238, 242, 263 P. 1009; see 78 A.L.R. 370, 376. The attorney of record is the person the client has named as his agent upon whom service of papers may be made. The statutes informed defendant that if he had no attorney of record the clerk of the court became his agent for the purpose of service. The burden lay upon the defendant to keep an attorney of record or to make such arrangements for notice with the clerk as he thought advisable. See Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256, 89 A.L.R. 653. If defendant had noted his discharge of Loucks in the record, plaintiff could have made service on the clerk of the court. The record, however, showed Loucks and Phis-

ter as counsel, and the court and opposing counsel were entitled to rely thereon until it was changed in the manner prescribed by law.

[10, 11] The service on Freston and Files of the notice of motion for allowance of attorneys' fees and costs on appeal was also valid. They appeared specially to challenge the jurisdiction of the court on the first motion and filed a notice of appeal from the order granting that motion. Upon a proper showing plaintiff is entitled to suit money to present her side on appeal and be represented by counsel. Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862; Parker v. Parker, 22 Cal.App.2d 139, 70 P.2d 1003. Defendant appointed Freston and Files to represent him in that appeal, and they may be regarded as his attorneys instead of Loucks and Phister under section 1015 of the Code of Civil Procedure for the service of papers with respect to the appeal, for it is clear not only that plaintiff may waive defendant's failure to follow the prescribed procedure in the substitution of attorneys, but that defendant cannot object to his own remissness. Gill v. Southern Pacific Co., 174 Cal. 84, 161 P. 1153; Anderson v. City Ry. Co., 9 Cal.App.2d 205, 48 P.2d 969.

[12-14] Defendant contends for the first time on appeal that the judgment of the trial court was entered in violation of section 200 of the Soldiers' and Sailors' Civil Relief Act of 1940. 54 Stat.L. 1180, U.S.C.A. Title 50, Appendix, § 520. That section provides in part as follows: "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment." This section is designed to protect a defendant in military service who does not appear, by insuring the appointment of an attorney to represent him. It does not apply, however, when, as in the present case, the defendant has appointed his own attorneys to protect his interest. There is no "default of any appearance" in such a case even though the defendant chooses to make only a special appearance to contest the jurisdiction of the court and therefore limits the authority of his attorneys to that issue. If that course proves ineffective he can hardly contend that he was not represented by counsel. There is nothing in the Soldiers' and Sailors' Civil Relief Act requiring the court to disregard the appointment of attorneys by the defendant and the course of action he decides upon and to appoint another attorney to embark upon another course of action on defendant's behalf. See, A Manual of Law for Use by Advisory Boards for Registrants Appointed Pursuant to the Selective Training and Service Act of 1940, as amended (2d ed.) Compiled by the Committee on War Work of the American Bar Association, 38–71; 130 A.L.R. 775.

The orders appealed from are affirmed.

GIBSON, C. J., and SHENK, CURTIS, and CARTER, JJ., concurred.

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21 Cal.2d 596

SCUDDER FOOD PRODUCTS, Inc., v. GINSBERG et al.

L. A. 17939.

Supreme Court of California.

Feb. 17, 1943.

1. Trade-marks and trade-names and unfair competition 🔑68(1)

Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, so long as the methods employed do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or procurement of violation of contractual relations.

2. Trade-marks and trade-names and unfair competition 🔑92

In action to restrain unfair dealing, a complaint alleging that plaintiff's products were put in packages with distinctive characteristics and designs and that defendant imitated such packages and containers with intent to deceive, was demurrable where the attached exhibits showed merely a similarity in respect of features common to the public and did not show deception from similarity of some feature of defendant's packages to a distinctive or peculiar feature of plaintiff's.

3. Trade-marks and trade-names and unfair competition 🔑92

In action to restrain unfair dealing, a complaint alleging that peanut butter labels on plaintiff's products had been imitated by defendant with intent to deceive was demurrable where the attached exhibits revealed a difference so pronounced that any one of ordinary eyesight and ability to read could not be misled.

4. Trade-marks and trade-names and unfair competition 🔑3(4, 5)

Words or phrases which have been in common use, and which indicate the character, kind, quality and composition of the thing, may not be appropriated by any one to his exclusive use.

5. Trade-marks and trade-names and unfair competition 🔑70(1)

Generally, no trader can adopt a trademark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled.

6. Trade-marks and trade-names and unfair competition 🔑92

In action to restrain unfair dealing, a complaint alleging that plaintiff and defendant each put up the same size package of potato chips, that defendant printed in large red figures "25¢" on each package and instructed its dealers to sell the same for 15 cents and that such acts were done for the purpose of defrauding the public and plaintiff in particular, was demurrable since the alleged acts were not unlawful.

7. Trade-marks and trade-names and unfair competition 🔑92

In action to restrain unfair dealing, a complaint which was demurrable because the acts alleged to have been done by defendant were not unlawful, does not state a cause of action merely because it further alleged that defendant acted with a bad motive, since an act lawful in itself is not converted by a bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

8. Trade-marks and trade-names and unfair competition 🔑99

Generally, it is a "question of fact" as to whether two containers or labels are so similar as to constitute unfair competition, and it is also ordinarily a question of fact as to whether the public has been or is likely to be misled thereby.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

9. Trade-marks and trade-names and unfair competition 🔑99

In action to restrain alleged unfair dealing by the use of similar labels and trade-marks, examination of containers and labels demonstrated as a matter of law that no reasonable person could conceivably be misled into believing defendant's containers and labels were those of plaintiff.

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In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Scudder Food Products, Inc., against Max I. Ginsberg and others to restrain defendants from alleged unfair trade dealing. From a judgment sustaining demurrer to complaint, plaintiff appeals.

Affirmed.

For prior opinion, see 126 P.2d 674.

W. I. Gilbert, Jr., of Los Angeles, for appellant.

Sherman & Sherman and W. B. Thomas, all of Los Angeles, for respondents.

PER CURIAM.

This cause was taken over after decision by the District Court of Appeal, First Appellate District, Division Two. Upon further examination of the record we adopt the opinion of Mr. Justice Sturtevant as part of the decision of this court. It reads as follows, 126 P.2d 674:

"The plaintiff commenced an action against the defendants to obtain an injunction restraining the defendants from unfair trade dealing. Its complaint contained five separate counts. The defendants appeared and filed a demurrer. The demurrer was sustained and from the judgment the plaintiff has appealed.

"In its brief the plaintiff sets forth an abstract of the first count. In substance that abstract is as follows. The plaintiff is and since 1929 has been a corporation; that Max I. Ginsberg, Jeanette Ginsberg and Sol Gendel are directors of Bell Nut Products, a corporation in dissolution; that Max I. Ginsberg is and has been doing business under the name of Bell Potato Chip & Pretzel Co.; that Max I. Ginsberg is and has been doing business under the name of Los Angeles Saratoga Chip & Pretzel Co.; that plaintiff has been engaged in manufacturing food products in southern California and has built up a valuable good will; that it puts up its products in containers and packages with distinctive characteristic labels and designs; that defendants have imitated such distinctive and characteristic containers and packages together with the labels and designs; that among others since February 1, 1940, plaintiff has put up a certain bag containing twelve ounces of merchandise; that said bag is attached as Exhibit A; that within four months thereafter defendants put up a similar bag, a sample of which is attached to the complaint and marked Exhibit B; that plaintiff's mode of packing became associated in the mind of the public with plaintiff's goods and that except for the defendants' acts the public could have continued to easily and readily and without the necessity of close reading identify plaintiff's merchandise; that defendants' acts are for the express purpose of misleading the public; that the similarity in packages is such that the public are and have been misled; and that by reason of the acts of defendants plaintiff has been damaged in the sum of $25,000. The second count contains similar allegations but with reference to a different package or container. One of the plaintiff's containers is annexed as Exhibit C, and one of defendants' containers is annexed as Exhibit D. Damages in the sum of $25,000 are alleged in that count also. In the third count similar facts are alleged regarding a three pound box. No exhibit is attached but the plaintiff's box is described in detail and the defendants' box is also described in detail. Damages in the sum of $25,000 are also alleged. The fourth count contains similar averments regarding a label used by the plaintiff. A copy is set forth as Exhibit E. The defendants' label is set forth as Exhibit G. Damages in the sum of $25,000 are also alleged. The fifth count alleges similar facts and describes a package of potato chips put up by the plaintiff which contains a weight of seven ounces. In paragraph III it is alleged that defendants offer a bag of light weight for sale, showing on the face thereof a price of 25 cents instructing the retail dealers, however, to sell this bag for 15 cents. In paragraph IV it is alleged that the arrangements alleged in paragraph III lead the purchasing public to believe that they are getting 25 cents of potato chips for 15 cents, if they shop with defendants, but they do not get 25 cents worth of potato chips for 15 cents, when they shop with the plaintiff. It is alleged that this device is used in order to induce purchasers who purchase from the plaintiff to purchase from the defendants. It is further alleged that the acts stated are done with a fraudulent intent to injure and divert the business of the plaintiff and to deprive plaintiff of profits which would otherwise accrue. Damages under this count are also alleged in the sum of $25,000.

[1] "Before proceeding further it should be noted that the foregoing pleading does not even purport to allege that either party had a trademark nor that a trademark has been infringed. Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 258 P. 630, and cases there cited, need not be discussed. Nor is it claimed that the trade name of a store or the proprietor has been pirated. It is therefore patent that American Automobile Ass'n v. American Automobile O. Ass'n, 216 Cal. 125, 13 P.2d 707, 83 A.L.R. 699, and cases there cited, need not be dwelt upon. Nor is any attempt made by the plaintiff to allege that it was the first in the field of action to use a specific trade name and had built up an established trade thereunder and that the defendants were newcomers who have attempted, and are now attempting, to pirate the plaintiff's trade name and established trade. It follows that the case entitled Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 P. 142, 30 L.R.A. 182, 50 Am.St.Rep. 57, is not necessarily controlling. Nevertheless the question remains whether the plaintiff has a cause of action against the defendants by reason of unfair competition. 24 Cal.Jur. 628. In Katz v. Kapper, 7 Cal.App.2d 1, 4, 44 P.2d 1060

[1061], the court said: 'In deciding whether the conduct of defendants alleged in the complaint is actionable, it is necessary to apply certain well-settled rules relating to competition in business. These may be generally stated as follows: "Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, or the procurement of the violation of contractual relations. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, as where a merchant undersells or oversells his neighbor, it is damnum absque injuria." 15 R.C.L., p. 73, and cases cited.'

[2] "Counts one and two being the same except they are addressed to different sized packages and containers may be considered together. In those counts the plaintiff has pleaded exhibits. Such exhibits show the defendants are using such colors, printing, paper, boxes, and combinations of color, printing, and arrangement as anyone engaged in trade is entitled to use and therefore the plaintiff may not complain. They are all common to the public. 'Plaintiff must show deception arising from some feature of its own, not common to the public.' Southern Cal. F. Co. v. White Star C. Co., 45 Cal.App. 426, 430, 187 P. 981. In said counts plaintiff has not stated a cause of action. The allegation of 'imitation' frequently made adds nothing to the pleading regarding matters common to the public.

"Count three does not plead exhibits. However paragraph two pleads a detailed description of plaintiff's three-pound box and paragraph three pleads a detailed description of defendants' three-pound box. All that we have said with reference to counts one and two is equally applicable to count three.

[3-5] "Count four is addressed to labels. Exhibits are attached showing plaintiff's label and defendants' label on similar products. They are different and the difference is so pronounced that one who runs may read. Both sets are the labels used respectively by the plaintiff and defendants on their packages of peanut butter. Said labels include two sets for each package. Exhibit E is plaintiff's. It is an oval the size of a turkey egg. Exhibit F is defendants'. It is a bell 2¼ inches high and 2¼ inches in diameter. Both have a dark navy blue background. Both have lettering in gold. Each has the words 'Peanut Butter' printed thereon. There is not another similar feature. The other set has a yellow background. Each label has some printing in red, some in black, some in white. On the plaintiff's there is a blue bird. On the defendants' there is a blue bell. Speaking of a similar contention, in Purity Springs W. Co. v. Redwood Ice Dlvy., 203 Cal. 286, 289, 263 P. 810, [811], the court said: 'Without attempting to convey the exact contour and form of said labels or their complete wording, it is sufficient to say that they are utterly dissimilar in shape, design, lettering, size, wording and coloring. A most casual glance should reveal to any purchaser by what company the water is sold.' Injunction was denied. Again in Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, at page 257, 110 P. 913 [at page 915], 32 L.R.A.,N.S., 439, the court said: '"There is no principle more firmly settled in the law of trademarks than that words or phrases which have been in common use, and which indicate the character, kind, quality and composition of the thing, may not be appropriated by any one to his exclusive use." Caswell v. Davis, 58 N.Y. 223, 17 Am.Rep. 233; Amoskeag Mfg. Co. v. Spear [& Ripley], 4 N.Y.Super.Ct. 599, 2 Sandf., N. Y., 599; * * *. This rule, fundamental in the law of trade-marks, finds statutory recognition in section 991 of the Civil Code, which prohibits the appropriation as a trade-mark of "any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on."' And in Schmidt v. Brieg, 100 Cal. 672, at page 681, 35 P. 623, [at page 625], 22 L.R.A. 790, the court quoted with approval as follows: 'What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader, as that *ordinary* purchasers buying with *ordinary* caution are likely to be misled.' (Italics ours.) So in the instant case any one who can read common print and has ordinary sight cannot possibly be imposed

upon by taking the labels of the defendants for the labels of the plaintiff.

[6, 7] "The fifth count is based on a distinctly different theory from the theory underlying the other four counts. The plaintiff alleges that each party puts up a seven ounce package of potato chips. The defendants print in large figures, one inch high, in a flaming red color, '25c,' on each package. But they instruct the dealers to sell for 15 cents. There is no allegation what the sales price of plaintiff's package is There are numerous allegations to the effect that defendants' acts are for the purpose of defrauding the public and the plaintiff in particular. The latter cites no authority and we know of none showing the alleged acts of defendants to be actionable. Assuming, although it is not alleged, that the defendants cause the dealers to mark the packages by scratching the '25c' and writing thereon '15c,' such conduct is, we think, a trade practice of which no one may complain.

"Returning to counts one, two, three and four, if we correctly understand the plaintiff's contentions, they are not at variance with any rule of law we have cited. However, the plaintiff relies on the sequence of events and charges the defendants with imitation apparently under the impression that imitation is *per se* actionable. That impression is not sustained by the authorities as clearly appears from what is said in Southern Cal. F. Co. v. White Star C. Co., supra. Again, on page 13 of the plaintiff's brief it speaks of the ruling of the trial court and says: 'The court's action could be correct only if it appears as a matter of law, by viewing the exhibits that confusion cannot arise, no matter what defendants' motives may be.' If by that statement the plaintiff means that if the defendants exercise rights common to the general public but that in doing so they acted with a bad motive then the trial court should have overruled the demurrers, such contention is not sustained by the authorities. It is settled law in this state that 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.' Parkinson Co. v. Building Trades Council, 154 Cal. 581, 595, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165."

[8, 9] The theory of plaintiff is that defendants accomplished their alleged fraudulent purpose by imitating a distinct combination of features of size, shape, color arrangement, and textual similarities adopted by the plaintiff, and that by such means the public was misled. If, in fact, the plaintiff had pleaded such facts we have no doubt that it would have pleaded good causes of action. The difficulty with the first four causes of action is that plaintiff has pleaded either as exhibits or by description the alleged imitative containers and labels. An examination of such containers and labels demonstrates, as a matter of law, that no reasonable person could conceivably be misled into believing defendants' containers and labels were those of plaintiff. While it ordinarily is a question of fact as to whether two containers or labels are so similar as to constitute unfair competition, and it is also ordinarily a question of fact as to whether the public has been or is likely to be misled, in this case the dissimilarities are so palpable, distinct and clear that it must be held, as a matter of law, that they are not similar, and that the public legally could not be misled.

The judgment is affirmed.

21 Cal.2d 586

In re BALDWIN'S ESTATE.

LISSNER v. BALDWIN et al.
L. A. 18111, 18206.

Supreme Court of California.
Feb. 16, 1943.
Rehearing Denied March 15, 1943.

1. Executors and administrators ⚿314(12)

An order striking from the files a request for special notice was not an "appealable order" but it would be considered so far as relevant in connection with authorized appeals by same party from orders denying his petition for ratable distribution and granting petition of executors for partial distribution. Probate Code, §§ 1000, 1010, 1202, 1240, 1242.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Courts ⚿90(4)

The adjudication of the meaning of the phrase "successor in interest" to embrace the acquisition of title in distinguishable situations such as those involving precise questions referable to the statutory right of redemption of realty is not determinative of the scope of that phrase as used by the Legislature relative to litigation in probate proceeding. Probate Code, § 1010.

See Words and Phrases, Permanent Edition, for all other definitions of "Successor in Interest".

3. Estates 🔑1

In common parlance, the word "interest" is broader and more comprehensive than the word "title" and its definition in a narrowed sense by lexicographers as any right in the nature of property less than title, indicates that the terms are not considered synonymous.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest" and "Title".

4. Executors and administrators 🔑314(3)

In providing that a "successor in interest" of any heir, devisee or legatee may petition for a ratable payment of legacies or ratable distribution of the estate, Legislature manifested its intent that the quoted phrase be given a liberal rather than a narrow and technical interpretation and term "interest" in its large sense as distinguished from the limited concept of title conforms with the import of the notable expansion of the class of persons entitled to petition for ratable distribution. Probate Code, § 1010.

5. Executors and administrators 🔑314(3)

A receiver succeeding to the right of possession of a legacy is to that extent a "successor in interest" of the legatee within purview of the Probate Code authorizing successor in interest of any heir, devisee or legatee to petition for ratable distribution of the estate, irrespective of receiver's failure to acquire also the predecessor's title to such portion of the decedent's estate. Probate Code, § 1010.

6. Executors and administrators 🔑314(3)

A person seeking distribution of a part of estate property need not be entitled to all the attributes of ownership therein in order to maintain his application in the probate court. Probate Code, § 1010.

7. Executors and administrators 🔑314(3)

A duly appointed receiver acting under the general powers conferred by section 568 of the Code of Civil Procedure and pursuant to specific instructions of the court in another legal action, may take steps in an estate proceeding to reduce a legacy to possession. Probate Code, § 1010; Code Civ.Proc. § 568.

8. Executors and administrators 🔑314(3)

Where a receiver was duly appointed to take possession of community property of spouses and of separate property of husband who as legatee was entitled to receive $1,500 monthly, receiver was the "successor in interest" of husband and was entitled to petition probate court for a ratable distribution of the estate. Probate Code, § 1010; Code Civ.Proc. § 568.

9. Executors and administrators 🔑314(3)

The probate court lacks power to distribute to a successor in interest of an heir, devisee or legatee only where the real parties in interest present a controversy concerning their respective rights. Probate Code, § 1010.

10. Divorce 🔑207
Executors and administrators 🔑314(3)

In a divorce proceeding, where husband had left the state but had property within the state, the court had power to appoint a receiver and to instruct him to reduce to possession a legacy of husband, and appointment of receiver established receiver's status as a "successor in interest" of the possessory right of husband as legatee. Probate Code, § 1010.

11. Receivers 🔑59

An order appointing receiver to take possession of community property of the spouses and the separate property of the husband including possessory right of husband as legatee was not subject to collateral attack in probate proceeding by receiver for ratable distribution of estate. Probate Code, § 1010.

12. Courts 🔑472(4)

Executors of estate were entitled to resist application for distribution by receiver of possessory right of a legatee, but such opposition would not create a controversy sufficient to oust probate court of jurisdiction to determine the matter in view of legatee's failure to contest the receiver's right pursuant to his judicial appointment. Probate Code, § 1010.

13. Courts 🔑198, 201

Probate proceedings are purely statutory and the superior court is circumscribed in such matters by the provisions of the Probate Code conferring jurisdiction, but fact that such court is acting in probate when required to apply rules in equity or principles of law to decide a question demanding settlement does not affect its jurisdiction to do so. Probate Code, § 1010.

14. Courts ⚷201

In determining issues arising in connection with the administration of an estate, the superior court as a probate court may bring to its aid the full equitable and legal powers with which it is invested as superior court. Probate Code, § 1010.

15. Courts ⚷201

Where the superior court has jurisdiction of the subject matter of the case falling within either equity or law, it has power to hear and determine in the mode provided by law all questions of law and fact the disposition of which is ancillary to a proper judgment, and the superior court has the same power when sitting in probate. Probate Code, § 1010.

16. Executors and administrators ⚷314(3)

The successor in interest of a legatee was a "person interested in the estate" within Probate Code provision that a person interested in the estate may file a written request for special notice of the filing of petitions and other pertinent papers, and shall thereafter be entitled to notice. Probate Code, §§ 1000, 1010, 1200, 1202.

See Words and Phrases, Permanent Edition, for all other definitions of "Person Interested in the Estate".

17. Executors and administrators ⚷314(12)

The probate court's erroneous failure to recognize right of person interested in the estate to notice of filing of petitions and other pertinent papers, and disregard of authoritative basis of such person's claim for ratable distribution of legacy then before the court for disposition in connection with another matter necessitated a reversal of order for partial distribution of that property, though it did not appear whether such person was prejudiced by mere fact of his failure to receive special notice of petition for partial distribution in view of his presence in court on day designated and his participation in the hearing. Probate Code, §§ 1000, 1010, 1200, 1202.

In Bank.

Appeals from Superior Court, Los Angeles County; William J. Palmer and Charles D. Ballard, Judges.

Proceeding in the matter of the estate of Anita M. Baldwin, deceased. From orders denying a petition by Louis M. Lissner, as receiver of the community property of Baldwin M. Baldwin and wife and the separate property of Baldwin M. Baldwin for ratable distribution, granting a motion by Baldwin M. Baldwin and another as executors of the estate to strike out the receiver's request for special notice of a hearing on the executors' petition for partial distribution, and an order for partial distribution, the receiver appeals.

Order denying petition for ratable distribution reversed; order granting petition for partial distribution reversed as to legacy of Baldwin M. Baldwin, and the probate court directed to proceed with such matters in a manner consistent with opinion.

Prior opinion, 126 P.2d 943.

Louis M. Lissner, of Los Angeles, in pro. per., Loeb & Loeb and Laurence M. Weinberg, all of Los Angeles, for appellant.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondents.

CURTIS, Justice.

Presented here for review are certain proceedings in probate marking the effort of a receiver, appointed in a divorce action to take possession of the community property of the spouses and of the separate property of the defendant husband, to secure from the probate court a ratable distribution of a legacy left to the husband.

Anita M. Baldwin died testate on October 25, 1939. Her will provided, among other things, that pending administration her two children, Baldwin M. Baldwin and Dextra Baldwin Jones, who are the executor and the executrix, respectively, should each receive the sum of $1,500 per month. On October 27, 1939, Rowena Schneider Baldwin instituted in the Superior Court of the County of Los Angeles an action for divorce against Baldwin M. Baldwin. As part of her complaint the plaintiff alleged the substantial value of the community holdings of herself and her husband as well as the latter's ownership of considerable separate estate, including the aforesaid legacy under the provisions of his mother's will; her husband's intent to dispose of all this mentioned property to her irreparable prejudice; and his departure from this state and establishment of residence in Nevada for the express purpose of evading service of process in the divorce proceeding and preventing the California courts from exercising jurisdiction over him. The defendant was never personally served with summons in that action and he made no appearance therein. Upon the basis of the above allegations of the complaint and pursuant to the prayer thereof the court on December 15, 1939, appointed Louis M. Lissner as receiver and ordered him to take into his possession all community property of Baldwin and his wife and all separate property of Baldwin. Located as an asset of the husband within this state was his interest in the estate of his mother, Anita M. Baldwin, and accordingly the executrix of her will, Dextra Baldwin Jones, was made a party defendant to the divorce action. Thereafter the receiver, upon petitioning the court for instructions, was directed by an order dated May 20, 1940, "to take and pursue all necessary steps in the matter of the estate of Anita M. Baldwin to reduce the claim of defendant Baldwin M. Baldwin for $1,500 per month during the course of administration to possession, and to hold such sums as he may recover in such proceedings in accordance with the order appointing him as receiver." To this end the receiver filed in the estate proceeding under authority of section 1010 of the Probate Code a petition for ratable distribution of the said legacy of Baldwin M. Baldwin. The receiver also filed in the same proceeding a request for special notice pursuant to section 1202 of the Probate Code. Thereafter motion was made by the executor and executrix to strike this request from the files. Upon the hearing in the probate court the petition for ratable distribution was denied and the motion to strike was granted.

Subsequently the executor and executrix of the will of Anita M. Baldwin, deceased, filed a petition for partial distribution pursuant to section 1000 of the Probate Code, and upon the hearing thereof distribution of the specified monthly payments accumulated over the period from October, 1939, to December, 1940, was ordered to be made to Baldwin M. Baldwin and his sister, Dextra Baldwin Jones, under their respective legacies. Although not served with special notice, the aforementioned receiver appeared at this hearing and after denial of his motion for continuance, he contested the propriety of such distribution, but his objections were overruled.

[1] The receiver has appealed from both orders adverse to his position in the estate proceeding—the order denying his petition for ratable distribution and the order granting the petition of the executor and executrix for partial distribution. The two appeals involve the same questions and they have been consolidated for presentation here. Upon this review the receiver properly recognizes that the order striking from the files his request for special notice is not an appealable order (Prob.Code, § 1240), but he correctly maintains that such ruling of the probate court will be considered in connection with the two authorized appeals in so far as it is relevant thereto. (Prob.Code, § 1242, subd. 2; Deering's 1933 Supp., p. 209.) Respondents, Baldwin M. Baldwin and Dextra Baldwin Jones (now known as Dextra Baldwin Derx), although the recipients of the legacies, appear throughout the probate proceedings here involved and upon these appeals in their representative capacities of executor and executrix, respectively.

The first point presented for determination is whether appellant is a party entitled to petition for ratable distribution under the provisions of section 1010 of the Probate Code. That section, so far as here material, reads as follows: "When the time for filing or presenting claims has expired and all uncontested claims have been paid * * * but the estate is not in a condition to be finally closed and distributed, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court for a ratable payment of the legacies, or ratable distribution of the estate, to the heirs, devisees or legatees, or their assignees, grantees or successors in interest * * *. Any person interested in the estate or any coexecutor or coadministrator may resist the application."

[2] Appellant predicates his authority to proceed under this section upon his status as a "successor in interest" of the legatee Baldwin. While he does not dispute the settled law that a receiver does not take title to property by virtue of his appoint-

ment, but only acquires the right of possession as an officer of the court (DeForrest v. Coffey, 154 Cal. 444, 449, 98 P. 27; North v. Cecil B. DeMille Productions, Inc., 2 Cal.2d 55, 57, 58, 39 P.2d 199; Clark on Receivers, 2d Ed., vol. 1, p. 460; 22 Cal. Jur., pp. 488, 489, §§ 73, 74), he claims that the attribute of ownership of property to which he does succeed warrants his inclusion within the statutory classification. Contrariwise, respondents maintain that this lack of title in a receiver precludes his characterization as a "successor in interest" of another, and as representative authority in support of this proposition they cite instances of the application of this descriptive term to a purchaser at an execution sale of real property because he thereby "acquires all the right, title, interest, and claim of the judgment debtor thereto." Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 455, 648; Bateman v. Kellogg, 59 Cal.App. 464, 211 P. 46. But the adjudication of the meaning of the words "successor in interest" to embrace the acquisition of title in distinguishable situations such as those involving precise questions referable to the statutory right of redemption of realty is not determinative of the scope of that phrase as used by the Legislature relative to litigation in probate proceedings.

[3-8] In common parlance the word "interest" is broader and more comprehensive than the word "title," and its definition in a narrowed sense by lexicographers as any right in the nature of property *less than title* indicates that the terms are not considered synonymous. Anderson's Law Dictionary, p. 562; Ballentine's Law Dictionary, p. 671. By the employment of a word whose ordinary signification is broad enough to include every species of property right, the Legislature manifested its intent that the statutory phrase in question be given a liberal rather than a narrow and technical interpretation. The view of the term "interest" in its large sense as distinguished from the limited concept of title conforms with the import of the notable expansion of the class of persons entitled to petition for ratable distribution under section 1010 of the Probate Code as above quoted. Prior to the amendment of this provision in 1937 only the executor or administrator was accorded this privilege, and the extended availability of such right to an "heir, devisee or legatee, or [his] assignee, grantee or successor in interest" demonstrates the Legislature's purpose to broaden thereby the basis for ratable distribution of a decedent's estate as far as consistent with established probate practice. In pursuance of this expression of legislative policy as bearing upon the present case, it would appear that a receiver succeeding to the right of possession of a legacy, a recognized property interest, is to that extent a "successor in interest" of the legatee within the purview of the statute and irrespective of his failure to acquire also the predecessor's title to such portion of the decedent's estate. A person seeking distribution of a part of estate property need not be entitled to *all* the attributes of ownership therein in order to maintain his application in the probate court. Countless factual situations suggest themselves in illustration of this proposition. For example, an administrator or executor, who does not succeed to the decedent's title (Estate of Hite, 159 Cal. 392, 395, 113 P. 1072, 32 L.R.A.,N.S. 1167, Ann.Cas.1912C, 1014), will be given possession of the estate property for purposes of administration and thus effectuating the orders of the court which appointed him its officer; or distribution of the property to an heir, devisee or legatee, may be directed subject to an equitable charge in favor of some other recipient of the deceased's bounty; or delivery of possession of the property may be ordered to a life tenant, with the remainder in fee to another person pursuant to appropriate designation; or a beneficiary of a testamentary trust may petition for partial or ratable distribution of the fund to the trustee. In re Mackay's Estate, 107 Cal. 303, 307, 40 P. 558; Estate of McGirl, 125 Cal.App. 310, 313, 13 P.2d 746. Commensurate with these observations as to probate procedure, it would appear beyond dispute that a duly appointed receiver, acting under the general powers conferred by section 568 of the Code of Civil Procedure and pursuant to specific instructions of the court in another legal action, may take steps in an estate proceeding to reduce a legacy to possession. Accordingly, appellant to the extent of the possessory right of the legatee Baldwin is the latter's "successor in interest" within the meaning of section 1010 of the Probate Code, and so entitled to seek ratable distribution thereunder.

[9] Respondents then argue that even though appellant as receiver be considered a "successor in interest" under the pertinent statute, his claim was beyond the

power of the probate court to adjudicate because they as executor and executrix, respectively, opposed his application in the estate proceeding. They rely in this connection upon a line of decision holding that the probate court is without jurisdiction to try and determine disputes concerning the existence or validity of the right asserted as the basis for distribution of the decedent's property otherwise than in conformity with the terms of the will or the laws of succession, as the case may be. Estate of Strong, 119 Cal. 663, 51 P. 1078; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459; Estate of Ryder, 141 Cal. 366, 74 P. 993; Estate of Howe, 161 Cal. 152, 118 P. 515; McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026. However, upon analysis, the rule established by these authorities has no application to the present situation. For instance, in the Estate of Howe, supra, the decision upheld the probate court in its refusal to determine the conflicting claims to the interest in certain real property of an heir and his judgment creditors, who had caused his interest to be levied upon and sold during the course of administration. So may the remaining cases cited be similarly distinguished as relating to controversies between the parties *directly affected* by the proposed distribution of the estate property—that is, between the heir, devisee or legatee and the contesting claimant. But the dispute urged here by respondents as derogatory of the probate court's jurisdiction does not involve objection by Baldwin as legatee. Pursuant to the rule of the above cases such court lacks power to distribute to the successor only where the *real parties in interest* present a controversy concerning their respective rights

[10-15] Under the well-defined principles of Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97, and Nichols v. Superior Court, 1 Cal.2d 589, 36 P.2d 380, 95 A.L.R. 894, the court in the above-mentioned divorce action under the circumstances outlined was authorized to appoint therein a receiver and to instruct him to reduce the legacy in question to possession. As stated in the foregoing discussion of section 1010 of the Probate Code, that appointment established appellant's status as a "successor in interest" of the possessory right of the legatee Baldwin. The order so appointing the receiver, valid on its face, is not subject to collateral attack in this probate proceeding. Although under the provisions of section 1010 of the Probate Code as above quoted, respondents as representatives of the estate involved were entitled to resist the receiver's application for ratable distribution, such opposition would not create a controversy of the type sufficient to oust the probate court of jurisdiction to decide the matter, for Baldwin in his individual capacity as the legatee directly affected has not undertaken to contest the receiver's right pursuant to his judicial appointment. While probate proceedings are purely statutory and the superior court is circumscribed in such matters by the provisions of the Probate Code conferring jurisdiction (Estate of Davis, 136 Cal. 590, 597, 69 P. 412; Texas Company v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 39, 53 P.2d 127), the proceeding instituted by appellant as receiver was such as is contemplated by the express language of said section 1010. The fact that such court is acting in probate when required to apply rules in equity or principles of law to decide a question demanding settlement does not affect its jurisdiction to do so. As a probate court in determining issues arising in connection with the administration of an estate, "it may bring to its aid the full equitable and legal powers with which, as the superior court, it is invested." Estate of Bell, 168 Cal. 253, 257, 141 P. 1179, 1180. When the superior court has jurisdiction of the subject matter of a case falling within either equity or law, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the disposition of which is ancillary to a proper judgment. It has the same power sitting in probate. Burris v. Kennedy, 108 Cal. 331, 336, 41 P. 458. In line with these settled principles, there can be no doubt as to the jurisdiction of the probate court to adjudicate the controversy as presented with regard to the petition for ratable distribution. Under respondents' theory in such situation as the present one the opposition of the representatives of the estate would automatically create a "dispute" which would render the probate court powerless to distribute to the petitioning successor in interest and yet at the same time leave it with authority to distribute to the contesting representatives upon application therefor. Such unjust result not only would nullify the express purpose of section 1010 in its amended form as quoted, the enlargement of the class of persons entitled

to invoke the statute's aid, but would conflict with the settled law governing the probate court's province of decision. From the foregoing discussion it follows that the order denying the petition for ratable distribution must be reversed.

[16, 17] Turning to a consideration of the appeal from the order of the probate court distributing the legacy in question to Baldwin M. Baldwin pursuant to respondents' petition for partial distribution, the disposition of this matter is governed in large measure by the above commentary as to appellant's status in the estate proceeding. Section 1000 of the Probate Code provides that "any person interested in the estate may resist the application" for partial distribution. Section 1202 of the same code provides that "any person interested in the estate, whether as heir, devisee, legatee, creditor, beneficiary under a trust, or as otherwise interested * * * may * * * file * * * a written request" for special notice of the filing of petitions and other pertinent papers, and thereafter such person shall be entitled to notice as provided in section 1200 of said code. While no statutory definition has been given of the words "person interested in the estate," it logically follows that appellant, by reason of his succession as receiver to the possessory right of the legatee Baldwin and his pecuniary interest to that extent in the disposition of the legacy involved, comes within the scope of the quoted phrase as used in the last two mentioned code provisions; and the probate court erred in holding to the contrary. Although it does not appear whether appellant was prejudiced by the mere fact of his failure to receive special notice of respondents' petition for partial distribution in view of his presence in court on the designated day and his participation in the hearing of the matter, such consideration is immaterial under the present circumstances. The probate court's failure to recognize appellant's standing in the estate proceeding by virtue of his appointment as receiver in the divorce action, as above discussed, and its disregard of the authoritative basis of his claim for ratable distribution of the identical legacy then before the court for disposition in connection with respondents' petition necessitate a reversal of the order for partial distribution of that property.

The order denying the petition of appellant for ratable distribution is reversed; the order granting the petition of respondents for partial distribution is reversed as to the legacy of Baldwin M. Baldwin; and the probate court is directed to proceed with these matters in a manner consistent with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

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21 Cal.2d 645

LARRABEE v. TRACY et al.

L. A. 18084.

Supreme Court of California.

Feb. 25, 1943.

1. Wills 🔑552(1)

A will may provide against operation of statute providing that when an estate is devised to any kindred and devisee dies before testator, leaving lineal descendants, such descendants take the estate in same manner as devisee would have done had he survived testator. Probate Code, § 92.

2. Wills 🔑552(3)

Provision of will that testator disinherited all persons who might be determined to be his "heirs at law" except as otherwise mentioned in will did not preclude daughter of testator's cousin who was deceased at time of execution of will leaving cousin one-sixth interest in the estate, from claiming such interest in same manner as cousin would have done had she survived testator, as provided by statute, since daughter relied on her status as "lineal descendant" and not as an "heir at law". Probate Code, § 92.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir at Law" and "Lineal Descendant".

3. Wills 🔑552(3)

Persons acquiring rights under statute providing that when estate is devised to any kindred and devisee dies before testator leaving "lineal descendants", such descendants take the estate in same manner as devisee would have done had he survived testator, acquire such rights as statutory "devisee" and the rights are acquired regardless of whether such persons are heirs of testator. Probate Code, § 92.

See Words and Phrases, Permanent Edition, for all other definitions of "Devisee".

4. Judgment ⚷443(1)

Equity will grant relief against a judgment on ground that extrinsic fraud or mistake deprived unsuccessful party of opportunity fully to present his case, or prevented a fair adversary proceeding.

5. Judgment ⚷443(1)

Whether plaintiff has made showing of extrinsic fraud or mistake to entitle him to equitable relief depends on all of the facts.

6. Executors and administrators ⚷1

An executor, in a broad sense, is a "trustee", and he is an "officer of the court" who occupies a "fiduciary relation" toward all parties having an interest in the estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relation", "Officer of the Court" and "Trustee".

7. Executors and administrators ⚷75

Executors occupy trust relation toward legatees, and are bound to utmost good faith in transactions with them.

8. Judgment ⚷443(1)

Where one obtaining judgment has duty to speak because of trust or confidential relation and fails to do so, failure is a "fraud" for which equity may afford relief.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

9. Executors and administrators ⚷315(4)

Where executor led deceased legatee's daughter who resided outside the state to believe that she would receive share of the estate, and did not inform her that executor would dispute daughter's right to legacy, executor in obtaining judgment decreeing that legacy lapsed, that daughter was entitled to no part of the estate and that executor as residuary legatee was entitled thereto, after giving of statutory notice, but without actual notice to daughter was guilty of breach of duty to daughter and the judgment would be set aside. Probate Code, § 92.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action in equity by Edith Larrabee against Mary Tracy, Ernest P. Wellman, individually and as executor of the last will and testament of Mark H. Rice, deceased, and others, to vacate and set aside an order adjudging that a legacy to the plaintiff's mother had lapsed and that Ernest P. Wellman, as residuary legatee, was entitled thereto. From judgment for plaintiff, defendant Ernest P. Wellman, individually and as executor, appeals.

Affirmed.

For prior opinion, see 126 P.2d 947.

Winterer & Ritchie and L. S. B. Ritchie, all of Los Angeles, for appellant.

J. B. Mandel, Dee Holder, and Robert M. Kaufman, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

The respondent, Edith Larrabee, alleging that an order of the probate court had been obtained by extrinsic fraud, brought this action in equity for relief. The order in question, made in the estate of Mark H. Rice, decreed that a legacy to Kate Chase, mother of the respondent, had lapsed and that appellant Wellman as residuary legatee was entitled thereto.

The will of Mark H. Rice was admitted to probate September 1, 1931. By its terms one-sixth of decedent's estate was given to his cousin Mary Tracy, one-sixth to his cousin Kate Chase, one-third to three charities, and the residue to appellant who was named as executor. In October, 1931, appellant learned that Kate Chase was dead and that her daughter, Edith Larrabee, lived in Hardwick, Vermont. Appellant then wrote to respondent stating "a client of mine who is related was anxious to get in touch with your mother * * * we would appreciate your informing us when your mother passed away and where she was living at the time of her passing." He also inquired concerning Mary Tracy. The requested information, including the fact of her mother's death nine years before, was furnished by respondent on November 5, 1931. No reply was made to this letter until March 8, 1932, when appellant wrote to respondent inquiring as to her knowledge of Mark H. Rice and the relationship of her mother to him; also whether she was the only child. Respondent immediately replied that she was the only child and that Mark Rice and her mother were cousins.

On March 15, 1932, appellant informed respondent of the death of Rice and sent her a copy of the will, stating in his letter that the one-sixth interest left to her mother "we think will revert to you." In response to a request for information concerning the estate, appellant sent respondent a copy of the inventory and advised her that in addition there was a trust fund which "will be distributed to the beneficiaries named in the will, which is your mother and your aunt, and the charitable institutions and myself. * * *" Appellant also stated that there was not sufficient cash to pay inheritance taxes and that a sale of assets did not then seem advisable. There was no further correspondence for over two years, when appellant answered a request for information made on behalf of respondent as follows: "you may be assured that everything is being done in the interest of the beneficiaries under the will and am just as anxious for distribution as anyone, but it is impossible at the present time owing to the condition of the market for sale of the property. * * * Mrs. Larrabee's mother's share may revert to her by law of succession. * * *"

Three years more passed and in July, 1937, respondent wrote to appellant insisting that her share of the estate be distributed to her. Appellant's secretary replied during appellant's absence. "Before Mr. Wellman went north, he stated it was his intention to file a petition shortly for rateable distribution, and in this connection wish you would kindly procure a certified copy of your birth certificate, and also a certified copy of your mother's death certificate, that same may be filed with the petition, showing proof of death and your heirship. * * * I will call Mr. Wellman's attention to your letter on his return." Respondent's letter and the secretary's reply were read to appellant by his secretary.

On September 1, 1937, Mr. Noonan, an attorney of Portland, Maine, wrote to appellant informing him that Mrs. Larrabee had received a citation affecting property of the Rice Estate located in Riverside County, California, and, referring to her great need, asked for an early distribution to Mrs. Larrabee of her share of the estate. Mr. Noonan testified that he never received an answer to this letter, although appellant claims he replied thereto on September 17, 1937, stating he intended shortly to file an account current for ratable distribution, and for a construction of the will. Appellant does not claim, however, that the letter informed Mr. Noonan that he intended to represent to the court that the legacy to Kate Chase had lapsed and that the same should be distributed to him as residuary legatee.

On October 1, 1937, appellant filed his third account current and included therein a petition for construction of the will and for ratable distribution, alleging that Kate Chase having predeceased the testator whose will disinherited all persons other than those specifically named therein, including the descendants of Kate Chase, "the devise and legacy to said Kate Chase should lapse and become a part of the residue" of the estate. The petition prayed for the distribution of $3,000 cash as follows: To Mary Tracy, $500; to the three named charities, $1,000; and to appellant, $1,500. Notice of the filing and hearing of the account and petition was posted by the clerk of the court upon the bulletin board of the courthouse in Los Angeles County. No other notice was given to respondent. On October 21, 1937, the court made an order settling the third account current and granting the petition. It decreed that respondent was not entitled to any part of the estate.

A check for $500 was mailed to Mary Tracy in payment of her legacy with a letter from appellant dated December 28, 1937. Upon learning of the receipt of this money by her aunt, respondent contacted her attorney in Maine who thereupon engaged an attorney in Los Angeles to investigate the matter. The present action followed. Wellman demurred to the complaint and his demurrer was sustained without leave to amend. Judgment was entered in his favor from which Mrs. Larrabee appealed. The judgment was reversed on appeal, with directions to the lower court to overrule the demurrer, the appellate court holding (Larrabee v. Tracy, 39 Cal.App.2d 593, 600, 104 P.2d 61, 65) that under the allegations of the complaint "it is apparent that the fraud and deceit of [Wellman] prevented [Mrs. Larrabee] from either appearing in court or presenting her side of the controversy." The court noted, with reference to Wellman's argument that Mrs.

Larrabee was deprived of any interest in the estate by the disinheritance clause of the will, "that appellant does not base her claim to an interest in the estate as an heir at law of testator, but rather upon her status as a lineal descendant of Kate Chase, under the provisions of section 92 of the Probate Code * * *."

After a hearing the trial court found that the order of the probate court "was obtained by extrinsic fraud worked by the defendant, Wellman, and * * * that Edith Larrabee is entitled to take said bequest by right of substitution," and gave judgment for respondent herein.

[1-3] On appeal from this judgment, Wellman urges, first, that the share to Kate Chase lapsed by reason of her death prior to that of Mark Rice, contending that the disinheritance clause shows the testator intended to exclude all persons except those specifically named in the will. This clause reads as follows: "I hereby generally and specifically disinherit each, any and all persons whomsoever, claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this will." The effect of this clause was considered on the prior appeal, but whether or not that decision is determinative of the question now raised, it is clear that appellant's contention is unsound. Appellant concedes that were it not for the above clause respondent, as the daughter of Kate Chase, would be entitled to her share pursuant to section 92 of the Probate Code. This section provides that a devise or bequest to any kindred of the testator who is dead at the time the will is executed but leaves lineal descendants surviving the testator, does not lapse, but that such descendant takes the estate in the same manner the devisee or legatee would have done had he survived the testator. Although a will may provide against the operation of this statute, the disinheritance clause in Mark Rice's will does not do so. It purports to exclude only those claiming as heirs at law of the testator, while respondent relies solely upon her status as the lineal descendant of Kate Chase under section 92, supra. As said in Re Estate of Tibbetts, 48 Cal.App.2d 177, 179, 119 P.2d 368, 369: "the persons acquiring rights under said statute acquire such rights as 'statute-made' devisees or legatees. * * * Such rights are acquired regardless of whether such persons are or are not heirs of the testatrix." Cf. In re Estate of Pew, 10 Cal.App.2d 41, 43-45, 50 P.2d 1045; Larrabee v. Tracy, 39 Cal.App.2d 593, 600, 601, 103 P.2d 61.

[4, 5] It was determined upon the prior appeal that respondent's complaint states a cause of action for extrinsic fraud, and the only problem now before us with regard to this issue is the sufficiency of the evidence to support the judgment. It has long been recognized in California that equity will grant relief against a judgment on the ground that extrinsic fraud or mistake deprived the unsuccessful party of an opportunity fully to present his case or prevented a fair adversary proceeding. Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; see Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, and cases there cited. It is sometimes difficult to apply this general principle in a particular situation, and whether or not a plaintiff has shown such grounds that equity ought to afford relief must depend upon all the facts in each case. Cf. 3 Freeman on Judgments, 5th Ed.., 1925, § 1233, pp. 2570, 2571.

[6-8] The evidence shows that appellant led respondent to believe that she was entitled to the share of the estate her mother would have received had she survived the testator, and that distribution would be made accordingly as soon as a fair price could be obtained for the real property in the estate. In correspondence covering a period of over five years appellant never at any time indicated there was any question concerning respondent's right to be substituted in her mother's place. Appellant seeks to justify this conduct by claiming that he "erroneously believed" that the bequest and devise to Kate Chase "reverted" to respondent upon the death of Kate Chase and that it was not until about the time the petition for distribution was filed that he "was advised and determined" that he was in error. This, of course, does not excuse appellant's failure to notify Mrs. Larrabee that he had changed his position and intended to ask the court to distribute to himself the legacy Mrs. Larrabee had been led to believe she would receive. Without informing Mrs. Larrabee of his intentions, appellant presented his adverse claim to the probate court stating as a fact that her share had lapsed. Appellant prosecuted his petition knowing full well that respondent would not be in court to challenge his claim to her share of the estate. Well-

man's conduct effectively prevented Mrs. Larrabee from obtaining a fair adversary hearing and, in our opinion, affords ample justification for the granting of equitable relief. As executor of the estate and its residuary legatee appellant had a clear duty to refrain from taking an unfair advantage of the impression he had created. An executor has numerous fiduciary obligations to the beneficiaries of the estate. In 1 Scott on Trusts (1939) it is stated (§ 6, p. 48): "An executor is often called a trustee; and in the broad sense of the term so he is. * * * The relation between an executor or administrator and the legatees and distributees, like that between a trustee and the beneficiaries of the trust, is a fiduciary relation." In Re Estate of Conkey, 35 Cal.App.2d 581, 585, 96 P.2d 383, 385, the court said an executor "is an officer of the court and occupies a fiduciary relation toward all parties having an interest in the estate." See, also, 3 Schouler on Wills, Executors and Administrators, 6th Ed., 1923, § 1397, p. 1676; 11A Cal. Jur. 75–77; 11B Cal.Jur. 208, 212; 21 Am. Jur. 372–375. A number of decisions have applied this principle in cases involving extrinsic fraud. Particularly applicable is the language in Bacon v. Bacon, 150 Cal. 477, 89 P. 317. The court, holding that extrinsic fraud or mistake existed where probate pleadings had understated the amount of a legacy, and the legatee, relying upon the executor's statements, failed to appear at the distribution, said at page 489 of 150 Cal., at page 322 of 89 P.: "Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary. * * * They were also residuary legatees, and hence whatever was lacking in full payment to the plaintiff was so much gained to them." In Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 210, 92 P. 184, 187, it was said that a common case of extrinsic fraud is where a party is deprived of his opportunity to be heard "by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party." In 3 Freeman on Judgments, supra, section 1235, pages 2575, 2576, the author declares that if there is a duty to speak because of a trust or confidential relation, a failure to do so is obviously a fraud for which equity may afford relief whether such fraud be regarded as extrinsic or an exception to the extrinsic fraud rule. And extrinsic fraud or mistake has uniformly been found where the executor conceals from the court the existence of certain heirs or fails to account for some of the assets of the estate, at the same time neglecting to give proper notice to the interested parties. See, for example, Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 221 P. 368; Bacon v. Bacon, supra.

While it may be that appellant would not have been guilty of a breach of duty had he given respondent actual notice that he intended to dispute her right to the legacy, allowing sufficient time for her to obtain an attorney to represent her in the probate hearing, it would be unconscionable for a court of equity to hold that, under the circumstances of this case, he had fulfilled his obligations by compliance with the statutory requirements of posting notice at the courthouse. In Aldrich v. Barton, 138 Cal. 220, 71 P. 169, 94 Am.St.Rep. 43, the court held sufficient against demurrer a complaint charging that trustees under a will fraudulently presented a false account after posting notice of the hearing for ten days but without the actual knowledge of the beneficiary, who was a resident of Hawaii.

[9] The appellant, having led respondent to believe that she was entitled to a share of the estate and that distribution would be made accordingly, was under a duty to give actual notice of his change of position, and cannot rely on mere compliance with the statute by posting a notice which he knew would not give actual notice.

The judgment is affirmed, costs on appeal to be assessed against appellant personally without any right of reimbursement from the assets of the estate.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

21 Cal.2d 652

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. TRACY et al.

L. A. 18085.

Supreme Court of California.

Feb. 25, 1943.

1. Trusts ⚿271½

A testamentary trustee which was faced with conflicting demands made by executor and another concerning right to a legacy, and was threatened with possible double liability, was entitled to judicial instructions concerning its duties under trust agreement.

2. Trusts ⚿271½

Where trial court found that action by trustee for instructions concerning its duties under trust agreement was necessarily brought by trustee in view of substantial conflicting demands made on it by executor and another, fee for attorneys who brought the action was allowable to the trustee out of the trust estate. Civ.Code, § 2273.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Security-First National Bank of Los Angeles, as trustee, etc., against Mary Tracy and others for declaratory relief and instructions concerning distribution of trust property. From an adverse judgment, defendant Ernest P. Wellman appeals.

Affirmed.

Winterer & Ritchie and L. S. B. Ritchie, all of Los Angeles, for appellant.

Ralph G. Miller, J. B. Mandel, and Dee Holder, all of Los Angeles, for plaintiff and respondent.

Newby & Newby and Robert M. Kaufman, all of Los Angeles, for defendants and respondents.

GIBSON, Chief Justice.

This is a companion case to Larrabee v. Tracy, Cal.Sup., 134 P.2d 265, but questions have been raised herein that have not been determined by that decision. On August 7, 1930, Mark H. Rice created a trust of certain real property, naming the plaintiff bank as trustee. The trust agreement provided that the trust was to terminate upon the death of the trustor, the property to be transferred according to the terms of his will. Rice died on August 6, 1931, and appellant Wellman, the residuary legatee, qualified as executor. The trustee, believing that the estate would be promptly closed, and with the consent of all the beneficiaries, allowed Wellman to possess and manage the real property. Thereafter the trustee repeatedly urged that Wellman close the estate, but Wellman failed to do so. In October, 1937, Wellman obtained an order from the probate court that he, as residuary legatee, was entitled to the one-sixth interest in the estate devised and bequeathed to Kate Chase, who had died before the will was executed. In May, 1938, the trustee brought this action for declaratory relief and for instructions, stating that a controversy had arisen as to the share left to Kate Chase. Plaintiff alleged that both Wellman and Kate Chase's daughter, Edith Larrabee, demanded this share, and that plaintiff was in doubt as to its rights and duties as trustee. It asked the court for directions for disposition of the trust property and, further, for the allowance of a reasonable sum out of the trust estate for the services of its attorney in this action. Both Wellman and Mrs. Larrabee filed answers to the complaint, each claiming the disputed share. Shortly after the commencement of this action Mrs. Larrabee brought an action in equity to set aside the probate order on the ground of extrinsic fraud practiced by Wellman. The superior court vacated the order and held Mrs. Larrabee was entitled to the legacy. See Larrabee v. Tracy, supra. On the same day the court rendered its judgment in the present action, similarly declaring that Mrs. Larrabee was entitled to the property left to Kate Chase, instructing the trustee to convey the disputed share to her, and allowing a sum of $1,250 for attorney's fees. Wellman has appealed from this judgment, contending that the trustee could not maintain this action and that no attorney's fees should have been allowed.

[1] The trustee, at the time this proceeding was commenced, was faced with substantial conflicting demands upon it threatening a possible double liability. It was entitled to judicial instructions as to its duties under the trust agreement. See Security-First Nat. Bk. v. J. D. Millar Realty Co., 217 Cal. 277, 18 P.2d 339.

[2] No error has been shown in the allowance of attorney's fees to the trustee.

The trial court found that this action "was necessarily brought," and under section 2273 of the Civil Code a trustee "is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust." Appellant has not objected to the amount of the allowance.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

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21 Cal.2d 892

SALVATION ARMY (a Corporation) et al., Plaintiffs and Respondents, v. SECURITY-FIRST NAT. BANK OF LOS ANGELES (a National Banking Association) et al., Defendants and Respondents; Ernest P. Wellman, Appellant.

L. A. 18086.

Supreme Court of California.

Feb. 25, 1943.

In Bank.

Appeal from Superior Court of Los Angeles County; Carl A. Stutsman, Judge.

For prior opinion, see 126 P.2d 953.

Winterer & Ritchie, of Los Angeles, for appellant.

Dee Holder and Newby & Newby, all of Los Angeles, Howard Hemenway, of Lynwood, and W. Cloyd Snyder, of Los Angeles, for plaintiffs and respondents.

Ralph G. Miller, Cosgrove & O'Neil, Robert M. Kaufman, and J. B. Mandel, all of Los Angeles, for defendants and respondents.

PER CURIAM.

All questions involved in this appeal having been decided adversely to appellant, Wellman in Larrabee v. Tracy, Cal.Sup., 134 P.2d 265, the judgment is affirmed.

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57 Cal.App.2d 375

PEOPLE v. YACHIMOWICZ.

Cr. 3639.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1943.

1. Criminal law 🔑1032(7)

In prosecution for grand theft, where defendant made no objections to variance between guns described in amended information and proof at the trial, he "waived" the variance and could not raise it for first time on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Criminal law 🔑517(4)

In prosecution for grand theft, evidence sufficiently established the corpus delicti, so as to make admissible defendant's confession.

3. Larceny 🔑65

Where it appeared that entire plan of stealing by defendant was in furtherance of his design to secure personal and monetary satisfaction for his treatment at the hands of his employers, evidence was sufficient to sustain conviction for grand theft, though there was no direct evidence that all five guns of the value of more than $200 were taken by the defendant at the same time, or that they were taken one by one at different times.

4. Larceny 🔑17

If the different asportations from the same owner are prompted by one design, they are a "single act" without regard to time.

See Words and Phrases, Permanent Edition, for all other definitions of "Single Act".

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

John Yachimowicz was convicted of grand theft and from such conviction and an order denying a new trial, he appeals.

Judgment and order affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

The defendant was charged in an amended information filed in the Superior Court with three offenses, burglary, grand theft and receiving stolen property. Count I, charging burglary, was dismissed "in the interest of justice," and upon a jury-waived trial he was found "not guilty" of receiving stolen property and "guilty" of the crime of grand theft, for which offense he was sentenced to imprisonment in the state prison for the term prescribed by law. He appeals from the judgment and from an order denying a new trial and contends, first, that there was a material variance in the property described in the information and the proof; second, that no corpus delicti of the crime of grand theft was established to admit the confession; third, that the court committed prejudicial error in the admission of evidence; and fourth, that the decision was contrary to law and that the evidence produced was insufficient to sustain the conviction.

At the trial it was stipulated that the case might be submitted on the transcript of testimony taken at the preliminary hearing, with the proviso that either side might produce additional testimony before the superior court. The defendant did not avail himself of the opportunity to produce witnesses at any time, either at the preliminary hearing or in the superior court, nor did he appear as a witness in his own behalf.

Among the witnesses produced by the prosecution was a deputy sheriff of Los Angeles County named Chaillie, who arrested the appellant on February 25, 1942, near Lancaster, California. He and another deputy had gone to that neighborhood looking for the defendant and met him as he came around the corner of a house where they were inquiring for him. He told the officers that his name was John Yachimowicz and stated that he had been "digging out the spring." The officer testified that he had previously viewed the path leading up to the spring and had seen no footprints there. He informed the defendant that he was under arrest and "backtracked" his footprints. At a point about a hundred yards from the house the officer noticed some freshly turned dirt and upon digging there found four small cardboard boxes, two of them card index files containing papers upon which were printed Union Hardware and Metal Company's headings. Upon showing these boxes to the defendant and asking him what he meant by burying them, the defendant merely stated that he had nothing to say; that he was not going to talk. The officers after a thorough search of the premises returned to Los Angeles and the defendant there stated in the presence of several witnesses that he had been employed by the Union Hardware and Metal Company for about seven years; that once or twice a week he was a night watchman; that on such occasions he would drive his car into the garage which was part of the building housing the Union Hardware and Metal Company, and as he made his rounds would accumulate from the stock various items for which he thought a sale might be found; that in the early morning before anyone else arrived, he would pull his car out on the street and around the corner and upon leaving his employment would drive his car over to the home of Mrs. Craine where he had a room built to store his goods, or to the place in Antelope Valley where he would store his goods. Upon being asked what he took at any one time the defendant answered that he had no way of knowing; he did not know what he took; he just took it all. He said at various times the items would range from safety pins to outboard motors and that he had no definite recollection as to when he took the guns or how many guns he took, but that everything he had was taken from the Union Hardware and Metal Company; that he previously had been employed as an assistant buyer; and had been demoted and his salary cut; and that he had "been given a raw deal" and that was why he started stealing from them.

Another deputy sheriff named Weiner, one of the investigating officers, testified that he saw five guns introduced in evidence at the preliminary hearing, and it was stipulated between counsel that they were put in evidence in factory cartons. This witness also testified that after the appellant was brought back to Los Angeles he stated that the records which were found buried by the officers "were his accounting system of the various merchandise that he had on what he called consignment to the various parties who were disposing of it for him." According to Weiner, the defendant "related his act of employment with the Union Hardware and Metal Company, and stated that he had become incensed at the treatment received from them, and decided to get even with them; that he had adopted the manner of loading up his car each night when he was working as night watchman, leaving with this various merchandise. In other words, he was stealing it from the store." This officer further testified that upon a search of the premises near Lancaster the officers "found a varied assortment of merchandise, ranging from all types of hardware, tools, electrical fixtures, silverware, sporting goods and jewelry, and every type of merchandise * * * in this house and in a little shed adjoining the house. The merchandise was all contained in wooden cartons and each carton was numbered and labeled. The numbers were found to correspond with the books * * * the merchandise in the house, itself, wasn't labeled. It was scattered around and contained in various cartons, and concealed in the furniture, in magazines and things of that nature. In the shed, however, the boxes were stacked and were all numbered, and the numbers corresponded with some of the numbers listed in here on the outside of these steel boxes. * * * He said that he had made several acquaintances of people, and that he would inquire of them if they had any means of disposing of various items which he could give to them at a very low price, and which would enable them to re-sell them and make a profit on them. He said he had made two or three contacts with other parties who wanted to do that, that he had been furnishing the material to them, and they had been disposing of it."

It was stipulated that if another deputy named Pierson were sworn, he would testify that he went to Lancaster to the house and shed, described by Weiner, and took the material stored there in a truck to the Union Hardware and Metal Company. It was further stipulated that the property recovered by the officers "was appraised in the inventory in the sum of $15,000.00."

[1] Chaillie had gone to the premises of Mrs. Craine two days before his trip to Lancaster and had there picked up fifteen guns, which had been stored in appellant's room by one Trudell. Included in the lot were five guns which had been marked for identification in the preliminary hearing and which were introduced as exhibits in the superior court, and were the same which Weiner saw at the time of the preliminary examination. Trudell testified that on February 22nd, he took over to Mrs. Craine's place about fifteen guns, which he had received from the appellant a few weeks previous; that the appellant at that time told him that he had purchased stock from bankrupt outfits and wanted to know whether Trudell would buy it or sell it for him. Trudell told him that he could leave the guns and if anyone appeared who might be interested he would advise the appellant. The five guns produced in court were identified by various employees of the Union Hardware and Metal Company as property which had been stolen from their employer. George Richmond, a buyer for that concern, testified that the fair market value of the five guns was $259.80 and that during all the period from January 1st, 1940, to the time of trial, the fair market value was in excess of $201.00. They were invoiced as Rifle #1219968, Rifle #1220718, Rifle #35133-A, Shotgun #802896, Rifle #24258. The amended information under which the defendant was convicted, however, did not charge him with the theft of any of these guns, the charge there referring to other weapons, four in number, described as follows: one 30/06 Winchester rifle, one 20 gauge Winchester gun, one 12 gauge Winchester gun, and one 410 gauge Winchester gun. None of these was offered in evidence. Upon this situation rests appellant's contention that there was a material variance between the charge of theft as laid and the proof. An examination of the record discloses that the point of alleged variance was not raised at the trial, nor, so far as appears, even on motion for new trial, if indeed it could have been raised then for the first time. The record discloses that the People had in their possession, apparently for possible use as evidence, some fifteen guns belonging to Union Hardware and Metal Company and which presumably were those which were shown to have been in the possession of defendant and to have been recovered from the premises of Mrs. Craine. It does not appear to have been noticed, at the preliminary examination, when the five rifles were placed in evidence, nor at the trial when they were identified, appraised and again placed in evidence that they were not the guns described in the amended information. If defendant was unaware of the alleged

variance he was uninjured by it; if he was aware of it he should have made his objection, and having failed to do so he will be deemed to have waived it. People v. Rabe, 1927, 202 Cal. 409, 261 P. 303; People v. Abila, 1934, 137 Cal.App. 26, 29 P.2d 796; People v. Myers, 1934, 1 Cal. App.2d 620, 37 P.2d 191; People v. Pryor, 1936, 17 Cal.App.2d 147, 61 P.2d 773. In the last named case the following appears (pages 151, 152, of 17 Cal.App.2d, page 775 of 61 P.2d): "An objection to evidence on the ground of variance may ordinarily not be made for the first time on appeal. It is waived by failure to raise that objection at the trial. People v. Fuski, 49 Cal.App. 4, 192 P. 552; People v. Woods, 190 Cal. 513, 213 P. 951; 8 Cal. Jur. 500, § 515. In 8 California Jurisprudence last cited it is said in that regard:

> "'An objection to variance between the pleading and proof cannot be made for the first time upon appeal. And when the case is tried on the theory that certain issues are covered by the indictment it is too late to make the point upon appeal, where it does not appear that prejudice resulted to the defendant from any imperfections in the indictment.'"

We have no hesitation in applying this rule to the instant case. The description of the stolen property as it appeared in the information apparently resulted from confusion in the selection of a few guns to be identified from the many which defendant had stolen from the same owner.

[2] In regard to the contention that the corpus delicti was not established in this case, we believe that the recital herein of the circumstances and statement under which the guns were delivered by the appellant to Trudell, and the testimony of the employees of the Union Hardware and Metal Company of the manner of their disappearance from the warehouse, together with a number of other incidents reported in the record, furnish a sufficient answer to the argument of the appellant that in the case at bar "there is no evidence of felonious intent to steal the property which is an essential element of the offense of larceny. One is not guilty of larceny who believes he has a legal right to possession." We note at this point the statement made by the appellant to Officer Chaillie that "his employers had given him a raw deal and that is when he started stealing from them."

As to the contention that the court erred in the admission of evidence, having read the entire record in this case we find no basis for that complaint.

[3, 4] On the point that the evidence in the case is insufficient to sustain the judgment of conviction, it appears that the only matter warranting comment relates to the value of the property which the appellant was convicted of stealing. He argues that if each gun were taken on a separate day there would be no grand theft under any theory known to the law. It must be conceded that there was no direct evidence that all five guns, of the value of more than $200 were taken by the appellant at the same time, nor was there any direct evidence that they were taken one by one at different times. However, it is apparent that the entire plan of stealing resorted to by appellant was in furtherance of his design to secure personal and monetary satisfaction for his treatment at the hands of his employers. Upon the evidence received by the trial court and under the reasoning of People v. Mills B. Sing, 1919, 42 Cal.App. 385, 183 P. 865, we feel that the defendant was justly convicted of the crime of grand theft. We quote from the language in that opinion, at page 396, of 42 Cal.App., at page 869 of 183 P., as follows: "The law is that, if the different asportations from the same owner are prompted by one design, one purpose, one impulse, they are a single act, without regard to time." See, also, People v. Fleming, 1934, 220 Cal. 601, 611, 32 P.2d 593; People v. Dillon, 1934, 1 Cal.App.2d 224, 229, 36 P.2d 416.

Judgment and order affirmed.

SHINN, J., and SHAW, J. pro tem., concur.

DILLARD et al. v. KERN COUNTY.
Civ. 3017.

District Court of Appeal, Fourth District, California.
Feb. 19, 1943.
Hearing Granted April 19, 1943.

1. Automobiles 🔑**230**

A claim filed with county for death of motorist colliding with county's truck did not comply with statute requiring presentation of claims before action may be brought against county, for failure to give names of county's employees alleged to be at fault. Pol.Code, § 4075.

2. Counties 🔑**211**

As right of action against a county for tort is creature of statute, Legislature may impose any restriction it deems reasonable upon exercise of such right, and conformance with such restrictions is an indispensable requirement which must be met by claimant before action may be brought. Pol.Code, § 4075.

3. Automobiles 🔑**230**

Where claim filed with county for death of motorist failed to give names of county's employees alleged to be at fault, there was no "substantial compliance" with statute requiring presentation of claim before action may be brought against county. Pol.Code, § 4075.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Compliance".

4. Automobiles 🔑**230**

An action against county for death of motorist in collision with county's truck, which action was based on claim which did not comply with statute, in failing to give names of county's employees allegedly negligent was not maintainable on theory that county "waived" and was "estopped" to urge any insufficiency in claim, since a county cannot waive compliance with statute. Pol.Code, § 4075.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Waive".

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by Geneva Dillard and another against the County of Kern to recover for death resulting from a collision between an automobile and defendant's truck. From a judgment for defendant after sustaining a demurrer to a second amended complaint without leave to amend, plaintiffs appeal.

Affirmed.

Chas. I. Rosin, of Los Angeles, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment after sustaining a demurrer to a second amended complaint without leave to amend.

Geneva Dillard is the widow, and Arley Dillard is the minor child of Henry Dillard who was killed in a motor vehicle collision in Kern County on September 24, 1940. They sought to recover damages resulting from his death.

[1] The sole question presented is whether or not the claim for damages filed by plaintiffs with defendant conformed to the requirements of section 4075 of the Political Code, the material portion of which provides as follows:

"In presenting any claim not founded upon contract full details as to the nature of the claim, the time and place when and where it arose, the public property and public officers or employees alleged to be at fault, the nature, extent and amount of the injury or damage claimed, and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him * * *."

A copy of the claim is attached to the pleading. It reads as follows:

"Claim of Geneva Dillard, Widow of Henry Dillard, Deceased, and Arley Dillard, a Minor Child of Henry Dillard, Deceased:

"Damages suffered by claimants, Geneva Dillard, widow of Henry Dillard, Deceased, and Arley Dillard, a minor child of Henry Dillard, Deceased, as a result of the negligence of the County of Kern and the State Department of Forestry, State of California, through their agents and servants causing truck operated by said County of Kern and the California State Department of Forestry, to collide with automobile in which claimants' husband and Father, Henry Dillard, deceased, was riding, to-wit: On September 24, 1940, at approximately the hour of 8:00 o'clock P. M. at the intersection of the Edison Highway and Weedpath Road, Kern County, State of California:

"Death of Husband and Father of claimants and loss of his support, society and comfort......$30,000.00.

"Geneva Dillard by Her Mark
"Allan Hamilton (?) (Signed)
"Cora A. Prichard (Signed)
"Witness to said Mark and Signature."

From a reading of the claim it is at once apparent that it does not conform to the requirements of the statute because it fails to give the names of the "employees alleged to be at fault."

[2] Prior to the adoption of the various public liability statutes in California no right of action existed against a public agency for damages resulting from tort. As the right of action is a creature of statute, the Legislature may impose any restrictions it deems reasonable upon the exercise of such right, and conformance with those restrictions is an indispensable requirement which must be met by a claimant before an action may be brought. Artukovich v. Astendorf, 21 Cal.2d 329, 131 P.2d 831; Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490; Eppstein v. City of Berkeley, 52 Cal.App.2d 395, 126 P.2d 365.

[3] Plaintiffs seek to escape the rigor of the foregoing rule by urging the sufficiency of the claim because it was "a substantial compliance with the statute" and that the defendant "has waived, and is estopped to claim, any insufficiency in compliance."

The first contention is sufficiently answered by the cases already cited and the many cases cited therein. Where required information is entirely omitted from the claim there can be no substantial compliance with the statute.

[4] The questions of waiver and estoppel, as well as substantial compliance with the statute, were considered in Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13, 16, where it was said:

"Plaintiff's contention that defendant by investigating and rejecting the claim waived any defects therein cannot be sustained. In the Spencer case, supra [Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320], an unverified claim was filed with the city and after investigation the city made an offer of compromise which plaintiff rejected. At no time did the city object to the defective form of plaintiff's claim. In holding that the city was not estopped to assert the defense of failure to comply with the statutory requirements relative to the claim the court observed that the city was powerless to waive compliance with the statutory provisions. The holding of the Spencer case was expressly approved by the Supreme Court in Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353, and was declared to be the law in all cases coming within its purview. Since the city is powerless to waive a compliance with the statute, actual knowledge on the part of the city officials of the facts required to be stated in the claim does not dispense with the filing of a proper claim. Kline v. San Francisco Unified School District, 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362.

"Plaintiff's final contention is that defendant is estopped to raise the defense of the insufficiency of the claim because of its failure to specially plead such defense in the answer. This proposition must be rejected for the question as to the sufficiency of plaintiff's claim was placed in issue by defendant's general denial of plaintiff's allegation that she had filed her claim with the city. Since the statutory requirements are mandatory and compliance therewith is a prerequisite to the maintenance of a suit for the damages claimed (Cooper v. County of Butte, supra [17 Cal.App.2d 43, 61 P.2d 516], and Sandstoe v. Atchison, T. & S. F. Ry. Co., supra [28 Cal.App.2d 215, 82 P.2d 216]), the burden of proof of such compliance was on plaintiff. Since plaintiff failed to sustain this burden the court properly entered the judgment of dismissal."

As plaintiffs failed to file a proper claim for the damages alleged to have been suffered by them they cannot maintain this action. This conclusion makes it unnecessary for us to consider other defects in the claim and its verification argued by counsel.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

BLACKER et al. v. BAKERSFIELD MUNICIPAL WATER DIST. et al.

Civ. 3083.

District Court of Appeal, Fourth District, California.

Feb. 19, 1943.

Hearing Granted April 19, 1943.

1. Waters and water courses ⚷183½

The Municipal Water District Act impliedly empowers such a district to provide annually for raising of funds by taxation to meet expenses reasonably to be anticipated during fiscal year without first incurring obligations therefor. Gen.Laws 1937, Act 5243, §§ 1, 12, and subds. 9, 10.

2. Waters and water courses ⚷183½

The statutory provisions for preparation, printing and publication of preliminary municipal water district budget, notice and holding of hearings thereon, and adoption thereof before fixing district tax rate, are for taxpayer's benefit and "mandatory", and if any of prescribed steps are omitted, district tax levy is invalid. Pol.Code, § 3714.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Statute".

3. Appeal and error ⚷917(1)

The allegations of complaint are admitted by demurrer thereto for purposes of review on appeal from judgment for defendants after sustaining demurrer without leave to amend.

4. Waters and water courses ⚷183½

Where municipal water district's board of directors never furnished county auditor itemized estimates of district's revenues and expenditures during fiscal year, and board's statement of sum required, with direction to levy tax at certain rate, was not given to county board of supervisors until after date fixed for consideration of preliminary budgets, county board's levy of district tax assessment was invalid. Pol. Code, § 3714.

5. Waters and water courses ⚷183½

The statutory provision that governing bodies of special tax or assessment districts, tax levies for which are not carried on regular county assessment rolls, except revenue producing utility districts and certain other districts, shall file itemized estimates of their expenditures and income with county board of supervisors, does not relieve municipal water district from filing itemized estimates of its revenues and expenditures with county auditor before hearing on preliminary budget. Pol.Code, §§ 3714, 3714b (1).

6. Appeal and error ⚷1138

In action to enjoin county auditor from entering municipal water district special tax on county assessment roll, judgment for defendant will not be reversed after auditor's performance of such act, though tax levy is invalid, as injunctive relief sought is "moot question" and reversal would afford plaintiffs no relief. Pol.Code, § 3714.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

7. Waters and water courses ⚷183½

In action to cancel invalid special tax assessments, levied by county board of supervisors for municipal water district, after inclusion thereof on county assessment roll, complaint was insufficient, in absence of offers therein to pay legal and justly due portions of taxes. Gen.Laws 1937, Act 5243; Pol.Code § 3714.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by E. N. Blacker and others against the Bakersfield Municipal Water District and another to annul proceedings for levy of a special district tax assessment, cancel the assessment, and enjoin entry thereof on the assessment roll of Kern County. From a judgment for defendant after sustaining a general demurrer to the complaint without leave to amend, plaintiffs appeal.

Affirmed.

Alfred Siemon, of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, Thos. Scott, Dist. Atty., and Oran W. Palmer, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment after a general demurrer to the complaint was sustained without leave to amend.

The defendant water district was organized under the Municipal Water District Act of 1911, as amended. Stats. 1911, p. 1290; Deering's Gen.Laws, Act 5243. The complaint alleges that on June 24, 1942, the board of directors of this district passed a motion in which the amount necessary to be raised by taxation was estimated at $25,000 and the secretary was instructed to forthwith furnish said estimate to the board of supervisors under the provisions of section 3714 of the Political Code; that on August 14, 1942, said board of directors passed a motion fixing at $25,000 the amount necessary to be raised by taxation for said district, fixing the tax rate at 10¢ on each $100 of assessed valuation on taxable property in the district, certifying these facts to the board of supervisors, and directing that board to levy and collect said tax at the time and in the manner required by law; that on August 24, 1942, this action was certified to the board of supervisors for the purpose of requiring that board to levy such a tax; that said district did not at any time comply with the provisions of section 3714 of the Political Code and did not file or present to the board of supervisors or any county official any itemized estimate or statement showing probable receipts or expenditures of the district for the fiscal year; and that on August 31, 1942, the board of supervisors, without any proceedings having been taken other than those just referred to, included within the county tax levy and levied for the fiscal year 1942 a special tax of 10¢ on each $100 of valuation on all property within the district.

It was further alleged that the district had on hand a surplus of about $8,000; that it had no obligations except current obligations which did not exceed $1,000; that said district has never acquired any water service or distribution system and has never been engaged in operating any business as a public utility; that the district has no bonded debt; that it has not entered into any contract for the purpose of acquiring any water system or other property; and that the board of directors of the district had incurred no obligations which would reasonably require the expenditure of $25,000. It is also alleged that the defendant county auditor will, unless he is restrained by order of the court, compute and enter in the assessment books of the county the special tax so levied, along with other taxes levied; that if said tax is computed and entered it will become a part of the total tax on all property in the district and it will then be impossible to pay the lawful tax levied without also paying said unlawful special tax; that the plaintiffs are owners of property in the district; that unless the defendant auditor is restrained from including such unlawful tax in his computation of the tax upon the assessment rolls a multiplicity of suits will result; and that plaintiffs have no plain, adequate and speedy remedy at law but will suffer great and irreparable damage unless the defendant auditor is thus restrained. The prayer of the complaint is that the proceedings for the levy of this tax be annulled, that the special assessment thus levied be canceled, and that the defendant county auditor be restrained and enjoined from computing and entering such special tax on the assessment roll, and for other and further equitable relief.

It is recited in the judgment that the appellants requested the court, in the event it sustained the demurrer, to sustain the same without leave to amend. The appellants state in their brief that the main object of the action is to have it adjudged that the tax thus levied for this district is unlawful and void and to enjoin the county auditor from computing and entering that tax.

[1] The appellants first contend that under the provisions of the Municipal Water District Act of 1911 such a district has no power to cause taxes to be levied except for the purpose of paying obligations which then exist, that contemplated obligations of any character may not be provided for in advance and that it follows, from the allegations of the complaint that this district had no existing obligations, that this tax is void. Section 12 of the act provides, among other things, that such a district shall have power to acquire and operate water systems, to exercise the right of eminent domain and borrow money and incur indebtedness. Subdivision 9 thereof gives the power "to cause taxes to be levied for the purpose of paying any obligation of the district." Subdivision 10 gives the power "to make contracts, to employ labor, and do all acts necessary for the full exercise of the foregoing powers." Section 1 of the act includes among the granted powers such as are "necessarily implied." The purpose of the act is to permit the formation of such districts and to enable them to operate water works systems. The operation of such a business would necessarily require, among other things, the hiring of labor, the purchase of materials and sup-

plies, and the making of repairs and extensions. It would hardly be reasonable to assume that it was the intention of the Legislature to require that all of these things, and many other acts which may become necessary, must be done upon a credit basis and must have taken the form of accrued obligations before any provision for meeting such necessary expenses may be made. We think the power to provide from year to year for the raising of funds to meet expenses reasonably to be anticipated during the fiscal year is necessarily implied from the language used in the act.

[2-5] It is next contended that the purported levy for this district is void for noncompliance with section 3714 of the Political Code, which contains what is commonly called the budget provisions. That section, so far as material here, provides that on or before July 10, in each year the person in charge of any district "excepting irrigation and reclamation and any other district where a tax levy for such district is not carried on the regular county * * * assessment-roll" shall file with the county auditor an itemized estimate showing both the probable revenues of the district from sources other than taxation during the fiscal year and expenditures required by such district for the same period, with certain explanatory statements. It then provides, in brief, for the making up of a preliminary budget, for a hearing on the same after notice to be commenced on or before August 20 of each year, for the final adoption of the budget not later than August 30 of each year and for the levy of taxes not later than September first of each year. It appears from the complaint which was here filed that these provisions were not complied with. No such itemized estimates or statements were ever furnished by the board of directors of this district and the bare statement that $25,000 is required, with a direction to levy a tax of 10¢ on each $100 valuation of taxable property within the district, was not given to the board of supervisors until August 24, after the date fixed for the consideration of preliminary budgets theretofore prepared and noticed. In Ryan v. Byram, 4 Cal.2d 596, 51 P.2d 872, 875, the court said:

"We agree with petitioner that, under the provisions of section 3714, supra, [Pol. Code] the board must adopt a budget as a condition precedent to a valid tax levy. We further agree with petitioner that a levy based on items not included within a previously approved and adopted budget is invalid to the extent that it includes items not part of the budget. * * *

"Applying the rules of construction to section 3714, supra, we are of the opinion that the provisions for preparing a preliminary budget; for its printing and publication; for the giving of notice and the holding of hearings; and for the adoption of a budget before the tax rate is fixed are all for the benefit of the taxpayer, are mandatory, and that, if any of these steps had been omitted, the tax levy would be invalid."

The principles thus announced are applicable here. The allegations of the complaint being admitted by the demurrer for our purposes it follows that since the provisions of section 3714 of the Political Code were not complied with the levy of this assessment for the purposes of this district was invalid. There is no merit in respondents' contention that section 3714 of that code is inapplicable because the respondent district as a revenue producing utility district is relieved from complying with section 3714 by the provisions of subdivision (1) of section 3714b. Subdivision (1) of section 3714b relates only to districts the tax levies for which are not carried upon the regular county assessment roll and that subdivision has no application to the district here in question, the tax levies of which are carried upon the regular county assessment roll.

[6, 7] While the tax levied here, in question, is invalid because the provisions of section 3714 of the Political Code were not complied with it does not necessarily follow that the judgment should be reversed. As the appellants point out in their briefs the main object of the action, as brought, is to enjoin the county auditor from computing and entering this tax for the reason that the levy was made in an unlawful manner. The only injunction asked for is to restrain the county auditor from computing and entering such special tax on the assessment. Aside from the general considerations affecting the right of a taxpayer to enjoin the levying of a tax, it would appear that the act of the county auditor here sought to be enjoined has already been done. The matter has become moot insofar as the only injunctive relief asked for is concerned, and a reversal of the judgment insofar as the county auditor is concerned would afford no relief to the appellants. There was also a prayer that the special assessment thus levied for this

district, which by now will have been included on the general assessment roll of the county and probably in part collected, should be canceled and annulled. Assuming that the portion of the tax which represents this special assessment could now be segregated and canceled, the complaint, as drawn, is not sufficient for that purpose since, among other things, it does not contain allegations offering to pay those portions of the taxes as finally entered on the assessment roll which are legal and justly due. See Charles v. City of Crescent City, 14 Cal. 2d 234, 93 P.2d 129; DeMille v. County of Los Angeles, 25 Cal.App.2d 506, 77 P.2d 905. Further assuming that some amendment to the complaint might now be made which would entitle the appellants to some form of equitable relief, we are faced with the fact that the appellants themselves requested that the demurrer, if sustained, be sustained without leave to amend. It would seem to follow that, under the facts as here presented, the appellants are not entitled to a reversal of the judgment and that they must be left to their legal remedies or to another equitable action if they can bring themselves within its requisites.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

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57 Cal.App.2d 233

PEOPLE v. TULLOS.

Cr. 554.

District Court of Appeal, Fourth District, California.

Feb. 19, 1943.

Rehearing Denied March 1, 1943.

1. Embezzlement 🔑1
False pretenses 🔑1
Larceny 🔑1

Any one of acts denounced disjunctively in statute defining crime of "theft" constitutes such crime, which has been substituted for former separate offenses of larceny, embezzlement and obtaining money or property under false pretenses. Pen. Code, §§ 484, 490a.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

2. Embezzlement 🔑1
False pretenses 🔑1
Larceny 🔑1

Though offense of theft has been substituted by statute for offenses of larceny, embezzlement and obtaining money or property under false pretenses, no elements of such former crimes have been changed. Pen.Code, §§ 484, 490a.

3. Criminal law 🔑823(4)

An instruction to convict of grand theft, if jury believed that defendant came into possession of specified sum through bank's mistake in crediting it to his account and appropriated the money to his own use with knowledge that it was not his, *held* not error prejudicial to defendant, in view of statutory definition of crime of theft and instructions given on defendant's request, though definition did not define all elements of former offenses included in such crime by statute. Pen.Code, §§ 484, 490a.

4. Larceny 🔑65

Evidence *held* sufficient to support conviction of grand theft. Pen.Code, § 484.

5. Criminal law 🔑753(2)

Trial court cannot instruct jury to acquit defendant, but is only authorized to advise jury to acquit, and jury is not bound by such advice. Pen.Code, § 1118.

6. Indictment and information 🔑91(2)

In information charging grand theft, allegation that defendant unlawfully took $723.63 in cash from bank sufficiently averred a felony offense without stating that he feloniously took such amount. Pen. Code, §§ 484, 952.

◆

Appeal from Superior Court, Tulare County; K. Van Zante, Judge assigned.

W. H. Tullos was convicted of grand theft, and he appeals.

Affirmed.

R. W. Henderson, W. C. Dorris, and C. Fleharty, Jr., all of Bakersfield, for appellant.

Robert W. Kenny, Atty. Gen., and Walter C. Haight, Dist. Atty., and Robert K. Meyers, Deputy Dist. Atty., both of Visalia, for respondent.

GRIFFIN, Justice.

Defendant and appellant W. H. Tullos was charged with the crime of grand theft. The information alleged that on December 27, 1941, he unlawfully took the personal property of the Bank of America National Trust & Savings Association, a corporation (hereinafter called the Bank), consisting of $723.63 in cash. The case was tried by a jury and after instructions were given by the court it returned a verdict of guilty as charged. After denial of a motion for new trial, judgment was pronounced. Defendant appealed.

The evidence shows that the appellant, on November 12, 1941, opened a checking account in the sum of $101.57 with the bank at Visalia under the name of "New Deal Appliance." The account shows that in addition to the original deposit, five additional deposits and numerous withdrawals were made up to and including December 27, 1941, at which time the sum of $723.63 was withdrawn by the appellant personally and the account was closed. A witness by the name of Sweet made a deposit on November 29, 1941, to the account of Olga M. Johnson, as executrix, in the sum of $905, which amount was erroneously credited by some employee in the bank to the New Deal Appliance account. Appellant was the only person authorized to draw checks on that account. The evidence further shows that a bank statement showing a credit of $905 was mailed to the appellant on December 1, 1941, by the bank; that no one in fact deposited the sum of $905 to the account of the New Deal Appliance on November 29, 1941, or at any other time. The sum of $905 was not credited to the account of Olga M. Johnson as executrix. The error of the bank was not discovered by it until April 10, 1942. Demand by the bank was thereafter made upon appellant for the return of the sum of money involved.

There is no dispute as to the testimony above related. After the people rested their case counsel for the appellant moved the court to "instruct the jury to find a verdict of not guilty on the evidence thus far presented." This motion was denied. Appellant took the stand and testified that he drew several checks on the account opened by him; that he received the statement of account mailed by the bank about December 1st and that he noticed that the credited item of $905 was made to his account at that time; that on December 27th he went to the bank and asked to draw the balance of his account; that the teller went to the ledger, made out a check in the sum of $723.63, the balance then remaining, and that the money was given to him in cash at that time; that that closed the account. When asked in regard to his knowledge of how the sum of $905 came to be credited to his account, he testified that he had a lady friend in Bakersfield from whom he had asked to borrow some money in November, 1941; that she did not have the money then but thought by December 1st, it would be available; that she was going to New York and that if she did not have it by that time she would send it to him; that she asked him how he wanted it sent and he replied that she could just "send it to the bank account, New Deal Appliance," and that when he received his bank account statement showing the extra credit of $905, he "just supposed that had been sent from her." He then testified that the day after withdrawing the money he went to Los Angeles in regard to some foot injury and on his return in April or May, 1942, he found a card on his door to come to the district attorney's office; that he went there and they asked him about some money he owed the bank; that all it "wanted was some money." On cross-examination he testified that he was a business man; that in May he wrote to his lady friend to ascertain if she had deposited the money in his account; that he would not "divulge her name" or "address" for business reasons; that he had borrowed $50 from her on a previous occasion; that there were no arrangements as to when he was to repay her or the amount of interest to be charged; that he spent the $723.63 paying up some of his bills and in the purchase of two trucks. Appellant also testified that a representative of the bank made demand on him for the $905 in Fresno, after his return in May; that he told him that "when I found out if I owed the Bank any money and this friend of mine got back. If I owed any money I would make restoration to pay back; that I would pay it back as I could." The appellant was arrested the next day. None of the money has been repaid.

The court then instructed the jury, and among the many instructions given, one was given in this language: "You are instructed that if you believe from the evidence in this case beyond a reasonable doubt that the defendant, W. H. Tullos, on or about the time charged in the information came into possession of the sum of $723.63, or any other amount over $200 through mistake on the part of the bank and knowing the money not to be his, formed the intent to appropriate it and did appropriate it to his own use, then you should find the defendant, W. H. Tullos, guilty as charged in the information."

In additon to the claim that the evidence is insufficient to support the verdict of guilty as found by the jury, appellant also claims that the above-quoted instruction is prejudicially erroneous. In addition to the above-mentioned instruction, the trial court instructed the jury in the language of section 484 of the Penal Code reading in part:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him * * * and thereby fraudulently gets or obtains possession of money, or property * * * of another, is guilty of theft."

Bearing upon this point, appellant offered and the court gave the following instruction:

"The crime of theft requires a specific intent to steal—in this instance an intent on the part of defendant to convert the property to his own use, with the consequent deprivation of possession and enjoyment by the owners thereof. This specific intent must be proved by the prosecution, the same as any other material fact in the case. It is not presumed from mere possession where the original taking was lawful * * *." And that "Felonious intent is an essence of the crime of grand theft. If one, in good faith, takes the property of another, believing it to be legally his own, or that he has a legal right to its possession, he is not guilty of larceny. * * *"

[1-4] Any one of the acts denounced in the disjunctive in Penal Code section 484 constitutes the crime of theft, which offense has been substituted for the former separate offenses of larceny, embezzlement, and obtaining money or property under false pretenses. Pen.Code, § 490a. Although the offense of theft has been substituted for the offenses of larceny, embezzlement and obtaining money or property by false pretenses, no elements of the former crimes have been changed. The elements of the former offenses of embezzlement and larceny and the distinction between them are clearly stated in People v. Bojorquez, 35 Cal.App. 350, 354, 169 P. 922. See, also, People v. Johnson, 91 Cal. 265, 27 P. 663; People v. Myers, 206 Cal. 480, 275 P. 219; People v. Selk, 46 Cal.App.2d 140, 115 P. 2d 607. While the instruction complained of, when considered alone, may not define all the elements necessary to constitute all the former offenses now contained within the crime of grand theft and essential to a conviction under that charge, yet, when considered in connection with the statutory definition of that offense as given, and particularly the instructions offered by appellant and given by the court, the appellant cannot be heard to complain that the instructions, when considered as a whole, were prejudically erroneous because they were not a fair statement of the law applicable. The evidence was sufficient to support the verdict. Byrd v. State, 90 Tex.Cr. R. 418, 235 S.W. 891.

[5] Appellant's claim, that his "motion to instruct the jury to acquit" should have been granted, is not well taken. The trial court, in a criminal case, is only authorized to advise the jury to acquit but the jury are not bound by the advice. Sec. 1118, Pen.Code; People v. Daniels, 105 Cal. 262, 266, 38 P. 720; People v. Horn, 70 Cal. 17, 11 P. 470; State v. Sullivan, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902.

[6] No demurrer was interposed to the information under section 1003 of the Penal Code. The allegation in the information that the defendant "unlawfully" took $723.63 in cash, was a sufficient averment of a felony offense without stating that he "feloniously" took that amount. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. § 952, Pen.Code. The order denying the motion for new trial was substantially grounded.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 63

HASKELL v. TOEPFER et al.

Civ. 12279.

District Court of Appeal, First District,
Division 1, California.
Feb. 10, 1943.

Trial ⚿=296(4)

In action for death of five-year-old boy who was struck by automobile in street, where evidence was such that jury could have found either way, error in instructing that if boy attempted to cross street not at intersection he was guilty of contributory negligence and if jury found it to be proximate cause of accident defendants were discharged from liability, which was aggravated by instructions that a minor could be held guilty of negligence, was not cured by stipulated instruction that any instruction on subject of contributory negligence should apply only to plaintiff, who was boy's father, and required a reversal.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Walter H. Haskell against John C. Toepfer and others to recover for the death of a minor child who was killed when struck by an automobile driven by one of the defendants. From a judgment for defendants, plaintiff appeals.

Reversed.

H. W. Glensor, of San Francisco, for appellant.

Robert L. Lamb, Daniel O'Brien, R. H. Cormany, and A. Dal Thomson, all of San Francisco, for respondents.

WARD, Justice.

This is an action for damages for the death of a minor child who was killed as the result of being struck by an automobile driven by defendant Gladys Toepfer. The trial was had before a jury, which rendered a verdict in favor of defendants. Plaintiff's motion for a new trial being denied, he has taken this appeal from the judgment. The contentions for reversal are that the trial court committed error, first, in the admission of evidence, and, second, in two of its instructions to the jury.

The accident occurred in the middle of the afternoon in a business district in San Francisco, where the deceased child, a boy of a little less than five years old, had apparently wandered from his home a block and a half away. The day was clear, and the sidewalks and road dry. On the block where the accident occurred are stores on both sides of the street, and the street runs approximately north and south. The child had been talking to an upholsterer, whose shop is in the block on the east side of the street, and had passed on to an adjoining place of business, a coal yard, where he was observed by a witness who had come to call upon people across the way, and, finding them not at home, sat down on the steps to write a letter and await their return. The defendant Gladys Toepfer was proceeding south in her automobile at a speed of from twenty to twenty-five miles an hour. She was looking straight ahead and driving three or four feet from cars parked closely on the west side of the street. Two other cars were following her. She testified that the first intimation she had that anything was wrong was when she heard a thumping noise; that she thought it was a flat tire, and stopped in a normal manner and got out to see what the trouble was; that she then saw the child lying in the street. He was thirty-four feet to the rear of her car. While the person writing upon the steps, and the upholsterer, testified that the child had been on the east side of the street just prior to the accident, there is testimony by the driver of the second car behind Mrs. Toepfer that he darted out from between cars parked on the west side of the street, which she was enabled to see clearly by reason of the fact that the car just ahead was proceeding somewhat to the left in an apparent effort to pass the Toepfer car. Testimony that the only mark on the Toepfer car was where some grease was rubbed off underneath the right rear spring may be a circumstance from which an inference may be drawn that the child approached the car from the west side of the street. Also, a blood stain was found ten feet out from the west curb; and thirty-four feet north of this spot, "in the general direction, the same line," were found "sort of marks made by shoes rubbing and there were threads of the boy's clothing between the blood and this point." From the above circumstances a jury weighing the evidence, having had the advantage of viewing the manner, etc., of the witnesses, could have reached a conclusion either way.

Appellant contends that it was error to, admit in evidence the traffic ordinance of the city and county of San Francisco, purporting to limit the rights of pedestrians in the use of the streets and imposing upon them greater restrictions than the Vehicle Code and "* * * to instruct the jury that if the deceased child attempted to cross Tiffany Street other than at an intersection he was guilty of contributory negligence as a matter of law and if the jury found it to be the proximate cause of the accident the defendants were discharged from liability." Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482; Nosbonne v. Brill, 53 Cal.App.2d 436, 128 P.2d 57; Fuentes v. Ling, 21 Cal.2d 59, 130 P.2d 121; Wilton v. Henkin, 52 Cal.App.2d 368, 126 P.2d 425; Ryan v. San Diego Elec. Ry. Co., 52 Cal.App.2d 460, 126 P.2d 401.

It was stipulated, and the court so charged the jury, that any instruction on the subject of contributory negligence should not apply to the five year old boy, but to plaintiff, the father of the boy. Notwithstanding this stipulation, the instruction was erroneous, and the error was aggravated by the following instructions indicating that under certain circumstances "the minor is held to be guilty of negligence as a matter of law." "I instruct you that the defendant, in the absence of knowledge to the contrary, had no reason to anticipate the presence of persons on the highway, at the place and time of said accident. That the law provides that a pedestrian or person desiring to cross a street in a business district must do so only at an intersection. It is your duty to determine from the facts and the law whether the area involved in this case was, and is, a business district.

"I instruct you that if you find that the deceased minor was attempting to cross Tiffany Street, other than at an intersection, the minor is held to be guilty of negligence as a matter of law. The defendants are discharged from liability if, in your opinion, such violation of law on the part of the child, was the proximate cause of the accident."

As stated above, the jury from the evidence could have found either way. As applied to all the circumstances and facts surrounding this case, the giving of the instruction complained of was prejudicial error.

The judgment is reversed.

PETERS, P. J., and KNIGHT, J., concurred.

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57 Cal.App.2d 123

PEOPLE v. LAIN.

Cr. 1807.

District Court of Appeal, Third District, California.

Feb. 13, 1943.

Rehearing Denied Feb. 27, 1943.

Hearing Denied March 11, 1943.

1. Robbery 🔑3

In robbery case, no felonious intent exists where owner takes his own specific property from possession of another, even though the taking is under such circumstances as would constitute robbery if possessor were owner thereof. Pen.Code §§ 20, 211, 211a, 213.

2. Lotteries 🔑15, 20

Games of chance such as lotteries are illegal, the winner gains no title to or right of possession of property at stake, and participants have no standing in a court of law or equity.

3. Robbery 🔑4

Recovery of money lost at gambling from winner by such force as ordinarily constitutes robbery is not "robbery" where loser is only acting in good faith to recover losses, notwithstanding that loser has no remedy at law or in equity. Pen.Code §§ 20, 211, 211a, 213.

See Words and Phrases, Permanent Edition, for all other definitions of "Robbery".

4. Criminal law 🔑742(1)

Jury is exclusive judge of weight of testimony.

5. Criminal law 🔑1159(1)

A judgment of conviction will not be reversed if verdict finds some support in the record.

6. Robbery 🔑24(1)

Evidence would authorize conviction of "robbery", notwithstanding that defendant was seeking return of moneys lost in illegal card game, where jury could have drawn inference from evidence that defendant did not in good faith intend to take only money that he had lost, but that defendant had made demand that all money be placed on bar by complaining witness and that accusation that complaining witness had been cheating was a mere pretext to cover up an intent to steal. Pen.Code §§ 20, 211, 211a, 213.

7. Robbery 🔑24(1)

Evidence, though authorizing conviction of robbery in second degree, would not support conviction of robbery in first degree, where it did not appear that at or prior to time that alleged robbery was completed defendant was armed with a deadly weapon. Pen.Code § 211a.

8. Assault and battery 🔑92

Evidence supported conviction of assault with a deadly weapon.

9. Assault and battery 🔑96(1)

Refusal to instruct upon simple assault is proper where evidence is such as to make it clear that if defendant is guilty at all, he is guilty of a higher offense. Pen.Code § 1159.

10. Assault and battery 🔑96(1)

Where defendant testified that he intended to shoot through floor to frighten person on other side of door who was threatening to break it down after defendant had ordered him to get away from door, and it was undisputed that defendant shot through door, there was no reasonable basis for finding defendant guilty of simple assault, and hence trial court was justified in refusing to so instruct and in refusing to submit such a form of verdict to jury. Pen. Code § 1159.

11. Witnesses 🔑266

Cross-examination of witness is a matter of right.

12. Witnesses 🔑349

Cross-examination of witness is permissible to identify him with community so that independent testimony may be sought and offered of reputation for veracity.

13. Criminal law 🔑1170½(5)
Witnesses 🔑344(4)

In robbery prosecution, where district attorney developed on direct examination that complaining witness' occupation was that of patrolman for railroad, refusal to permit defendant on cross-examination to show that at time of alleged robbery that complaining witness earned greater portion of his livelihood by gambling was error, but did not constitute reversible error, in view of evidence.

14. Criminal law 🔑1039

Failure of defendant to object to order placing jury in charge of deputy sheriff who had been a witness, for prosecution at time order was made constituted a "waiver" of any objection which might have been interposed thereto, and such objection could not for first time be raised on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

◆

Appeal from Superior Court, Yolo County; John H. O'Donnell, Judge pro tem.

Quinton Lain was convicted of assault with a deadly weapon and of robbery in the first degree, and he appeals.

Affirmed in part and reversed in part.

George T. Davis, of San Francisco, and Joseph P. Lacey, of Oakland, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

SCHOTTKY, Judge pro tem.

Appellant was convicted on two counts, count one being assault with a deadly weapon, and count two being robbery in the first degree. This appeal is from the judgment and also from the order denying appellant's motion for a new trial.

Appellant urges numerous grounds for a reversal of the judgment. In order that our discussion of the various points raised may be better understood, we will give a fairly complete summary of the facts, as shown by the record.

The appellant was a tavern owner in the city of Woodland. On April 2, 1941, one James Bailey, the complaining witness on the robbery count, met appellant at a poolroom in Woodland. The meeting occurred about 6:30 p. m., and appellant suggested to

Bailey that they should have a drink, and that they should then go to appellant's tavern, where appellant would call up some people for the purpose of having a poker game. Bailey agreed to the suggestion. Bailey's wife then came along, and Bailey asked her for a $100 bill, stating that they were going to have a good game, and that he would not be home until late. Before they left the pool-room, one Dorsey Childers was asked by appellant to have a drink, and several drinks were purchased there, Bailey himself buying one. Appellant informed Bailey that Childers would take care of the poker game. Appellant, Bailey and Childers then got into appellant's car and went to appellant's place of business known as the Del Mar Bar. Upon arrival there appellant called up one Mr. Whitehead on the telephone and invited him over, and appellant sent Childers out to buy some cards and get some change. When Whitehead came in, he and appellant and Bailey had some drinks, and appellant told Whitehead they were to have a card game, and appellant, Childers, Whitehead and Bailey went into the kitchen, which was in a room behind the west end of the bar, but separated entirely from the main barroom, and they immediately began to play stud poker.

In order that the physical situation may be better understood, we will give a brief description of the premises where the difficulty took place.

The barroom is approximately 40 feet long from east to west, and is approximately 19 feet wide. The main entrance to the barroom is from Third Street on the east. Along the south wall of the barroom are located the dressing-rooms for ladies and men, and some booths, the booths being opposite the bar which is 21 feet and 8 inches long, and which is located near the west end of the barroom. Between the west end of the bar and the west wall is a lift, which is raised in order to get behind the bar, the distance from the west end of the bar and the west wall being approximately 2½ feet. The distance from the north side of the booths to the bar is approximately 7½ feet. According to the evidence there were a row of stools in front of the bar. Leading back from the lift to the north wall of the barroom in the northwest corner thereof, is a door which leads into a small pass-hallway which leads into the kitchen where the gambling game took place. From the lift to the door leading into this hallway is a distance of approximately 7 feet from the lift at the west end of the bar. In the west wall of the barroom proper is a door leading into the lobby of the Del Mar Hotel.

About an hour after the game started, one Jesse D. Dutcher joined the game, entering the kitchen through the same door in the barroom through which the others had entered. Before Dutcher entered the game, Childers left, because Childers got into an argument with the defendant, and the defendant ran him out. These parties continued to play stud poker until about 1:45 a.m. the following morning. Drinks were occasionally served during the game. Bailey won about $65. There was no dispute or argument between Bailey and appellant during the game. Appellant quit the game about 1:15 a.m. Another party named Joseph Jungbluth played in the game for a short while. One John Hendrix, a nephew of appellant and a bartender in the main bar premises, was occasionally in and around the kitchen during the course of the game.

Shortly before the game broke up, Bailey informed the others that he was going home, and thereupon stood up. Hendrix invited Bailey to have a drink and Bailey went into the bar premises proper. Appellant had already been in the barroom prior to this entrance of Bailey. Jungbluth also came into the barroom. Bailey walked over to a stool near the bar. Appellant accused Bailey of cheating, and told him to put "that money on the bar." Bailey denied that he had been cheating, and stated that he had won the money fairly. About that time Jungbluth struck Bailey in the mouth with his fist, knocking Bailey over against a booth in the barroom. Bailey got up and walked back toward the bar, and was all bloody, and some of his teeth were gone, and told them they "did a Hell of a thing in knocking out his teeth." The appellant spoke up, saying something about they "should have done more than that," so the complaining witness became scared and tried to get out. He could not get through the door to get out, and in the meantime defendant kept telling him to put the money up on the bar or he would take it away from him. Bailey then put $115 on the bar, testifying that he did so because he was scared. Later on in the evening and upon his return to said premises in company with a police officer, he put an additional $10 on the bar. Bailey testified that John Hendrix, the bartender, counted the money. Bailey also stated that he retained the $100 bill that he had previously received from his wife, keeping this bill in his shoe. He claimed to have $57.50 besides this $100 when he entered the poker game.

When Bailey put the money on the bar, Jungbluth, Hendrix and Bailey were in the bar premises. Jungbluth then left. Bailey testified that appellant then asked him where the $100 bill was, and then urged him to put that bill on the bar also. Bailey then ran for the door, and appellant grabbed him, and according to Bailey, started choking him. Bailey then "hollered" for help. While defendant was choking Bailey, someone in the hallway separating the kitchen, where the card game had taken place, from the main bar premises, rapped at the door leading from said hallway to the barroom. Hendrix came over and told appellant to quit choking Bailey, and pulled him off. Appellant then went from the front of the bar where Bailey was, through a lift at the west end of the bar to the door behind the bar leading into the hallway, and said to whoever was on the other side of the door, "Get the Hell away from there or I will start shooting through it." And Bailey testified that he then for the first time saw a gun in appellant's hand, and appellant was then standing close to the door and started shooting through it. When the shooting started, Bailey took advantage of his chance to get out, and got out through the door from the west end of the barroom, and ran through the lobby, and as he passed the bar he grabbed the sum of $6.25 in silver off the bar. Bailey ran down the street, meeting police officers, and then returning with them to the bar premises. En route they met Hendrix, who accompanied them to the barroom. Appellant was in the barroom when they entered, and appellant again accused Bailey of cheating. Bailey said he wanted his money back. Hendrix had the money in the pocket of his jacket. Appellant then informed the officers that there had been a little trouble, and Hendrix proceeded to tell the story of the occurrences. Appellant then put the money on the bar and Bailey added an additional $10 from the sum in his pocket. The moneys were then separated in the presence of the officers, Bailey being given $57.50, (the amount with which he started the game), for his share, and Hendrix, the balance. Bailey testified that he did not know how much money Whitehead had lost, or how much Dutcher or Jungbluth had lost. The evidence shows also that appellant and Bailey had previously been in a card game in Woodland, appellant having lost $400 in the said game, and Bailey having won $200.

Bailey testified that before the game started they were all drinking pretty fast. Each person had about seven or eight drinks at least. Bailey stated that the way some of them drank on that evening, it was pretty hard to keep up with them. The testimony is undisputed that appellant was badly intoxicated on that evening, and the district attorney conceded this fact in his opening statement to the jury. Bailey also testified that he was choked by appellant after he had put the money on the bar, and that five or seven minutes elapsed from the time Jungbluth struck him until he left the premises, and that appellant did not touch him until a minute or two before he left the premises. Bailey also testified that during the time that appellant was choking him he heard someone say, "Open the door or I will break it down." Bailey further testified that before he put the money on the bar Hendrix also urged him to put it there,—Hendrix at the time stating that they would count it.

Joseph Jungbluth was called a prosecution witness, and testified that he also accused Bailey of cheating; that Bailey made some kind of a move, and that he thereupon struck him. Jungbluth also testified that Hendrix urged Bailey to put the money on the bar in order that the money might be counted. He stated that the money was then put upon the bar by Bailey. Jungbluth left before the shooting occurred.

Childers, who was also called as a witness for the prosecution, testified that appellant was pretty well intoxicated about 8 o'clock that evening.

Whitehead was also called as a witness for the prosecution. He testified that he lost $30 in the game. Whitehead was out in the hallway separating the bar and the kitchen, during the scuffle between appellant and Bailey.

Dutcher, also a prosecution witness, testified that he was in the hallway at the time Whitehead was there. Dutcher banged on the door. Dutcher testified that Bailey wound up with most of the money, and that when Bailey went into the bar premises, he stayed in the kitchen with Whitehead; that he heard some noise, and said, "Let's get out of here." He went from the kitchen to the door separating the bar door. He stated that one Murphy and Elmer Snyder were there at that time, and that he, Dutcher, demanded that the door should be opened up or that he would kick it down, and that he kicked the door several times, and that the shooting thereupon occurred. He also stated that at the time he heard the shots he was getting ready to break the door down. Dutcher was shot in the right ankle and in the calf of the left leg.

One Fred Ewert, a deputy sheriff, testified that the bullets hit about 3 inches from the floor just about the baseboard on the wall opposite the door separating the hallway in the main bar premises. This hallway was about 3 feet wide. He further testified that one of the bullets entered the door about 30 inches from the floor, two other bullets entering the door about 2 or 3 inches below that.

The statement of appellant given to the district attorney was read into the evidence, and in it appellant stated that he tried to quiet Bailey after Jungbluth had knocked him down, and that he believed that someone was trying to break down the door, and that appellant shot into the door to scare such person, to keep him from breaking down the door, and that he intended only to shoot through the floor.

Murphy, the police officer, testified that the bullets went through the door at a forty-five degree angle; that there were three shots fired, and that appellant told him that he merely shot to scare the person away who was trying to break down the door. The officer saw the gun lying on the back bar when he entered the bar premises on that evening.

Elmer Snyder, a defense witness, testified that he was in the hallway alongside Dutcher at the time of the shooting. He stated that Dutcher said he would "break the damned door down." He also stated that Dutcher backed himself against the wall and started kicking the door. He heard appellant say, "Get away from the door and don't break it down." He heard appellant say this five or six times.

[1-3] Appellant's first contention is that "appellant having only sought the return of moneys lost in an illegal card game, his conviction of robbery is contrary to law." In support of this contention appellant relies strongly upon the case of People v. Rosen, 11 Cal.2d 147, 78 P.2d 727, 728, 116 A.L.R. 991. In the Rosen case it is undisputed that the defendant, while armed with a pistol, took the sum of $198 from a tin-box in the possession of one Whitecomb, by putting Whitecomb in fear; and also, that during several months prior to the date of the alleged offense, the defendant had frequented the gambling place conducted by Whitecomb, and had lost the sum of about $1,000, and that on the night in question he had lost about $55. In reversing defendant's conviction on the charge of the robbery, our Supreme Court said:

> "The Penal Code, § 211, defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. Robbery perpetrated by being armed with a dangerous or deadly weapon is robbery in the first degree and is punishable by imprisonment in the state prison for not less than five years. Sections 211a and 213, Pen.Code. Section 20 of the Penal Code provides that in every crime or public offense there must exist a union or joint operation of act and intent. This requirement of union of intent and act has led to the uniform rule in robbery cases that there can exist no felonious intent when the owner takes his own specific property from the possession of another, even though the taking is under such circumstances as would constitute robbery if the possessor were the owner thereof. People v. Vice, 21 Cal. 344, 345; People v. Ammerman, 118 Cal. 23, 50 P. 15; 22 Cal. Jur., p. 841; Johnson v. State, 24 Okl.Cr. 326, 218 P. 179; People v. Hughes, 11 Utah 100, 39 P. 492; State v. Brill, 21 Idaho 269, 121 P. 79; Triplett v. Commonwealth, 122 Ky. 35, 91 S.W. 281; Glenn v. State, 49 Tex.Cr.R. 349, 92 S.W. 806, 13 Ann.Cas. 774, 775, and cases cited in note; Temple v. State, 86 Tex.Cr.R. 219, 215 S.W. 965; note, 135 Am.St.Rep., p. 485. While there appears to be a conflict of authority on the question whether felonious intent is present when the defendant seeks the recaption of money lost by him at an illegal game (note, 135 Am.St.Rep., pp. 485–489), the weight of authority supports the conclusion that the intent to steal is lacking in such a case, for the law recognizes no title or right to possession in the winner. It is the law in this state that certain games of chance, such as lotteries, are illegal; that the winner gains no title to the property at stake nor any right to

possession thereof; and that the participants have no standing in a court of law or equity. Gridley v. Dorn, 57 Cal. 78, 40 Am.Rep. 110; Bank of Orland v. Harlan, 188 Cal. 413, 421, 206 P. 75; 16 Cal. Jur., p. 716. In jurisdictions where such is the state of the law the weight of authority appears to favor the view that the recaption by force or fear of money lost at illegal games is not robbery, although the act may be punishable as an unlawful assault or trespass. People v. Hughes [supra]; Thompson v. Commonwealth, 18 S.W. 1022 [13 Ky.Law Rep. 916]; Sikes v. Commonwealth, 34 S.W. 902 [17 Ky.Law Rep. 1353]; Gant v. State, 115 Ga. 205, 41 S.E. 698; State v. Price, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458, and note at page 1461; notes 57 L.R.A. 443; 13 Ann.Cas. 775; 21 Ann.Cas. 1139; 40 L.R. A.,N.S., 805, 806. The courts recognize that in such a case, whatever other element of crime may be present, there cannot exist an intent to steal or take feloniously the property of another, which is an essential element of the crime of robbery. In People v. Hughes, supra, it was said: 'In all criminal cases the question of intent is an important one. If this element is lacking, the general rule is that no offense has been committed. This rule is not only humane, but a contrary one would be opposed to all the principles which underlie human conduct as respects the bearing of individuals towards each other, and also as regards their position towards the state. And so the law is that, when evil intent is lacking, the act or omission, which otherwise would constitute an offense, is robbed of its criminality. The rule governing this class of cases seems to be well settled and thoroughly defined. In a note in 70 Am.Dec. 188 (State v. McCune), where a number of authorities are collected, this proposition is laid down: "When the prisoner takes the property under a bona fide impression that the property belongs to him, he commits no robbery, for there is no animus furandi." * * * The defendant in all cases is entitled to have the law governing his case given to the jury for their guidance, and in this case the question of honest belief and bona fide intention should have been submitted to and passed upon by the jury under proper instructions.' * * *

"It has also been held that in resisting the charge of robbery by a showing that the intention was the recaption of money lost at an illegal game, it is not incumbent upon the defendant to prove that the money reclaimed was the identical money won from him. Sikes v. Commonwealth, supra; Gant v. State, supra. However, the accused must intend in good faith to retake his own property. The question of intent is one for the jury, which may find, if the facts justify it, that the defendant's expressed intent was a mere pretext resorted to as a cover for an intent to steal. Crawford v. State, 90 Ga. 701, 17 S.E. 628, 629, 35 Am.St.Rep. 242. * * *

"The court did instruct the jury on the necessity of the union of act and felonious intent and in addition that 'one cannot be guilty of robbery where the property taken belonged to him, even though the taking is accomplished by force or fear.' But the failure to instruct further on the theory of the defense that it was the defendant's bona fide belief that the money was his own constituted prejudicial error on the record here presented."

[4-6] It must be admitted that there is strong similarity between the facts of the Rosen case and those of the instant case, but we do not believe that we would be justified in holding that upon the record in the instant case, the jury could not have found appellant guilty of robbery. The jury is the exclusive judge of the weight of the testimony, and in view of the fact that the record shows that appellant ordered Bailey to take the money from his pocket and place it on the bar, and persisted in ordering him to do so after Jungbluth had knocked Bailey down, and in view of the further fact that the jury may well have drawn the inference from the testimony that appellant had lost not more than $35, in the stud poker game, and that Bailey had not been cheating, the jury may have concluded, quite properly, that appellant did not in good faith intend to take only the money that he had lost, but that appellant had made the demand that all the money be placed on the bar and the accusation that Bailey had been cheating as a mere pretext to cover up an intent to steal. It must be admitted that the facts in the instant case are most unusual, and one may well be surprised that appellant was found guilty of robbery, but under the familiar rule that a judgment of conviction will not be reversed if the verdict finds some support in the record, we cannot say

that the finding of the jury that appellant was guilty of robbery finds no support in the record.

[7] What we have just said, however, does not mean that we are satisfied that appellant's conviction of robbery in the first degree is sustained by the record. Robbery in the first degree, as defined by section 211a of the Penal Code, is "all robbery which is perpetrated by torture or by a person being armed with a * * * deadly weapon." We have searched the record in vain for any evidence that at or prior to the time the robbery was completed, appellant was armed with a deadly weapon. No witness testified that any weapon was seen on the person or in the possession of appellant until sometime after Bailey had placed his money on the bar. Certainly appellant did not use any gun or other weapon in the commission of the robbery. The record shows that after the money had been placed on the bar by Bailey, and a new argument between appellant and Bailey had begun, appellant began to choke Bailey, and while he was doing so, someone commenced to knock on the door between the barroom and the kitchen, which had been locked after appellant, Bailey, Hendrix and Jungbluth had re-entered the barroom, and demanded admission; that Hendrix then pulled appellant away from Bailey, and appellant went from where Bailey was in the space in front of the bar, to the west end of the bar through the lift, and back behind the bar to the door leading to the kitchen, and ordered whoever was on the other side to go away; that someone then started to kick vigorously on the door, and that appellant then shot downward through the door. Bailey testified:

"A. I didn't see the gun until he had it in his hand—where he got it I couldn't say or anything else. Q. And when you looked over there, he had it in his hand, and was that before or after the shooting? A. That was just as he started shooting."

Respondent argues that "it is reasonable to say that appellant had the gun in his possession even when he commanded the victim to put the money on the bar." We do not believe that such an inference can be drawn from the record, and before a defendant is convicted of first degree robbery, there should be evidence that he was armed with a deadly weapon, and not merely that he might have been so armed.

We conclude, therefore, that the evidence was insufficient to sustain a verdict of robbery in the first degree, even though we have concluded that the evidence would sustain a verdict of robbery in the second degree.

[8] Appellant contends that the evidence was insufficient as a matter of law to sustain his conviction of assault with a deadly weapon. There is no merit in this contention. The jury may well have concluded from the evidence that appellant knew who was on the other side of the door, that he had reason to believe that they wanted to have the door opened so that they could find out what was going on in the barroom, or leave the premises in the same way they had come in, and that appellant had no reason to believe that any harm was intended to him. The persons who were in the kitchen had gone into the kitchen through the barroom, and it was reasonable to suppose that they would leave the premises by way of the barroom, and it was further reasonable to suppose that they would knock on the door leading from the kitchen into the barroom when they found it locked, as it was not locked when they entered earlier in the evening. Appellant was the proprietor of the barroom, and was of course familiar with the premises, and knew that the persons who had gone into the kitchen, with his knowledge and consent, had a right to come back into the barroom. The jury is, of course, the judge of the weight and effect of the testimony, and there was sufficient evidence to sustain the verdict of guilty of assault with a deadly weapon.

[9, 10] The court refused to instruct the jury, as requested by appellant, that "a defendant charged with the offense of assault with a deadly weapon may be convicted of simple assault," nor did the court give a similar or modified instruction to that effect; and the court also failed to submit to the jury a form of verdict whereby it might have found appellant guilty of simple assault. Appellant contends that this constituted reversible error.

Section 1159 of the Penal Code provides as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

The law is well settled in California that a court may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the higher offense. See People v. Galloway, 104 Cal.App. 422, 286 P. 476; People v. Rogers, 163 Cal. 476, 126 P. 143; People v. Thomas, 100 Cal.App. 82, 279 P. 826; People v. Albori, 97 Cal.App. 537, 275 P. 1017; People v. Lopez, 135 Cal. 23, 66 P. 965; People v. Madden, 76 Cal. 521, 18 P. 402.

In the instant case the appellant testified that he intended to shoot through the floor to frighten the person on the other side of the door who was threatening to break it down after appellant had ordered him to get away from the door. There was no denial that appellant did shoot through the door and that the shots fired by him struck Dutcher. If the jury believed that under all the circumstances shown by the record he was justified in shooting through the door as he did, then he was not guilty of any offense, but there was no reasonable basis for finding him guilty of simple assault, and hence the trial court was justified in refusing to so instruct the jury and in refusing to submit such a form of verdict to the jury. The issue of self-defense was also presented by appellant, and the court fully and fairly instructed the jury upon that issue.

Appellant attacks numerous instructions given by the trial court. In the instant case there were two counts, and the matter of instructing the jury in a manner that would not be somewhat confusing was far from easy. Taking the instruction as a whole, we believe that the jury was fully and fairly instructed, and that appellant was not prejudiced by the giving of the instructions complained of. We believe also that the instructions given by the court covered the matters included in the instructions offered by appellant and refused by the court.

We believe that the court erred in refusing appellant permission to ascertain the occupation of Bailey, who was the alleged victim of the robbery and the chief witness against appellant. On direct examination he testified that he resided in Jefferson, Oregon, and his occupation was that of a patrolman with the Southern Pacific Company. Upon cross-examination he admitted that he had been employed by the Southern Pacific Company for only about seven weeks. He was then asked by counsel for appellant as to how many times he had been in Woodland prior to the time of the alleged robbery, and on what occasions. The district attorney objected to any answer by the witness which would specify the occasions. Counsel for appellant then stated that he desired to ascertain the occupation of the witness both before and after April 2, 1942. The court sustained the objection of the district attorney. Counsel for appellant then asked the following questions, objections to which were sustained by the court:

"Have you not for a period of two years earned the greater portion of your livelihood playing poker?

"During the time that you were in Woodland prior to April 2nd, did you not earn your livelihood dealing and playing poker?

"On every other visit that you made prior thereto to the City of Woodland, did you not make your livelihood playing poker?

"Is it not a fact that since 1925 up to the present time, outside of these seven weeks you have been employed, ninety-five per cent of the time you have earned your livelihood playing poker?

"* * * weren't you spending the greater portion of your time gambling?"

It is the contention of appellant that to so limit the cross-examination of this particular witness so as to prevent disclosure of facts which would identify the witness with his environment was prejudicial to the cause of this appellant and constitutes an additional reason for the reversal of the judgment herein.

[11, 12] In the case of Alford v. United States, 282 U.S. 687-694, 51 S.Ct. 218, 219, 75 L.Ed. 624, the Supreme Court of the United States, in reversing the judgment of conviction said:

"Cross-examination of a witness is a matter of right. * * * Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood * * *; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment [citing cases]; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased [citing cases]. Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; * * *. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [citing cases] To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. [citing cases] * * * The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, * * * was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. [citing cases] * * * No obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. * * * The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

[13] In the instant case the district attorney had developed, upon direct examination, that Bailey's occupation was that of a patrolman for the Southern Pacific Company, and we believe that the trial court should not have sustained the objection to the questions as to Bailey's occupation, though such error, in our opinion, is not sufficient to justify a reversal of the judgment, in view of evidence that Bailey had been playing cards at different times prior to the night in question.

[14] Appellant's final contention is that it was prejudicial error for the trial court to place the jury in charge of Fred Ewert, the deputy sheriff who had been a witness for the prosecution. This contention lacks merit because appellant made no objection at the time. As was said in People v. Stennett, 51 Cal.App. 370, 380, 197 P. 372, 376:

"The point was not made in the court below and cannot for the first time be raised on appeal. Indeed, by his failure to object to the order at the time it was made, the defendant waived any objection which might have been interposed to the order placing the jury in charge of the sheriff's deputy."

For the reasons hereinbefore set forth we believe that the judgment and order should be affirmed as to count one, and that as to count two the judgment must be reversed and a new trial granted.

It is so ordered.

ADAMS, P. J., and THOMPSON, J., concurred.

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57 Cal.App.2d 354

MILLER v. MILLER.

Civ. 13688.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1943.

Hearing Denied April 26, 1943.

1. Divorce 🔑217, 309

Where defendant had appeared in divorce action by filing an answer, and minute order made by court at first hearing of motion pendente lite for alimony and support of minor child provided that order was without prejudice to renewal of motion for increase of allowance for support of plaintiff and child, service of notice of renewal of motion upon attorney of record for defendant was sufficient. Code Civ.Proc. §§ 1010–1012.

2. Divorce 🔑217

In divorce action where, on hearing of motion for increased alimony allowance pendente lite, husband's counsel appeared, made an application for continuance, urged that matters involved in previous hearing had been adjudicated and that on merits no change of circumstances was shown, the relief sought by husband constituted a "general appearance" irrespective of sufficiency of service of notice of motion for increased allowance. Code Civ.Proc. §§ 1010–1012.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

3. Appearance ⚿9(1)

If a party defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, he makes a "general appearance".

4. Appearance ⚿9(2)

If a party defendant wishes to insist on objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only and must keep out for all other purposes except to make that objection.

5. Divorce ⚿217

In divorce action where order pendente lite fixing alimony and child support reserved wife's right to make motion for modification, wife's affidavit, in support of motion for increased allowance, stating that wife's continued illness had caused her to incur debts and that her present allowance was insufficient to permit care of specialist required by her condition, justified modification of maintenance order, as against contention that the first order was "res judicata".

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Divorce ⚿217, 309

In divorce action where, at first hearing on wife's motion pendente lite for alimony and support of minor child, court had no information from husband regarding financial status of parties, but evidence at hearing on motion for increased allowance, disclosed that community property was of value in excess of $300,000 and included $30,000 cash in bank, granting an increase in award pendente lite from $300 to $450 per month was not an abuse of discretion.

7. Appeal and error ⚿956(1)
Continuance ⚿7

An application for a continuance is addressed to the sound discretion of the trial court and an abuse of discretion must be shown to justify reversal of the order.

8. Divorce ⚿217, 309

An affidavit is proper in support of, or in opposition to, a motion for increased allowance, pendente lite, for alimony and support of minor child. Code Civ.Proc. § 2009.

9. Divorce ⚿217, 309

In divorce action where wife made motion for increased allowance, pendente lite, of alimony and support for minor child and supported motion by affidavit disclosing urgent need for special medical attention, denial of husband's application for continuance because of illness of husband rendering him unable to appear in court was not error.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action for divorce by Rose Miller against Julius Miller. From an order pendente lite for payment of alimony and support of minor child, defendant appeals.

Affirmed.

Harry A. Finkenstein, of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, Edward Flam, Charles J. Katz, and Alfred Gitelson, all of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from an order pendente lite for the payment of alimony and support of minor child in an action for divorce.

An order to show cause in re alimony pendente lite, support and custody of minor child was issued on May 16, 1941, and served upon defendant. The hearing thereon was held on May 26, 1941, and defendant appeared in court with his attorney. The court made an order awarding plaintiff "$300.00 per month alimony pendente lite, $300.00 costs of audit and depositions without prejudice to renewal of motion; also $500.00 attorney's fees." On November 4, 1941, after defendant had appeared generally in the action by filing an answer to the complaint, plaintiff served a notice of renewal of motion for an additional allowance for support of herself and child on defendant's attorney of record by mailing a copy of said notice and a copy of plaintiff's affidavit in support thereof to defendant's attorney, who had been his attorney of record from the time defendant first appeared in the action. The notice was signed by the attorneys for plaintiff. It was conceded that the notice was received by defendant's attorney. A copy of said notice was not delivered to the defendant in person. The motion came on for hearing on November 25, 1941, at which time defendant was not present in court but his attorney of record was present. Defendant's attorney filed a written notice of motion for postponement of plaintiff's motion until the trial which was set for January 12, 1942. In support of said motion for a continuance, the attorney for defendant also filed an affidavit of a physician which stated in substance that defendant was ill and any court appearance by defendant within 90 days would seriously jeopardize defendant's recovery. Defendant's attorney then made an oral motion for a continuance of the hearing for 90 days upon the ground that defendant was ill, as stated in the affidavit. The attorney also objected to the jurisdiction of the court upon the ground that the notice was served upon the attorney for defendant and was not served upon the defendant in person; also that there was no showing that defendant could not be served in California and no court order had been made authorizing service upon the attorney for defendant. He further objected on the ground that "the matter is res judicata" in that there was no showing defendant's assets had increased since the original hearing. Plaintiff was not present in court.

The documents presented for the consideration of the court at the hearing for increase of allowance were: The notice of motion for an increase, and plaintiff's affidavit in support thereof; defendant's notice of motion for postponement; and the physician's affidavit concerning defendant's illness. In addition to the documentary evidence, the hearing included oral arguments by the attorneys for the parties as to jurisdiction and whether the circumstances of the parties had changed since the original hearing. The attorney for defendant asserted that a consideration of the wife's questionnaire which was filed at the original hearing and her affidavit filed at the second hearing would not show a sufficient change in circumstances to warrant an increased allowance. The attorney for plaintiff contended to the contrary.

The record shows that plaintiff and defendant had been married over 33 years at the time she filed her action for divorce; they had three children, one a minor; neither had any separate property. The original order to show cause came on for hearing on May 26, 1941, and plaintiff was not present due to illness. Plaintiff's questionnaire which was filed in connection with the order to show cause recited, among other things, that $524 was necessary for her monthly expenses; that defendant's then financial worth was approximately $400,000; and that his estimated net income for the previous year was $34,800. Defendant did not file a questionnaire and, although present at the hearing, he did not testify. Plaintiff's affidavit, filed with her renewal of motion, stated that her monthly expenses were approximately $393, and that at the time of the original order defendant's income was not made known to the court; that since that time plaintiff's illness had continued and that additional funds were necessary to meet expenses, to provide medical services by a specialist, to obtain the services of a nurse, and to discharge unsatisfied judgments against her in the amount of $2,331.50, which judgments were based upon obligations incurred, in order to maintain her household, by plaintiff prior to the original hearing; that an inventory and appraisement of the stock in trade of defendant's business, and defendant's deposition, showed community assets in excess of $300,000, consisting of said stock in trade, real property, stock, bonds and over $30,000 cash in the bank.

The court made the following minute order: "Renewal of motion for support of plaintiff and child comes on for hearing, Derthick, Cusack and Ganahl appearing as attorney[s] for the plaintiff, and Harry A. Finkenstein, for the defendant. Order for support of plaintiff and minor child is increased to $450.00 per month."

Appellant contends: (1) That the court did not acquire jurisdiction over him by service of the notice of renewal of the motion for increased allowance on his attorney of record; (2) that the "matter of alimony and support" under the first order was res judicata; (3) that the court abused its discretion in granting the increase in view of a showing that the community assets were less than when the first order was made; (4) that the court erred in failing to grant defendant's motion for a continuance upon his showing that illness prevented him from appearing at the hearing.

(1) In presenting his first point on appeal, relative to lack of jurisdiction, appellant asserts that the proceeding herein was

an original one for the purpose of securing a money judgment, and therefore the service of process upon his attorney, in the absence of an order of court authorizing such service, did not confer jurisdiction over defendant when he was within the state, his whereabouts known, and he could have been served in person. Prior to the service of the notice upon the attorney, defendant had appeared in the action by filing an answer. The minute order made by the court at the first hearing provided that the order then made was without prejudice to a renewal of the motion.

Section 1010 of the Code of Civil Procedure, which relates to the form and service of notices and papers in actions, provides in part: "Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter [Chapter V, Pt. 2, Tit. 14], when not otherwise provided by this code." Section 1011 of said code, which section is a part of said chapter, provides in part: "The service may be personal, by delivery to the party or attorney on whom the service is required to be made * * *." Section 1012 of said code, which section is also a part of said chapter, provides in part: "Service by mail may be made where the person on whom it is to be made * * * has his office at a place where there is a delivery service by mail * * *."

[1] It does not appear that the manner of serving the kind of notice here involved is provided in said code otherwise than is provided in said chapter. The proceeding herein was the renewal of the motion under the express provision of the previous minute order that a renewal of the motion might be made. There was no denial that the attorney served was defendant's attorney of record and, pursuant to the requirements of section 1012 of the Code of Civil Procedure, a copy of plaintiff's affidavit and a copy of the notice of motion for renewal were mailed to defendant's attorney of record at his office address where there was delivery service by United States mail. It therefore appears that the plaintiff complied with the provisions of said code sections. The service of the notice of motion upon the attorney of record for defendant was sufficient. In Reed v. Reed, 1919, 40 Cal.App. 102, 180 P. 43, the defendant appealed from an order requiring him to pay plaintiff alimony pendente lite. Defendant had been served with notice of motion to have the cause set for hearing but the hearing was continued twice, with the consent of both parties, and on the third date set for hearing, the court made its order for alimony pendente lite. Defendant contended the court was without jurisdiction, since no notice had been served upon him of the date for the hearing. The court said (page 104 of 40 Cal.App., page 44 of 180 P.), "We think the notice served and filed * * * and the subsequent stipulations relative to continuances, together with the issues tendered by the complaint relative to alimony * * * were sufficient to empower the court to make the order for * * * support pendente lite, even if jurisdiction were dependent upon any formal notice. However, contrary to appellant's assumption, no notice was necessary. The defendant had appeared in the action, so that the court had acquired jurisdiction, not only of the subject-matter of the action, but of the person of the defendant. Having acquired such jurisdiction, the court had the power to order, ex parte, without any previous notice the payment of any reasonable sum for alimony and suit money. [Citing cases.]"

[2-4] In the present case, irrespective of the sufficiency of such service of the notice of motion for an increased allowance, the relief sought by defendant at the hearing on said motion constituted a general appearance. Defendant's counsel appeared at the hearing of the motion, made an application to the court for a continuance, urged that the matters involved in the previous hearing had been adjudicated, and that on the merits no change of circumstances was shown. In the case of MacPherson v. Superior Court, 1937, 22 Cal.App.2d 425, page 430, 71 P.2d 91, page 94, it was said: "It is the well-settled rule that if a party defendant raises any question *other than that of jurisdiction* or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed 'special,' and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. [Citing cases.] If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all other purposes

except to make that objection. Taylor v. Superior Court, 93 Cal.App. 445, 269 P. 727. [Italics added.]"

[5] (2) Appellant's next contention is that under the first order "the matter of alimony and support" was res judicata in that there was no change of condition between the first hearing and the second hearing sufficient to justify the court in changing its order. Appellant cites Snyder v. Snyder, 1933, 219 Cal. 80, 25 P.2d 403, and Molema v. Molema, 1930, 103 Cal.App. 79, 283 P. 956, among other cases, to support his argument that a court may not arbitrarily change such an order when the condition of the parties is shown on the second hearing to be substantially the same as on the first hearing. Both of these cases, however, concede the power of a court to modify the allowance for alimony when the state of the case existing at the time of the first order has changed sufficiently to justify a modification of the award. It was stated in Mathews v. Mathews, 1920, 49 Cal.App. 497, page 499, 193 P. 586, page 587: "That the court may modify its orders with respect to alimony there can be no question. It is so provided in Civil Code, § 139, and our courts have so held. [Citing cases.]" Here the court specifically protected plaintiff's right to make a motion for modification by the express provision that the first order was "without prejudice to renewal of motion." The question to be determined is whether the circumstances were such as to justify the modification of the allowance. The only evidence presented at the second hearing as to the circumstances of the parties was plaintiff's affidavit. Although defendant had notice of the motion and an opportunity to reply thereto, the statements in plaintiff's affidavit remained uncontradicted. There was no showing that defendant was unable to make an affidavit; on the contrary, defendant's counsel stated at the second hearing that he appreciated he "could have replied to counsel's affidavit by way of analysis of these claimed payments, and so fourth [sic]." Plaintiff's affidavit stated that her continued illness had caused her to incur debts; that her condition required the attention of a specialist but her present allowance was insufficient to permit such care; that it was likewise insufficient to permit her to employ a graduate nurse; and that at the time the previous order was made, she felt her physical condition would improve but she had become convinced that the care and attention of a specialist was the only way she could regain her health. Plaintiff was ill at the time of the first hearing. Her doctor's affidavit, which was filed in that proceeding, stated that her condition was serious and that he had ordered her to bed for a period of "possibly a month or more." Plaintiff apparently had no reason then to believe that her condition would not improve, and she could not have known then that, after the lapse of approximately 6 months, she would require the attention of a specialist. Plaintiff's affidavit, upon which the first hearing was based, stated that her monthly expenses were $524, and her affidavit in the second hearing stated that such expenses were $393. At the hearing based upon the first affidavit she was awarded $300 a month. At the hearing based upon the second affidavit, in which the stated expenses were $131 less than stated in the first affidavit, she was awarded $450 a month. It is to be noted, in explanation of the differences between the specified amounts in the two affidavits, that the statement in the first affidavit as to her monthly expenses was a statement of her then present expenses including medical attention, and that the statement in the second affidavit was a statement of her then present expenses not including certain medical attention which she alleged was then necessary. Plaintiff's affidavit set forth grounds sufficient to justify the modification of the maintenance order.

[6] (3) Appellant further asserts that the court abused its discretion in granting the increase. The argument is that plaintiff's affidavit in the second hearing stated the assets of defendant were substantially less than they were at the original hearing when the first order was made. Plaintiff's affidavit in support of her claim at the first hearing stated that defendant's financial worth was "$400,000.00 estimated," and stated it would be "necessary to have an audit made of deft's books in order *to determine the amount and location of community property*." (Italics added.) The defendant failed to file a questionnaire and he did not testify at the first hearing. The court, therefore, had no information from the defendant regarding the financial status of the parties at the time it made the first order which provided it was made "without prejudice to renewal of motion," and that defendant should pay "$300.00 costs of audit" of defendant's books. Since the

first order was made, and prior to the filing of plaintiff's second affidavit, the audit was completed and defendant's deposition was taken. At the hearing on the renewal of the motion the court had for its consideration, as above shown, in addition to the evidence on the first hearing, the further affidavit of plaintiff, the audit, and the deposition of defendant. The evidence showed that the community property of the parties was of a value in excess of $300,000 and included $30,000 cash in the bank. That the court contemplated at the time of making its first order that a modification might be necessary was indicated by the fact that the first order included the express provision that it was "without prejudice to renewal of motion." The trial court did not abuse its discretion in granting an increase in the award pendente lite.

[7-9] (4) The last point urged by appellant, that the court erred in failing to grant defendant a postponement of the hearing on the showing made that he was unable to appear in court by reason of illness, is untenable. An application for a continuance is addressed to the sound discretion of the trial court. An abuse of discretion must be shown to justify a reversal of the order. Barnes v. Barnes, 1892, 95 Cal. 171, 177, 30 P. 298, 16 L.R.A. 660. In considering the interests of the parties to this action, the trial court may well have concluded that, in view of plaintiff's allegations relative to an urgent need for special medical attention, any delay occasioned by a continuance would result in injustice to her. Defendant's illness was the only reason presented by his counsel for making an application for a continuance. An affidavit is proper in support of, or in opposition to, such a motion as the one involved herein. Code of Civil Procedure, sec. 2009. The original order was made upon affidavits (although defendant was present at the hearing he did not testify). Defendant offered no evidence to show that his opposition to plaintiff's motion could not have been made by means of an affidavit, or that he would suffer damage to his interests if unable personally to attend the hearing. The trial court properly denied the application for a continuance.

The order is affirmed.

DESMOND, P. J., and SHAW, Justice pro tem., concur.

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57 Cal.App.2d 226

FITZ-PATRICK et al. v. OSBORNE et al.
Civ. 13952.

District Court of Appeal, Second District,
Division 1, California.
Feb. 19, 1943.
Hearing Denied April 19, 1943.

1. Evidence ⊂⇒588

The trial judge is not bound to believe any testimony.

2. Fraudulent conveyances ⊂⇒299(11)

In action by judgment creditor to set aside fraudulent conveyances, uncontradicted testimony of debtor husband's stepfather that he had for cash bought the debtors' residence from an estate and automobile from the debtor wife was not conclusive, but trial court was authorized to consider the relationship of the parties and the circumstances incident to the transactions. Code Civ.Proc. §§ 2051, 2061.

3. Fraudulent conveyances ⊂⇒299(1)

Evidence supporting finding that, pursuant to a general scheme to defraud judgment creditor, defendant, without consideration, had purchased a residence from debtors and had purchased an automobile from one debtor who repurchased it from defendant on a conditional sales contract, authorized setting aside of transfers at suit of creditor. Code Civ.Proc. §§ 2051, 2061.

◆

Appeal from Superior Court, Los Angeles County; Louis W. Kaufman, Judge pro tem.

Action by Ada H. Fitz-Patrick and others against John R. Osborne and others to set aside allegedly fraudulent conveyances. From part of an adverse judgment, defendant Dale C. Boice appeals.

Affirmed.

Benjamin Lewis, of Los Angeles, for appellant.

Howard & Littlefield, of Hollywood, and George A. Judson, of Los Angeles, for respondents.

DORAN, Justice.

This is an action by a judgment creditor to set aside the transfer of property alleged to have been transferred to defraud creditors. The parties to the within action were involved in a former action for the recovery of money wherein the parties occupied the same relative position. It is alleged, in effect, in the within action that the property involved herein was transferred by defendants during the trial of the former action in anticipation of an adverse judgment. In the within action the trial court found for plaintiff on all issues and in the judgment which followed, defendants were adjudged to be the owners of the property in question, which consisted of about twenty-two items of real property and one automobile. The judgment further subjected said property to the lien of the former judgment. Defendant Boice appeals from the judgment, but only as to the automobile and one item of real property. Appellant concedes the validity of the judgment in so far as it sets aside the transfer of the other parcels of real property on the grounds that such transfers were made as gifts to appellant Dale C. Boice by his codefendants John R. Osborne, Laura C. Osborne and Edith May Boice, or either of them.

The sole question presented by the appeal is whether the evidence sustains the findings and judgment.

The record reveals that as a matter of law the evidence either directly or inferentially supports the findings that Dale C. Boice is the husband of Edith May Boice, his codefendant, and that Dale C. Boice is the stepfather of his codefendant John R. Osborne, the husband of the other codefendant, Laura C. Osborne; that the property in question was transferred to appellant Dale C. Boice by certain of his codefendants for the purpose of defrauding plaintiffs and preventing the collection of the judgment debt; that certain property purchased by defendant Osborne was placed in the name of defendant and appellant Dale C. Boice for the same purposes and that all of said transactions as between defendant Dale C. Boice and his codefendants were without consideration. The court also found in substance and effect that the aforesaid conduct of defendants was the product of a general scheme to defraud plaintiffs. The judgment that followed decreed defendants to be the owners of the property in question; that said property was subject to the lien of the former judgment theretofore procured by plaintiffs and against defendants.

It is appellant's contention that the evidence fails to support the findings with regard to one parcel of real property and the automobile. Appellant's position in this regard is based on the contention that "the only evidence in the record is that the appellant with his own money bought this parcel of real property" from an estate. With regard to the automobile it is contended in like manner that it was bought by appellant Dale C. Boice from his codefendant Laura C. Osborne. In connection with both of these transactions, appellant Boice testified that he paid the consideration in cash, viz.: $1,325 for the automobile, and for the real property, $5,500. It should be noted that the evidence reveals that the real property in question was a residence formerly owned and occupied by appellant Dale C. Boice's codefendants, John R. Osborne and Laura C. Osborne, and that they visited appellant and suggested to him that he purchase the property. After the purchase thereof by appellant the Osbornes rented it from him and lived there. The evidence reveals that appellant bought the automobile in question from his codefendant Laura C. Osborne; also that said Laura C. Osborne then repurchased the car from him on a conditional sales contract providing for monthly payments to him by her in consideration therefor. The evidence also reveals that appellant had no bank account and carried the above-mentioned funds at the time of these transactions on his person.

Although appellant submits the record in support of the contentions relied on, nevertheless it is entirely possible that the trial court had some misgivings as to the truth of the testimony of appellant and his codefendants, of which the above is a brief summary.

[1,2] It is too well known to require the citation of authority in support of the rule that the trial judge is not bound to believe the testimony of any witness. The testimony of the defendant and appellant Dale C. Boice was not conclusive. Nor does it follow that, because no other witness testified to the contrary, Boice's testimony remained unrefuted. A witness may be impeached by contradictory evidence. (Sec. 2051, Code Civ.Proc.) As in the case of a jury, the trial judge is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction, against a presumption or other evidence otherwise satisfying. (Sec. 2061, Code Civ.Proc.) The relationship of the parties together

with the other circumstances surrounding and incident to the transactions constituted evidence that of itself warranted inferences in direct conflict with the testimony of appellant. That the court properly could take such evidence into account, there can be no question. With regard to appellant's testimony it is described by respondent as follows: "It is clear that his story of the various transactions in question taxes human credulity. His testimony was inherently improbable to say the least."

[3] As a matter of law, the evidence was sufficient to support the findings and the judgment; and the judgment is therefore affirmed.

YORK, P. J., and WHITE, J., concurred.

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57 Cal.App.2d 382

PEOPLE v. HOPKINS.

Cr. 3642.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1943.

1. Criminal law 🔑369(2)

Generally, evidence of other crimes is not admissible to prove offense charged, but there are certain exceptions as when evidence of the other offense is intermingled with the crime charged.

2. Criminal law 🔑369(2)

In prosecution for burglary of fur stores by throwing bricks through windows and removing fur coats through holes in windows, trial court properly admitted testimony of police officer concerning arrest of defendant for throwing brick through drug store window, though fur stores were burglarized several months before breaking of drug store window, where defendant confessed breaking of windows in fur stores, and fur stores were located near drug store.

3. Criminal law 🔑781(4)

The subject of confessions was satisfactorily covered in instruction that jury had duty to determine whether confessions were obtained or made under hope of reward, immunity from punishment, or by promises, duress, violence, force, or fraud, and whether they were freely and voluntarily made, and that if jury was of opinion that confessions were not freely and voluntarily made, jury had right to disregard them in arriving at verdicts, or that if jury had a reasonable doubt in regard thereto, jury should resolve such doubt in favor of defendant.

4. Criminal law 🔑1186(4)

The admission of testimony concerning an offense other than that with which defendant was charged, if error, did not require reversal of second degree burglary convictions, on ground that there was a miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Rufus Hopkins was convicted of two charges of second degree burglary, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

Defendant appeals from two judgments of conviction of second degree burglary and the order of the trial court denying his motion for a new trial. He was convicted by a jury of burglarizing the store of Maurice Ball Furriers, 500 West Seventh Street, Los Angeles, on or about January 16, 1942, and the store of Pelta Fur Company, 437 West Seventh Street, on or about February 22, 1942.

He was arrested on Sunday, May 10, 1942, at approximately 6 o'clock a.m. in front of the Best Drug Store, located at 737 West Seventh Street, three blocks west of the Pelta Fur Company establishment. The officer who arrested him testified that as he was driving south on Flower Street he noticed the defendant standing in front of the window of the Best Drug Store and saw him throw a paper-covered brick through the window; that defendant, when he threw the brick, "placed his back against the window and he stuck his finger—he had a cut on his left-hand finger and powdered glass all over his shoulders"; that he then asked the defendant why he had been breaking windows, to which the defendant made no reply; that he took him to the police station and that the defendant there admitted that he had broken the window and, in fact, had broken several windows. The officer also stated that at the time of the arrest the defendant had a folded shopping bag under his arm; that the defendant was booked and the next day was questioned by investigating officers. These officers testified that the defendant told them that the only windows he had smashed were along Seventh Street, after which they took him for a tour along that thoroughfare; that defendant, on the trip, pointed out the store of the Maurice Ball Furriers and the Pelta Fur Company as places where he had broken windows, and had stolen, from the first establishment a gray fur coat, which Mr. Ball later testified at the trial was worth approximately $80, and from the Pelta Fur Company a Chinese mink coat, which the proprietor, Mr. DeGorter, testified was worth wholesale about $380. The defendant told the officers, according to their testimony, verified by the defendant when on the stand, that he had sold to a man named Avery the first mentioned coat for $30 or $35, and the other for $50. It also appeared from the testimony that the defendant was taken to Maurice Ball at his store and confessed to him the theft and his disposition of the stolen gray fur coat, and at the other store confessed to Mr. DeGorter the theft and sale of the mink coat. There was testimony that each of these burglaries was committed between closing time on Saturday night and early Sunday morning, although the Ball burglary was charged in the information to have been committed on or about January 16, 1942, which was Friday. The evidence showed that entry to the Maurice Ball Furriers was made by someone throwing a missile, variously described by different witnesses as a rock or a brick, through the glass window, making a hole large enough for the garment to be removed; that entrance to the Pelta Fur Company store was gained by throwing a paper-wrapped brick through the display window. The defendant, upon his trial, admitted that he had told the officers that he broke all three windows, at Ball's, DeGorter's and at the Best Drug Store, but stated that none of his confessions were free and voluntary and that all were false and induced by threats and violence. The officers, on the other hand, denied that any force, violence or threats were employed in their investigation. The jury, judging from their verdicts, did not believe the defendant's story, either of mistreatment at the hands of the officers, or of the claimed falsity of his confessions to them and to the fur merchants. This is not at all surprising to one who reads the record.

The appellant claims that error arose when the court, over his objection, admitted testimony respecting offenses other than those charged against him in the information. As a second point, the defendant urges that the court erred in refusing to give an instruction which he offered concerning the continuing effect of force and violence on successive admissions or confessions of a defendant.

[1, 2] The appellant feels aggrieved because the officer who arrested him on the morning of Sunday, May 10th, was permitted to testify to the circumstances surrounding his arrest, including the act of throwing the missile in the window of the Best Drug Store, an offense upon which he was booked immediately thereafter at the Central Jail on suspicion of burglary. He was never prosecuted for that offense and now relies upon the familiar rule that evidence of other crimes is not admissible to prove the offense charged against a defendant. But there are certain exceptions to that rule and one arises, to quote from appellant's brief, "when the evidence of the other offense is intermingled with the charged crime." To determine whether or not the evidence in this case concerning the breaking of the window at the Best Drug Store is in any way connected with the Ball and DeGorter burglaries, we note the following: At the very time when this defendant was booked he admitted, according to Officer Wilton, "before Lt. Mitchell and myself that he had broken the window and had broken several windows." He was then held for investigating detectives who, next day, proceeded to question him concerning windows which he had broken, including the drug store window and the other windows. As a result of their investigation, he confessed that he had not only broken the window of the drug store but "other windows", including those of Ball and DeGorter, all of them being on Seventh Street within a few blocks of each other. The defendant's con-

victions rest upon his confessions and in investigating the question of his culpability, the detectives naturally started with his first confession made in the presence of Lt. Mitchell and the arresting Officer Wilton who, in his testimony, said "we booked him on the advice of Lt. Mitchell and held him for the investigating detectives." We think a sufficiently tangible chain of connection exists between his confession of the burglaries and his admissions in the booking office in the Central Jail on the preceding day and that, therefore, the testimony of the occurrence which led to the first confession and ultimately to the others was properly admitted.

As to the second point on appeal, we understand that defendant wishes us to consider the circumstances surrounding two classes of confessions: first, confessions which he testified he made to the investigating officers as a result of beatings inflicted upon him with fists in the basement of the City Hall and by means of punches in the stomach and blows with a blackjack while he was on his way into Los Angeles in an automobile from the western part of the city; second, the confessions which he made shortly thereafter to Mr. Ball and Mr. DeGorter where there was no evidence of violence or threats being employed. It seems to be the theory of the defendant that the jury may have believed his story that he confessed to the officers under threats and violence, but hearing no evidence of violence employed or threats made in the presence of DeGorter and Ball, they may have concluded that those confessions were free and voluntary; whereas, if they had been properly instructed the jurors would have recognized the fact that the admissions to Ball and DeGorter, like the confessions to the police officers, were induced by unlawful means. The defendant, therefore, requested that four separate instructions be given on the subject of confessions including the following: "If you believe from the evidence that force and violence was inflicted upon the defendant by the police officers, and that this force and/or violence resulted in, or produced, or caused a first confession on the part of the defendant, then I instruct you that in the absence of a clear showing that the influence and effect of such force and violence had been entirely removed from the mind of the defendant, before he made a second confession if any, that the second confession, if any, is subject to the same rule, as to its not being free and voluntary; that is to say, that it is to be assumed that the second confession also, was induced by the same force and violence that caused the earlier confession, if you find that such force and violence was used by the police against the defendant." Defendant feels that the foregoing instruction was warranted under the authority of People v. Castello, 1924, 194 Cal. 595, 600, 229 P. 855; People v. Reed, 1924, 68 Cal.App. 19, 228 P. 361, and People v. Loper, 159 Cal. 6, 112 P. 720, Ann.Cas. 1912B, 1193. We have read each of these cases but find that not one presents facts similar to the instant case.

[3] Referring to the record, we find that the defendant stated "Well, they told me they wanted me to tell the manager of the store just like I told them. So they took me to the store. Quite naturally I told them; of course I was scared they would take me back and beat me again." In view of this direct statement by the defendant that he made his confession to Ball and DeGorter under the influence of fear of a beating, we feel that the subject of confessions was satisfactorily covered in another instruction requested by the defendant which the trial court gave to the jury, reading as follows: "While under the law it is the province and duty of the court to determine in the first instance the admissibility in evidence of the confessions of the defendants; nevertheless the jury under the law of this State have also the duty to determine whether said confessions were obtained or made under a hope of reward, immunity from punishment, or by promises, duress, violence, force, or fraud and whether they were freely and voluntarily made. If from all the evidence relating to said confessions you are of the opinion that said confessions were obtained or made under a hope of reward, immunity from punishment, or were obtained by promises, duress, violence, force or fraud and were not freely and voluntarily made, you have a right to disregard them in arriving at your verdicts in this case. Or if you have a reasonable doubt in regard thereto, you should resolve such doubt in favor of the defendants."

[4] If we are mistaken in our reasoning that the trial court was justified in admitting the testimony of Officer Wilton concerning the arrest of May 10th, and defendant's confession then that he had broken the drug store window and "other

windows," we still do not feel, having read the entire record, that the defendant suffered any harm by reason of that ruling, and the same is true as to the failure of the court to give more than one instruction on the subject of confessions. It does not appear to us that there was in this case any miscarriage of justice. Therefore, under Section 4½, Article VI, Constitution of California, the verdicts should stand. People v. Stefini, 1931, 114 Cal.App. 530, 300 P. 112; People v. Lawlor, 1913, 21 Cal.App. 63, 69, 131 P. 63. Accordingly, the judgments and order are affirmed.

PARKER WOOD, J., concurs.

SHAW, Justice pro tem. (concurring).

I concur. I believe the admission of the testimony complained of can be justified on the ground that it tends to prove a plan or system of defendant in the commission of like crimes, under the rule of People v. King, 1939, 13 Cal.2d 521, 527, 528, 90 P.2d 291; People v. Thorne, 1938, 10 Cal.2d 705, 708, 76 P.2d 491; People v. James, 1940, 40 Cal.App.2d 740, 745, 105 P.2d 947.

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57 Cal.App.2d 388

In re PARKER.

Cr. 3678.

District Court of Appeal, Second District Division 3, California.

Feb. 26, 1943.

1. Habeas corpus 🔑30(2)

Though constitutionality of law under which an indictment is found may be raised on habeas corpus, failure of indictment to sufficiently allege the offense or to allege facts sufficient to constitute the offense charged may not be questioned in such a proceeding.

2. Habeas corpus 🔑30(2)

Petitioner may obtain release from custody upon habeas corpus if indictment totally fails to charge an offense known to the law, but where indictment in superior court purports or attempts to state offense of a kind of which court has jurisdiction, whether facts charged are sufficient to constitute offense of that kind will not be examined into on habeas corpus.

3. Indictment and Information 🔑110(3)

Statutory rule that indictment may charge offense in words of statute describing offense or in any words sufficient to give accused notice of offense of which he is accused is applied in testing sufficiency of charge on appeal where charge may be subjected to much more critical examination than on habeas corpus. Pen.Code § 952.

4. Forgery 🔑12(4)

Forged writing need not create a valid and legally enforceable obligation in order to constitute the making of it a "forgery", but it is sufficient that it might possibly deceive another and was prepared with intent to deceive and defraud another. Pen.Code § 470.

See Words and Phrases, Permanent Edition, for all other definitions of "Forgery".

5. Forgery 🔑7(1, 5)

A contract that is void as against public policy, a letter that could not have any actual legal effect, a county clerk's certificate to copy of divorce decree, or a recorder's certificate of recording of a deed may be the subject of a forgery. Pen.Code § 470.

6. Forgery 🔑29(2)

Where writing alleged to have been forged shows on its face that it might be the means of fraud, no averments of extrinsic fraud to show how it could be thus used are necessary to charge offense of forgery. Pen.Code § 470.

7. Evidence 🔑14, 20(1)

In determining on habeas corpus whether information charging forgery of affidavits of birth of two men, 36 and 41 years of age, charged an offense, court would take judicial notice that men of such ages were usually competent to engage in defense work, and that birth certificates and other proof of citizenship were in demand at the time to obtain employment in defense industries. Pen.Code § 470.

8. Habeas corpus 🔑30(2)

Information charging in terms of statute the making and uttering of forged affidavits of birth of two males 36 and 41 years of age with intent to defraud named corporations one of which was engaged in defense work was sufficient on habeas corpus to charge a public offense so as to support commitment, where affidavits were made at a time when and in county where such proof of United States citizenship was in great demand by applicants for employment in defense work. Pen.Code §§ 470, 952.

◆

Proceeding in the matter of the application of Ethel Parker by her attorney Donald Mackay for a writ of habeas corpus to secure release from custody.

Writ discharged and petitioner remanded to custody.

Donald Mackay, of Los Angeles, for petitioner.

John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., for respondent.

SHAW, Judge pro tem.

The petitioner is held in custody upon a commitment issued by the Superior Court of Los Angeles County after her conviction therein upon two counts of an information attempting to charge her with forgery. She seeks release upon habeas corpus, advancing as a ground therefor the claim that the information does not charge her with any public offense.

[1, 2] No contention is made that the law under which she is held is for any reason invalid. The rule applicable to such a situation is stated in Re Leach, 1932, 215 Cal. 536, 547, 12 P.2d 3, 7 as follows: "It is well settled that while the constitutionality of the law under which an indictment is found may be raised on habeas corpus, the failure of the indictment to sufficiently allege the offense, or to allege facts sufficient to constitute the offense charged, may not be questioned in such a proceeding. 'The scope of inquiry upon habeas corpus into the sufficiency of an indictment or information is limited, for, although the petitioner may be discharged if the pleading totally fails to charge an offense known to the law, if there is attempted to be stated an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into.' 13 Cal.Jur., p. 232." The same rule has been declared in many other cases, including: In re Bell, 1942, 19 Cal.2d 488, 508, 122 P.2d 22; In re Wilson, 1925, 196 Cal. 515, 518, 238 P. 359; In re Wood, 1924, 194 Cal. 49, 62, 227 P. 908; In re Kavanaugh, 1919, 180 Cal. 181, 180 P. 533; Matter of Ruef, 1907, 150 Cal. 665, 89 P. 605; In re Brown, 1929, 102 Cal. App. 97, 98, 282 P. 538; In re Rissman, 1927, 87 Cal.App. 176, 261 P. 727; In re Williams, 1925, 73 Cal.App. 485, 490, 238 P. 1044; Matter of Clifton, 1915, 26 Cal. App. 334, 146 P. 1064; Matter of Ruef, supra, is cited with approval in nearly all the later cases, and the court there said: "We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus." This rule is not applied in its full extent to justice's and other inferior courts, (Ex parte Greenall, 1908, 153 Cal. 767, 770, 96 P. 804; Matter of Ah Sing, 1909, 156 Cal. 349, 104 P. 448; In re Rissman, supra; In re Williams, supra) but here we have a proceeding in the superior court, to which it does apply.

[3] The statement of the offense charged in an indictment or information "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." (Pen. Code, sec. 952.) This is the rule applied even when the sufficiency of the charge is attacked on appeal, where it may be subjected to much more critical examination than can be given it on habeas corpus. People v. Pierce, 1939, 14 Cal.2d 639, 646, 96 P.2d 784; People v. Lavine, 1931, 115 Cal.App. 289, 296, 1 P.2d 496.

Section 470 of the Penal Code, defining the offense of forgery, declares that "Every person who, with intent to defraud, * * * counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, * * * knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; * * * is guilty of forgery." The section contains also a detailed enumeration and description of many documents, the false making of which, with intent to defraud, is forgery; but since the information before us appears to be founded on the words quoted, we omit the enumeration. The two counts of the information here in question are substantially alike, except for names, dates and other such data, and each charges that the defendant "with intent then and there to cheat and defraud," in one case, a named corporation, and in the other a named corporation and an individual, "did then and there willfully, unlawfully, fraudulently and feloniously make, forge and counterfeit the handwriting of" a named person "to and upon an affidavit of birth and did then and there utter, publish and pass the same, knowing said affidavit of birth to be false, forged and counterfeit, as aforesaid, with intent then and there to cheat and defraud" the same parties previously named. In each count is set forth a copy of the affidavit referred to therein. This charge is in the exact words of the statute, as far as it relates to the original making of the forged paper, and nearly so as to the uttering of it; and it is undoubtedly sufficient to comply with the habeas corpus rule above stated, and even with the rule on appeal, unless its efficacy is destroyed by the nature of the affidavit which is set up as the subject matter of the forgery. Petitioner claims that it is so destroyed.

[4-6] Perhaps the force of a charge of forgery might be thus completely overcome, even on habeas corpus, if the paper charged as having been forged were one which could not, by any possibility, operate to defraud anyone; e. g. a purely social letter, or a merely libelous letter (see People v. Wong Sam, 1897, 117 Cal. 29, 48 P. 972; People v. Turner, 1896, 113 Cal. 278, 280, 45 P. 331), on the theory that the pleading totally failed to charge an offense known to the law. It is not necessary, however, that the forged writing create a valid and legally enforceable obligation in order to constitute the making of it a forgery. People v. Gayle, 1927, 202 Cal. 159, 162, 259 P. 750; People v. McKenna, 1938, 11 Cal.2d 327, 332, 79 P.2d 1065; People v. Munroe, 1893, 100 Cal. 664, 668, 35 P. 326, 24 L.R.A.,N.S., 33, 38 Am. St.Rep. 323. It is sufficient that it might possibly deceive another and was prepared with intent to deceive and defraud another. People v. Turner, supra, 1896, 113 Cal. 278, 281, 45 P. 331. A contract which is void as against public policy may, nevertheless, be the subject of a forgery. People v. Gayle, supra; People v. Munroe, supra; People v. Collins, 1908, 9 Cal.App. 622, 99 P. 1109. Even a letter which could not have any actual legal effect may be the basis for a charge of forgery. People v. McKenna, supra, 11 Cal.2d at page 333, 79 P.2d 1065. A county clerk's certificate to copy of a decree of divorce may also be the subject of a forgery (Ex parte Finley, 1884, 66 Cal. 262, 5 P. 222), and so may a recorder's certificate of the recording of a deed. People v. Turner, supra. Where the writing alleged to have been forged shows on its face that it might be the means of fraud, no averments of extrinsic facts to show how this could be are necessary. Ex parte Finley, supra, a habeas corpus case; People v. Di Ryana, 1908, 8 Cal.App. 333, 339, 96 P. 919, where the same rule was stated on appeal.

[7, 8] In this case the two affidavits charged to have been forged are alike in character. Each purports to state in detail the facts of the date and place of birth and the parentage of a named person. No statute has been cited to us which, at the time of these offenses, would give standing, purpose, or legal effect to such an affidavit, and we have found none. It does not appear that any legal proceeding was pending in which either of the affidavits was or could be used as evidence. In fact, their purpose does not appear at all, except by the general allegation that the petitioner made and uttered them with intent to defraud one person and two corporations, one of which was "engaged in United States of America Defense Work." We cannot say that such an affidavit could not be used to defraud, as charged. The persons whose births were recited in the affidavits appeared therefrom to be males and to have been respectively 36 and 41 years of age at the time of the forgeries. We may take notice of the fact that males of these ages are usually competent to engage in the making of articles used for defense work. One of the affidavits, according to the information, was forged May 19, 1941, and the other June 10, 1942. We also take judicial notice of the facts that at these times there were in Los Angeles County, where the forgeries were committed, a large number of factories engaged in making for the United States and other governments a variety of articles used or useful

for war and defense purposes, that these factories employed many thousands of men in their work and were rapidly increasing the number of their employees, that they demanded of all applicants for employment proof of United States citizenship and that birth certificates and other similar papers which might be accepted by these factories as proof of such citizenship were in great demand among those seeking employment. In the light of these facts we cannot say that the affidavits in question could not be used to defraud anyone. Indeed, it seems obvious that there are many ways in which they might be so used. The information must therefore be held sufficient, on habeas corpus, to support the commitment of petitioner.

The writ is discharged and the petitioner is remanded to custody.

DESMOND, P. J., and SHINN, J., concur.

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57 Cal.App.2d 1018

PEOPLE, Appellant, v. Porter L. BROWN, Respondent.
Civ. 2651.

District Court of Appeal, Fourth District, California.
Feb. 15, 1943.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Reversed.

Earl Warren, Atty. Gen., and Walter L. Bowers and Gilbert F. Nelson, Deputy Attys. Gen., for appellant.

Irvine P. Aten, Richard V. Aten, and G. L. Aynesworth, all of Fresno, for respondent.

PER CURIAM.

The decision of the Supreme Court of the United States in Parker, Director of Agriculture, et al. v. Brown, 63 S.Ct. 307, 87 L.Ed. ——, is controlling upon this appeal. Upon that authority the judgment herein is reversed.

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57 Cal.App.2d 363

PEOPLE v. DURAN et al.
Cr. 3625.

District Court of Appeal, Second District, Division 3, California.
Feb. 26, 1943.
Hearing Denied March 25, 1943.

1. Criminal law 🔑1159(2)

In prosecution for kidnapping and forcible rape, evidence supporting conviction of some defendants *held* not so inherently incredible as to require reversal.

2. Criminal law 🔑1030(1)

Where two defendants appear at trial by separate counsel, one of them, on appeal from conviction, cannot take advantage of objections raised only by counsel for other defendant, in absence of stipulation or understanding that either defendant should have benefit of objections made by other defendant's attorney.

3. Criminal law 🔑1036(1)

In prosecution of six defendants for kidnapping and forcible rape, where attorney for three convicted defendants made no objection to or motion to strike out police officer's testimony, which nonappealing defendants' attorney objected to and moved to strike, and there was no stipulation or understanding that any defendant should have benefit of objections made by attorney for any other defendant, appealing defendants "waived" any objection to such testimony and cannot raise objection thereto for first time on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Indictment and information 🔑169

Evidence of conspiracy among persons charged with crime is proper, though no conspiracy is charged in indictment or information.

5. Conspiracy 🔑47

Circumstantial evidence is sufficient to prove conspiracy, and direct evidence that parties thereto met together and agreed to undertake performance of unlawful act is unnecessary.

6. Rape 🔑18

Persons participating in conspiracy, pursuant to which other conspirators committed rape, may be found guilty of such offense without having personally committed it.

7. Kidnapping ⚷6
Rape ⚷59(1)

In prosecution for kidnapping and forcible rape, where there was ample evidence that all defendants and two others acted together for purpose of obtaining common object and two defendants denied that they personally committed rape, court properly instructed jury on law of conspiracy, though information did not charge conspiracy.

8. Criminal law ⚷673(2)

An instruction that only purpose for which accusatory statement, in face of which accused stood mute, is received in evidence, is to show accused's acquiescence in or admission of charge, was not erroneous, in view of instructions that jury were sole and exclusive judges of weight, effect and value of evidence, witnesses' credibility, and all fact questions submitted to them.

9. Criminal law ⚷823(2)

An instruction, referring to "attempts" by defendants' counsel to impeach police officer, whose testimony as to statement of man accompanying prosecuting witness at time of crime charged was admitted, *held* not erroneous as implying failure of such attempts and constituting charge on facts, in view of court's power to comment on evidence and other instructions given.

10. Criminal law ⚷730(8)

The district attorney's statements in argument to jury that he knew two police officers, accused by non-appealing defendants of using force to compel admissions or confessions by them, and had right to rely on such officers' testimony, *held* not misconduct prejudicial to appealing defendants, in view of instructions to disregard such statements or any statements of counsel concerning facts.

* * *

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Raymond M. Duran, Estanis Elizarraras, and Alex M. Gloria were convicted of kidnapping and forcible rape, and they appeal.

Affirmed.

Philip S. Schutz and Alexander L. Oster, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

SHAW, Justice pro tem.

The defendants Duran, Elizarraras and Gloria were jointly charged by the information herein with the crimes of kidnapping and forcible rape, committed upon the same person and at the same time. Three other defendants, Muro, Jorquez and Moreno, were charged by a separate information with identical offenses. The cases were consolidated and tried together and all the defendants were convicted of both the crimes above mentioned. The defendants Duran, Elizarraras and Gloria appeal.

The alleged victim of the offenses charged was Carmen Murietta. A summary of her testimony follows: At the time of the offenses charged she was 32 years of age, was living with Amos Murietta as his wife and had been so living since 1937 but was not married to him. Before 1937 she had lived with another man to whom she was not married, and before that had been married to a third man, from whom it does not appear whether she was divorced. She and Amos had spent the evening in Los Angeles, and on the way to their home in Watts, they got off the street car about 2:30 a. m. on a Sunday morning. While they were walking from the street car, she saw an automobile with no lights on and three boys on the sidewalk by it; then two more boys got out of the car. Four of them seized her by her arms and legs and put her in the car. At the same time the fifth one hit Amos Murietta in the neck and threatened him with a knife. She called to Amos for help, and the boy with the knife said "you come over here and I am going to stick the knife in you." Amos "stood there" and the boys all jumped into the car. Carmen screamed, a handkerchief was put into her mouth and her eyes were covered. There were eight boys in the car and one of them said to her, "if I scream and holler and hit them they are going to choke me." The car was driven to some other place, the location of which she did not know. There were no houses close and no passersby. Here the handkerchief was removed and her eyes uncovered. They partially undressed her and said they were going to have sexual intercourse with her. All eight of them then did have intercourse with her, some three times and some twice, making a total of twenty-one such acts. She resisted, but was forcibly compelled to submit, four boys holding her down on the back seat of the car by her arms and legs while the acts were performed. While this was going on some of the boys lit matches and smoked cigarettes, so that she was able to see the faces of all. She identified all the appellants, as well as the other defendants on trial, as among the eight who committed the acts above described. She also contrived to see and remember the first four figures and the letter of the license number of the car in which she was taken, and gave these to the police. Her assailants kept her about three hours and then released her about two blocks from her home. She walked home, and finding there Amos Murietta, at once went with him to the Watts police station, where she complained to the police of what had happened to her. The next day she was sore all over and had a bruise on her arm and another on her neck.

This testimony of the complaining witness had some corroboration. Her references to "boys" are explained by the facts, appearing from the testimony of the various defendants, that two of the appellants were twenty years of age and the other nineteen, two of the other defendants were sixteen and the third, although his exact age is not given, was young enough to have been before the juvenile court in this matter. Shortly after she went to the police station, she was taken to the Los Angeles Receiving Hospital, where a city physician, Dr. Olney, examined her. He testified that she was then cool and collected but very angry. He found no evidence of any recent injuries on her external genitalia or in her vaginal vault, but said that acts such as those to which she testified might occur without any lacerations, that bruises might make their appearance later than his examination, and that the lighting conditions under which he made his examination were not good for discovering irritation, and a minor condition of congestion and redness would not appear. Dr. Olney found a thick secretion in her vaginal vault, from which he took a smear. A police chemist testified that he examined this smear microscopically and found in it spermatozoa from the male seminal fluid. Dr. Olney testified that such spermatozoa would not remain where he found them more than twenty-four hours, which was the upper limit, the average time being two to twelve hours.

Police officer Winter testified that during his investigation Carmen Murietta showed him a dress, that he found white stains near the bottom, upon its hem, and that she was wearing this dress at the trial. Carmen testified that the dress she wore at the trial was the same one she wore at the time of the attack upon her.

Amos Murietta corroborated the complaining witness in regard to the kidnapping. He testified as she did to their trip to Los Angeles and their return, and that as they were walking from the street car to their home they were attacked. The first he knew of it was that he was hit in the back of his neck. He staggered and was about to fall and saw that the person attacking him had a knife. When this happened Carmen screamed, "and when this fellow held me at bay with the knife a car drove up along the curb and two more boys jumped out of the car, and four, two grabbed her by the legs and two by the hands and shoved her in the car." The one with the knife threw it at Amos, then ran and got on the running board and the car drove off. It was a tan colored four-door sedan. Amos then went home and from there went at once to the Watts police station, where he made complaint of the attack.

The defendant Gloria testified that he owned a tan car whose license number had the same first four figures and letter as those which Carmen Murietta said she saw. A police officer testified that this car, which Gloria said was his, had the same license number given by Carmen, that it was a tan sedan, and that a white spot was found on its back seat. In their testimony the three appellants admitted being together during the evening preceding the attack, but said they separated between midnight and 12:30 a. m. and went to their respective homes, arriving there by 12:30 a. m., and staying there the rest of the night. On the last two points each was corroborated by one or more members of his family. Defendant Gloria testified that before going home he loaned his car to another boy and went home in a car driven by Elizarraras.

Police Officer Winter testified that in the presence of himself and officer Ullery, appellant Gloria admitted his participation in the affair, saying that he and the other two appellants, one Negretti and three juveniles whose names he did not know, were driving around, and saw the complaining witness and her husband walking down the street, that Negretti chased the husband with a knife and some of the other boys threw the woman in the car, and that they parked the car and had sexual intercourse with the victim, stating that he, Gloria, tried but was unable to consummate the act. Officer Winter also testified that to himself and Officer Ullery, appellant Elizarraras said he was with the boys but did not rape the woman. Officer Winter further testified that in the presence of himself and Officers Didion and Ullery, appellant Duran admitted that he was with the boys and had sexual intercourse with the woman. The conversation with Duran occurred three-quarters of an hour after his arrest; those with the other appellants the next day after their arrest. Appellant Gloria denied making any admission except that he "was one of the guys." Duran denied making any admission at all, and so did Elizarraras. Each appellant said violence was used on him by the police officers for the purpose of getting a confession. This was denied by the police officers.

Each of the three nonappealing defendants testified that, being on the streets together in the early hours of the morning, they came upon a car by which were six boys unknown to them and near which the complaining witness and a man were standing cursing each other; that the man then left and the other boys asked these defendants if they wanted to have intercourse with the complaining witness and were answered in the affirmative; then she got into the car voluntarily, all the boys got in and they drove away to a spot where these three nonappealing defendants and the complainant got out; they had intercourse with her with her consent, and collectively paid her one dollar; and they then went away, after being told by her that it was late for them and they had better go home.

The prosecution on rebuttal presented, over objection by the defendants Muro, Jorquez and Moreno that it would be hearsay, the testimony of police officer Young that Amos Murietta, when he first arrived at the police station, about a half hour after the time fixed by Murietta for the encounter in which Carmen was taken away, told this officer a story which is substantially the same as that he related as a witness in this case.

The appellants, in support of their appeal, urge the following propositions for a reversal:

1. The evidence in support of the judgment is inherently incredible;

2. The trial court committed error in receiving evidence of the statement of Amos Murietta to the police officer;

3. The trial court erred in instructing the jury on the law of conspiracy;

4. An instruction given on the law regarding accusatory statements was erroneous;

5. An instruction regarding the evidence mentioned in proposition 2 was erroneous;

6. The district attorney was guilty of prejudicial misconduct.

[1] 1. Appellants' first proposition is untenable. In support of it they rely mainly on the case of People v. Flores, 1936, 15 Cal.App.2d 385, 59 P.2d 517. In that case several defendants had been convicted of rape committed by each on the same victim on the same occasion, and in that respect the case resembled the case at bar. The testimony presented there as to the circumstances surrounding the offenses and the details of the conduct of the perpetrators and the victim differed greatly from that appearing here, the differences being mainly on the side of incredibility, and yet the court said, at page 400 of 15 Cal.App.2d, at page 525 of 59 P.2d: "Although the foregoing sordid tale is one that strains one's credulity, we are not prepared to say, as a matter of law, that the evidence of the witnesses for the prosecution was so inherently incredible that it cannot be accepted." The judgment there was reversed, but the ground of reversal was errors in ruling on evidence—errors which were held prejudicial by reason of the improbable nature of the evidence in support of the verdict. People v. Castillo, 1935, 5 Cal.App.2d 194, 42 P.2d 682, is also cited by appellants. That was also a case of forcible rape, but otherwise it bears no resemblance on the facts to that before us. The court there said that it could not hold the evidence insufficient, as a matter of law, to support the verdict of guilty, but characterized it as "weirdly improbable" and for that reason held that certain errors must result in a reversal. We do not regard the evi-

dence here as subject to the characterizations applied to that given in the two cases just cited.

[2, 3] 2. Whether appellants' second proposition is tenable or not we need not decide, for appellants are in no position to raise it. The appellants were all represented at the trial by one attorney. The other, nonappealing, defendants were represented by other attorneys, two of them appearing by a deputy public defender and one by private counsel. When Officer Young was asked, on rebuttal, to relate the conversation he had with Amos Murietta when the latter first appeared at the police station, the district attorney stated that he offered the testimony only for the limited purpose of refuting "the suggestion that Mr. Murietta has trumped up his testimony here in court concerning what took place at the time and place on the street when his wife was taken off the street and kidnapped." An objection was made by the deputy public defender on the ground that this would be hearsay. The court overruled the objection and stated that the evidence was received only for the limited purpose for which it was offered. The officer then gave the testimony previously stated by us. After it was received the deputy public defender made a motion to strike it, on the same ground as that of his objection, and in connection with his motion presented briefly his contention as to the law governing the matter. The moton was denied. No objection or motion to strike was directed at this testimony by appellants' attorney and he took no part in the discussion of it, although he was present at the time and cross-examined this officer on other matters. No sort of stipulation or understanding that any defendant should have the benefit of objections made by the attorney for any other defendant has been called to our attention, and a search of the record by us has disclosed none. In the absence of such stipulation or understanding, where two defendants appear at the trial by separate counsel, one cannot take advantage on appeal of objections raised only by counsel for the other. Lusco v. United States, 2 Cir., 1923, 287 F. 69. It must be concluded that these appellants were satisfied to have this evidence in the case, and waived any objection they might have to it. They cannot raise the objection for the first time on appeal. 8 Cal. Jur. 500, 503.

[4-7] 3. Appellants' third proposition is untenable. They concede that the instructions given on the law of conspiracy were correct, but say, in support of their point, that "appellants were not charged with conspiracy and the case was not tried on the theory of a conspiracy," citing People v. Sheffield, 1930, 108 Cal.App. 721, 724, 293 P. 72, 73, 77. In that case it was held that instructions on the law of conspiracy should not have been given, for the same reasons urged by appellants here, but there the court said that "it was stated repeatedly throughout the trial that no conspiracy existed between the defendants." No such statements were made in the present case. It is true there was no charge of a conspiracy here, but evidence of a conspiracy is proper even where no conspiracy is charged in the indictment or information. People v. Gregory, 1936, 12 Cal.App.2d 7, 15, 54 P.2d 770. We cannot agree that the case was not tried on the theory of a conspiracy. The word "conspiracy" was not used in the course of the trial, but there was ample evidence to show that all the defendants on trial and two other persons were acting together for the purpose of attaining a common object, that is, the kidnapping and rape of the prosecuting witness. This would be sufficient proof of a conspiracy to that end. Circumstantial evidence is sufficient to prove a conspiracy; there need not be direct evidence that the parties met together and agreed to undertake the performance of an unlawful act. People v. Gregory, supra, 12 Cal.App.2d page 16, 54 P.2d 770. Here the extra-judicial statements of two of the appellants, which were placed before the jury, denied that they had personally committed a rape upon the prosecuting witness. If these denials were accepted as true, these two appellants could, nevertheless, be found guilty of rape by reason of their participation in the conspiracy above mentioned, in pursuance of which others did commit that crime. People v. Stoddard, 1941, 48 Cal.App.2d 86, 89, 119 P.2d 160. In order that the jury might understand this it was quite proper to instruct them on the law of conspiracy.

[8] 4. Appellants' fourth point is also untenable. The instruction complained of, after stating fully the rule that where a defendant stands mute in the face of an accusation of crime, there being a fair opportunity to reply, his silence may be taken against him "as evidence indicating an

admission of guilt," stated further, in language which appellants claim is erroneous, that "The only purpose for which an accusatory statement is received in evidence is to show acquiescence or admission on the part of a defendant in the face of an accusatory charge." This is criticised on the authority of People v. Flores, supra, 1936, 15 Cal.App.2d 385, 405, 59 P.2d 517, 528 where an instruction on the same subject informing the jury that the manner and actions of a defendant in the face of accusatory statements are admissible "as tending to show acquiescence" was held erroneous because of the words quoted, it being the province of the jury "to determine the effect of such evidence." The ground of the holding was not further explained. Apparently the idea of the court was that the use of the word "tending" made this an instruction on the weight of the evidence. Even if it were such, we question whether it should be held improper, in view of the court's constitutional power to comment on the evidence—a matter which was not mentioned in the Flores case. Here the word "tending" was not used, but the court merely informed the jury of the "purpose" for which the evidence was received, and the jury were given the usual instructions that they were the sole and exclusive judges of the weight, effect and value of the evidence, of the credibility of the witnesses, and of all questions of fact submitted to them, thus leaving them to determine for themselves whether the "purpose" of the evidence mentioned had been accomplished.

[9] 5. Appellants' fifth proposition is untenable. The instruction regarding evidence of Murietta's statement to the police properly informed the jury that it was not received in proof of the facts stated by him. It referred several times to "attempts by counsel for the defense to impeach him" and these parts of it are objected to, as carrying an implication of failure of the attempts and being a charge on the facts. In view of the court's power to comment on the evidence and its compliance with the constitutional requirement in this respect by giving the instructions mentioned in discussing the preceding point, we cannot find any error in this matter. The use of the word "attempt" does not necessarily imply failure, for many an attempt succeeds. People v. Pianezzi, 1940, 42 Cal.App.2d 270, 279, 108 P.2d 685.

[10] 6. Appellants' sixth proposition does not lead to a reversal. The appellants in their testimony accused police officers Ullery, Didion and Winter of using force upon them for the purpose of compelling admissions or confessions by them. The officers, as witnesses, denied these accusations. Evidence of statements by the nonappealing defendants was also given, and these defendants accused officers Young and Lillywhite of using force to compel these statements. Regarding them the prosecutor said in his argument: "But the reason you won't hear police officers testify from the witness stand that they used force is because if such a thing would occur, if I sensed such a thing, I wouldn't use the confession. * * * However, as for Mr. Young and Mr. Lillywhite, I have worked with those gentlemen for many years during the time I have been in the office of the District Attorney, and if they didn't like their reputation, and believed they are the character of men that these defendants contend they are, I am sure they could have called some witnesses to testify to their bad reputation. But they didn't do that. I know those two gentlemen and I know the kind of officers they are. The other three, Ullery, Didion and Winter and whoever they were—I don't know them as well as I know the first two, Young and Lillywhite, because I have worked with them in other cases, and I have a right to rely upon their testimony." Appellants now contend that this argument constitutes misconduct. Undoubtedly, it is the precise sort of argument condemned as misconduct by the Supreme Court in People v. Pantages, 1931, 212 Cal. 237, 249, 297 P. 890, 895. It was argued there, as it is here, that the misconduct was cured by an instruction to disregard the statement of the prosecutor. Upon this point the court said: "Although authorities are not lacking in their declaration of the law in substance that the effect of such prejudicial misconduct may be cured by an instruction to the jury to disregard the remark of counsel, nevertheless an exception to such general rule is noted where the misconduct is of such a character that it is reasonably clear that its harmful result could not have been obviated or remedied by an instruction to the jury to disregard it. * * * It is apparent that repeated acts of misconduct of the same tenor may present a situation radically different from a single isolated transgression of the same general nature; * * *." In that case "repeated acts" were involved; here we have only "a

single isolated transgression." In making the objection here the deputy public defender said: "I don't think the District Attorney has any authority to refer to his own knowledge of any man or any thing connected with the case * * * to build up a witness here by his own personal knowledge. I think counsel is going too far." Appellants' counsel made no objection. The court said: "I think your objection is well taken. It will be sustained and the jury will disregard any such statement of the District Attorney." In the instructions given at the close of argument, the court further directed the jury that "If any counsel, upon either side, have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are." These admonitions would ordinarily be sufficient to overcome such a statement as that made by the prosecutor here, and we see no reason to doubt that they had that effect here.

Moreover, it is obvious from what we have quoted of the prosecutor's argument, as well as the context not quoted, that he was speaking only of the charges that Young and Lillywhite had used force on certain defendants to compel confessions or admissions and his encomiums referred only to their character in that respect. The appellants in their testimony made no such charges against Young or Lillywhite; they referred to other officers. The charges of beating against the officers named were made by the other defendants, Moreno, Jorquez and Muro. The question whether admissions of the three defendants last named were obtained by force was not material to the cases of the appellants; and since none of the appellants had made any accusations of this sort against the officers whom the prosecutor commended in his argument, it is clear that such argument could not have affected the appellants' case to any considerable extent and that if there was any such effect it could be and was removed by the instructions.

In People v. Berryman, 1936, 6 Cal.2d 331, 337, 57 P.2d 136, the court stated two exceptions to the rule that where no objection is made to misconduct, or objection is made and sustained and the jury is properly admonished, the misconduct will not furnish grounds for a reversal. One exception is that stated in People v. Pantages, supra, 1931, 212 Cal. 237, 249, 297 P. 890, and already considered, and the other is "where the case is closely balanced and there is grave doubt of defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict." [6 Cal.2d 331, 57 P.2d 139]. Reading of the evidence here does not leave on us the impression that there is such grave doubt of appellants' guilt as to make this exception operative; and, for the reasons above stated, it does not appear that the misconduct contributed materially to the verdict.

Other complaints are made of misconduct of the prosecutor but the misconduct complained of, where it amounted to that, was minor in character and the jury were instructed in each case to disregard it. We regard these instructions as sufficient to avert any ill consequences to appellants from such misconduct as appears.

The judgments and the orders denying a new trial are affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

LOPER et al. v. MORRISON et al.

Civ. 13812.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1943.

Rehearing Denied March 15, 1943.

Hearing Granted April 15, 1943.

1. Automobiles 🔑242(6)

Where employer's automobile was being driven by employee at time of accident, the jury may infer that employee was operating automobile with permission of owner.

2. Automobiles 🔑242(6)

That driver of automobile involved in accident was owner's employee, gives rise to the inference that he was acting within the scope of his employment.

3. Automobiles 🔑245(28, 30)

In action against employee and employer for injuries sustained in collision with automobile driven by employee, where it may reasonably be inferred from the primary facts that the fact of agency and scope of employment existed, plaintiff has introduced sufficient evidence to entitle him to a jury trial.

4. Master and servant 🔑302(6)

Generally, where an agent with a fixed place of employment departs therefrom on an errand or enterprise entirely his own, he is then not acting "within the scope of his employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Within the Scope of Employment".

5. Automobiles 🔑193(10)

To relieve the master from liability for negligence of servant in operation of automobile on ground that servant departed from his route, it must be shown that the deviation was for a purpose entirely personal to the servant, since the "deviation" will be regarded as immaterial if the servant combines his own business with that of the master or attends to both at substantially the same time.

See Words and Phrases, Permanent Edition, for all other definitions of "Immaterial Deviation".

6. Master and servant 🔑302(1)

A mere deviation by servant from the strict course of his duty does not relieve the master from liability for servant's negligence, but in order to have that effect the deviation must be so substantial as to amount to an entire departure.

7. Master and servant 🔑332(2)

Whether there has been a deviation so material or substantial as to constitute a complete departure by employee from the course of his employment, so as to release employer from liability for employee's negligence, is usually a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

8. Automobiles 🔑245(31)

Where driver for dairy company, using his own automobile in collecting company account and soliciting new customers, deviated from his course to take another driver home and on return trip to customer's home became involved in automobile accident, whether such deviation was a "departure" relieving dairy company from liability was question for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Departure".

9. Trial 🔑194(16)

In action against dairy company and driver for injuries sustained in automobile accident occurring when driver deviated from his route to take another driver home, trial court properly refused requested instruction which compelled a finding for dairy company from the mere fact that driver was without the boundaries of his route when accident occurred.

10. Trial 🔑29(1)

Remarks of trial court in an attempt to prevail upon counsel to curtail length of cross-examination and argument, and which did not indicate court's opinion as to the merits of the case, did not constitute "misconduct", particularly where jury was instructed to disregard any expressions of the court indicating an opinion.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

11. Evidence 🔑318(3)

A nurses' record containing entries written by one nurse but which represented opinions given to her orally by other nurses as to the condition and conduct of a patient, was "hearsay" and inadmissible on issue as to pain and suffering. Code Civ.Proc. §§ 1953e to 1953h.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

12. Evidence 🔑351

A nurses' record containing entries written by one nurse but representing opinions given to her orally by other nurses as to the condition, conduct and treatment of a patient, was not admissible in evidence on issue of pain and suffering under statute providing that the record of an act, condition or event in a business shall be competent evidence upon proof of identity and mode of preparation in the regular course of business, since neither the sources of information nor the methods or time of preparation were such as to justify its admission. Code Civ.Proc. §§ 1953e to 1953h.

13. Evidence ⚷351
Witnesses ⚷255(1)

Books, reports and memoranda which are merely used as a matter of convenience and as part of a system for conducting a business are generally inadmissible as evidence except for purposes of refreshing the memory of a witness. Code Civ.Proc. §§ 1953e to 1953h.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Elsie Loper and others against Cameron E. Morrison and Arden Farms, Inc., to recover for injuries sustained in colliding with an automobile driven by the defendant Morrison and owned by the defendant corporation. From a judgment for plaintiffs against both defendants, defendants appeal.

Affirmed.

Russell H. Pray, of Long Beach, Henry F. Walker, of Los Angeles, and S. J. Nordorf and William C. Price, both of Long Beach, for appellant.

Joseph A. Ball, Albert D. White, and Kenneth Sperry, all of Long Beach, for respondents.

DRAPEAU, Judge pro tem.

There are two defendants in this case; one a milk distributing corporation, the other an employee of the corporation. It was the duty of the employee to deliver milk to customers of the milk company within a certain area in the city of Long Beach. In the milk business such areas are called "routes"; and such employees are generally called "drivers." In addition to delivering milk, it was the duty of the driver to collect the accounts of the customers on his route, and to solicit new business. As one of the witnesses stated: "He had to keep the route up."

Customers were divided into two classes; authorized and unauthorized. Authorized customers were those whose accounts were with the company. If the customer failed to pay any part of such accounts, the loss fell upon the company. Unauthorized accounts were also between the customer and the company, but if any part of such accounts was not paid, the driver made up the loss. To insure that he would do this, he put up with the company a bond or deposit of $100. On the route in question, a greater part of the customers were authorized accounts, but a portion of them were unauthorized accounts, for which latter accounts this particular driver was responsible.

For the purpose of delivering milk, the company provided a truck, to be operated by the driver. He checked in to work about 3 a.m. and checked out about 12 noon. After 12 noon, if the driver had to collect accounts or solicit new business, he used his own car. He was never told to collect any money after hours, but was told that it was his responsibility to get all delinquent accounts in. And if he failed to collect unauthorized accounts he was that much out of pocket.

On the day of the automobile accident which occasioned this law suit, the driver defendant went to work at the usual hour and checked out about noon. After noon he attended a union meeting at the company's plant. Then he was advised by the telephone operator at the company's office of a new customer who should be seen. So he started out, in his own car, to see this new customer and to make a collection on an unauthorized account. The latter was a sort of hard-to-find, dead-beat customer. On this trip he was accompanied by another of the company's drivers. It was his purpose, along with the others just mentioned, to take the other driver home.

First he called to see the new customer; then to collect the delinquent account. But the latter customer was not at home. Then he started to go to the other driver's home. On the way there they stopped at a tavern and had something to eat and a glass of beer. At least an hour or two was spent in that method of relaxation. The place of refreshment mentioned and the home of the guest driver were several city blocks outside of the limits of the milk route.

Then the driver took the other home. After leaving his home, he started back to the house of the customer from whom he was endeavoring to collect. This house was within the limits of the milk route.

It was on this part of the trip, and before he reached the outer boundaries of the milk route, that he endeavored to stop his automobile at an intersection, his brakes failed, his car ran into another, ricocheted off that car and struck the plaintiff's car, with resultant injuries and damages to the plaintiffs, who were husband and wife. The ...cts involved were submitted to a jury, which rendered its verdict against both defendants for loss and damages to the plaintiffs. In due time this verdict was followed by judgment and appeal.

The main ground of appeal is that the evidence will not support the verdict of the jury as to the corporate defendant, in that when the accident occurred the defendant driver was not engaged in the performance of duties within the scope of his employment. Other grounds are that there was error in the refusal of the trial court to give certain instructions to the jury; misconduct on the part of the trial judge so serious that the appellant was deprived of a fair trial; and error in refusing to admit certain evidence.

[1, 2] As the law of negligence applied to motor vehicle accidents has developed, there have been many cases involving the rights of persons damaged because of negligence of other persons driving vehicles, either with the consent of the owner, or in the relationship of principal and agent. Of the consent cases, the latest is Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868. In that case our Supreme Court held that when the evidence disclosed an automobile belonging to the employer was being driven by an employee at the time of the accident, the jury may infer that the employee was operating the automobile with the permission of the owner, and when there was such evidence it was error for the trial court to direct a verdict for the employer. In Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, our Supreme Court held in an agency case that if the driver of the automobile was an employee of defendant that fact gave rise to the inference that he was acting within the scope of his employment.

[3] Whether the car belongs to the employer or the employee does not necessarily determine the fact that the driver was the agent of the employer defendant and was acting within the scope of his employment. The driver may be driving his own car, as was the case in Gardner v. Marshall, 56 Cal.App.2d 62, 132 P.2d 833, and in Hiner v. Olson, 23 Cal.App.2d 227, 72 P.2d 890, 73 P.2d 945. The fact to be determined is whether the driver was the agent and as such agent was acting within the scope of his employment. To ascertain this fact, certain facts must appear. Such primary facts do not follow any fixed pattern, but depend upon the circumstances of each case under consideration. If from these primary facts it may reasonably be inferred that the fact of agency and scope of employment exists, then the party has introduced sufficient evidence to entitle him to have a jury decide the issue. Blank v. Coffin, supra.

Counsel in the case at bar stress the circumstance that the driver departed from the boundaries of his route and that perforce he was not acting within the scope of his employment. It was entirely proper to argue such theory to the jury. But on appeal such theory does not as a matter of law require a reviewing court to set aside the verdict and judgment.

[4-7] It is settled law that when an agent with a fixed place of employment departs therefrom on an errand or enterprise entirely his own, he is then not acting within the scope of his employment. Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538. In some cases this has been termed the departure rule. In Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 56, 15 P.2d 217, 219, the proper rule of decision is set forth in order to determine whether a given case comes within this rule. " 'To exonerate the master, however, it is essential that the deviation be for purposes entirely personal to the servant (39 Cor.Jur., p. 1297, Master and Servant, §§ 1493, 1494); and a deviation will be regarded as immaterial if the latter combines his own business with that of the master or attends to both at substantially the same time (Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894.) A mere deviation from the strict course of his duty does not release the master from liability. In order to have that effect it must be so substantial as to amount to an entire departure. 39 Cor.Jur., p. 1297, Master and Servant, § 1493. As the rule has been stated: "One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be the controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed; or they are in many instances the mingling

with the pursuit of the master's business some purpose of the servant's own." Shearman & Redfield, Negligence (6th Ed.), § 147a. Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury.' These rules have been approved in Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 P. 966."

[8] The present case does not come within the departure rule and the fact as to whether the defendant driver was acting within the scope of his employment was properly submitted to the jury.

[9] Appellant's complaint of instructions refused by the trial court is closely connected with the question of respondeat superior just discussed. The refused instructions followed appellant's theory that the mere fact that the driver was without the boundaries of his route when the accident occurred, as a matter of law compelled a judgment for the corporate defendant. The proposed instructions so far as they follow this theory were properly refused. Other instructions proffered by the defendant and refused were given in effect elsewhere in the instructions. The jury was fully and fairly instructed as to the rights of both parties and the law applicable to the case.

[10] The assignment of error as to misconduct of the trial judge is without merit. During the course of the trial, cross-examination by counsel for appellant was protracted. At one time the court commented on the fact that counsel was asking many questions; and at another time the court remarked that counsel had been allowed to go along to the point of almost exhaustion. At another time the court indicated to counsel what he considered to be the proper method to present certain proffered testimony. We have read the entire reporter's transcript, with particular reference to the remarks of the court assigned by counsel as reasons for reversing the judgment, and find none of them prejudicial to the rights of the defendant. In none of the court's remarks did he indicate any opinion one way or the other as to the merits of the case. In all of them the court was endeavoring to save its time and that of the jury in an attempt to prevail upon counsel to curtail lengthy cross-examination and argument and to expeditiously present defendant's case to the jury. Also the jury was given the stock instruction that if the judge had said or done anything which suggested that he was inclined to favor the claims or position of either party, the jury should not be influenced thereby, and if any expression of the judge seemed to indicate an opinion relating to any of these matters, the jury should disregard it.

[11] Finally, appellant insists that the trial court erred in ruling that a hospital record denominated "nurses record" was not admissible in evidence. The plaintiff wife was in the hospital several weeks after the accident; she testified to pain and suffering. Her doctor testified to his opinion of her pain and suffering, of her physical condition, and of the treatment she received; the jury fixed her damages in the sum of $2,000 and her husband's damages in the sum of $600. In an endeavor to refute this testimony as to pain and suffering and treatment, defendant offered in evidence the nurses record. Plaintiffs' objections to it were that it was hearsay.

The entries in the nurses record were expressions of opinion as to the physical condition of the patient in each day's record; whether she had a good day, or night, and similar expressions. The entries were written by one nurse, but the opinions which she set down were given to her orally by other nurses. It is therefore apparent that the objections were well taken unless there is some exception to the general rule of evidence involved. Appellant asserts that this is to be found in section 1953e to 1953h inclusive of the Code of Civil Procedure. These sections in part embody what has been termed the Uniform Business Records as Evidence Act.

[12, 13] The offered evidence is a written record of opinions of nurses as to the physical condition of a patient in a hospital, written in the record by a person other than the ones who formed and expressed the opinions. To admit such evidence would deprive the party against whom it is offered of the right of cross-examination. Section 1953e to 1953h, Code of Civil Procedure,

provide that the record of an act, condition or event in a business shall be competent evidence, upon proof of identity and mode of preparation, in the regular course of business "if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." This record does not come within the intent or meaning of the code sections named because neither the sources of information, nor the method nor time of preparation were such as to justify its admission. "Books, reports, and memoranda which are merely used as part of a system for conducting a business have generally been held to be inadmissible as evidence, except for purposes of refreshing the memory of a witness. A mere memorandum for convenience, which discloses no purpose to charge or bind anyone, may be resorted to for the purpose of aiding the memory of a witness, but not for proof of a disputed fact." 20 Am.Jur., § 1045, p. 885.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

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57 Cal.App.2d 1017

RAISIN PRORATION ZONE NO. 1, Appellant, v. SOHN SINGH, Respondent.

Civ. 2623.

District Court of Appeal, Fourth District, California.

Feb. 15, 1943.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Reversed.

Strother P. Walton, of Fresno, for appellant.

Irvine P. Aten, Richard V. Aten, and G. L. Aynesworth, all of Fresno, for respondent.

PER CURIAM.

The decision of the Supreme Court of the United States in Parker, Director of Agriculture, et al. v. Brown, 63 S.Ct. 307, 87 L.Ed. 315, is controlling upon this appeal. Upon that authority the judgment herein is reversed.

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57 Cal.App.2d 108

GLASHOFF et al. v. GLASHOFF et al.

Civ. 6725.

District Court of Appeal, Third District, California.

Feb. 11, 1942.

Hearing Denied April 8, 1943.

1. Statutes 🔑200

Punctuation is never a controlling factor in interpretation of a statute, and it may be ignored when it becomes necessary to ascertain true meaning of language employed by Legislature.

2. Statutes 🔑188, 189

Generally, meaning of a statute is to be sought in language used by Legislature, but such rule does not mean that courts are always to be governed by exact phraseology and literal meaning of every word or phrase employed.

3. Statutes 🔑181(1), 184, 208, 214, 217, 218, 225

Intention of Legislature, in enacting statute, may be ascertained, in doubtful cases, not only by considering words used, but also by taking into account other matters, such as the context, object in view, evils to be remedied, history of the times and of legislation upon the same subject, public policy, contemporaneous construction, and the like.

4. Statutes 🔑183

A thing which is within legislative intention is as much within statute as if it were within the letter, and a thing within the letter is without the statute if without intention.

5. Statutes 🔑184

Courts will interpret language employed so as to carry into effect legislative purpose, so far as it may not be unquestionably at variance with the Constitution.

6. Constitutional law ⚷48

Every reasonable presumption will be resolved in favor of constitutionality of an act.

7. Statutes ⚷72

Statutes are not "special legislation" if they operate alike upon all persons to whom they apply and apply equally to all persons in same category within jurisdiction of the lawmaking power.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Legislation".

8. Limitation of actions ⚷4(1)

The statute of limitations is purely a matter of legislative creation, and Legislature may prescribe different periods of time within which different species of obligations may be enforced.

9. Constitutional law ⚷70(1)

Courts are not at liberty to refuse to apply unambiguous language in a statute which involves no absurdity nor any necessary inconsistency with its general purpose, nor may they indulge in speculation to effect that Legislature meant something other or less than what it said.

10. Statutes ⚷183

Courts may not depart from literal construction of a statute unless they can be reasonably assured that Legislature meant to say something different from what it appears to have said.

11. Statutes ⚷85(2)

Section 19 of the Mortgage Moratorium Act of 1937, extending time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust, or contract of purchase, etc., which would otherwise expire by virtue of Section 337 of the Code of Civil Procedure or by virtue of specified provisions in prior Mortgage Moratorium Acts, is not unconstitutional as constituting "special legislation" on theory that section gives certain benefit to debtors but gives no like benefit to creditors. St.1937, p. 466, § 19; Code Civ.Proc. § 337, subd. 1.

12. Limitation of actions ⚷112

The effect of section 19 of Mortgage Moratorium Act of 1937, extending time within which an action may be commenced upon any obligation founded upon a written instrument, secured by mortgage, deed of trust, or contract of purchase, etc., which would otherwise expire by virtue of section 337 of the Code of Civil Procedure or by virtue of specified provisions of prior Moratorium Acts, was to extend only those actions which would have expired by virtue of Section 337 of Code of Civil Procedure, during effective dates of the Act. St.1937, p. 466, § 19; Code Civ.Proc. § 337, subd. 1.

13. Limitation of actions ⚷112

An action to foreclose a note and mortgage dated January 5, 1929, due five years after date, which did not come within extention of 1937 Mortgage Moratorium Act, could not be further extended by the 1939 Act. St.1937, p. 466, § 19; Code Civ.Proc. § 337, subd. 1.

◆

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Herman Glashoff and another, as executors, etc., against John Glashoff and another, to foreclose a mortgage. From a judgment of nonsuit the plaintiffs appeal.

Affirmed.

Francis C. McInnis and W. U. Goodman, both of Fairfield, for appellants.

Ernest C. Crowley, of Fairfield, for respondents.

PEEK, Justice.

Plaintiffs' complaint to foreclose a note and mortgage dated January 5, 1929, and due five years after date, was filed May 16, 1940. Defendants' demurrer, on the ground that the complaint on its face showed that the action was barred by subdivision 1, section 337 of the Code of Civil Procedure, was overruled. The defendants then answered plaintiffs' complaint alleging that fact as a separate defense. At the conclusion of plaintiffs' case defendants' motion for a nonsuit on the same grounds, was granted.

From the judgment plaintiffs appeal, raising the question: Was the action barred by subdivision 1, section 337 of the Code of Civil Procedure, or was the right of action extended by what are more commonly known as the Moratorium Acts?

The Legislature, beginning in 1933, enacted a series of such acts: Stats.1933, chap. 30, p. 307; Stats.1933, chap. 263, p. 795; Stats.1933, chap. 1057, p. 2717 [Deering's Gen.Laws, 1937, Act 5102]; Stats. Extra Sess., 1934, chap. 1, p. 1; Stats. 1935, chap. 348, p. 1208; Stats.1937, chap. 167, p. 460 [Deering's Gen.Laws, 1937, Act 5101] and Stats.1939, chap. 86, p. 1045 [Deering's Gen.Laws, 1939 Supp.Act 5100]. The only one which is essential to a determination of the present case is chapter 167, Statutes of 1937, and in particular section 19 of that act, which provided: "Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter I, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter 7 or Chapter 348, Statutes of 1935, or by virtue of the provisions of Chapter 5, Statutes of 1937, or any other provision of law, during the period commencing with the effective date of this act and ending on October 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1939."

[1] Plaintiffs suggest that after the words "Civil Procedure" a semi-colon should be inserted in lieu of the comma as the section is now written, and that a second semi-colon should be inserted in lieu of the comma after the words "October 1, 1937." Apparently it is the thought of plaintiffs that such construction would extend the provisions of the 1937 act to the effective date of the 1939 act which in turn would extend the time within which the present action could have been commenced to a date subsequent to the date on which the action was filed. In passing upon a similar question this court, in Roth Drugs, Inc. v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022, 1025, stated the correct rule to be that "punctuation is never a controlling factor of interpretation" and it may be ignored when it becomes necessary to ascertain the true meaning of the language employed by the Legislature. 23 Cal.Jur. 733.

It is reasonable to suppose that if the Legislature had desired to change that particular portion of section 19 "it would have done so by express enactment and not by substituting a semi-colon for a comma." Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, 664.

In Re Davis, 18 Cal.App.2d 291, 63 P.2d 853, 854, this court had before it construction of a statute in which, it was contended, a semi-colon instead of a comma should be used. It was also argued that the Legislature intended that the words contained in the portion of the statute affected should stand alone "unconnected with any of the specific acts prohibited by the language in the subdivision." In answer the court said: "All the authorities which have been called to our attention, and which we have discovered in our own search, are to the effect that in construing a statute and seeking to ascertain the intent of the Legislature, punctuations are not controlling, and an interpretation must be given which avoids an absurdity." Thus it appears that the contention of plaintiffs in the case now before us is untenable, "as it leads directly to the absurd conclusions heretofore mentioned, and it is not to be assumed that the Legislature intended any such result if any reasonable construction, and we may say, just and fair construction can be given to the language under consideration." In re Davis, supra.

[2-4] In 23 Cal.Jur., page 734, section 113, the text reads: "We have noticed the general rule that the meaning of a statute is to be sought in the language used by the legislature. But this does not mean that the courts are always to be governed by the exact phraseology and literal meaning of every word or phrase employed. The primary rule of intention is to be first applied. And intention may be ascertained, in doubtful cases, not only by considering the words used, but also by taking into account other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, contemporaneous construction, and the like. * * * A thing which is within the intention is as much within the statute as if it were within the letter, and a thing within the letter is without the statute if without intention."

Applying this rule we have but to look to section 1 of the 1937 act wherein it is stated that the policy of the Legislature was that "In making provisions permitting such delays the greatest care must be taken to prevent an economic result contrary to the purpose of moratoria legislation.

* * * That relief by moratoria legislation should not be extended beyond the periods prescribed by this act, and although such policy will not be binding upon the succeeding Legislatures it may, nevertheless, serve as a recommendation. With these considerations in view, the following provisions are intended to permit such delays and such safeguards to the interests of creditors affected thereby as are required by the present emergency."

[5] The Legislature having stated its intent and having acted accordingly we must therefore determine if the result is at variance with the Constitution. As stated in Re Sekuguchi, 123 Cal.App. 537, at page 540, 11 P.2d 655, at page 656, citing Commonwealth v. Barney, 115 Ky. 475, 74 S.W. 181: "It is for the Legislature to choose its subjects, and its own mode of expression. It is for the court to interpret the language employed so as to carry into effect the legislative purpose, so far as it may not be unquestionably at variance with the Constitution."

[6] Plaintiffs contend that section 19 as construed by the trial court is discriminatory in that it is special legislation and therefore is unconstitutional, their theory being that the limitations contained in said section give certain benefits to debtors but give no like benefits to creditors. It is evident from the Legislature's statement of intent that it desired to safeguard the interests of creditors as well as debtors, but that such legislation should not be extended beyond the periods prescribed by the act even to a point of recommending such policy to succeeding Legislatures. By the words, "In * * * permitting such delays the greatest care must be taken," section 1 of the 1937 act adds further evidence of a definite intent to examine critically all extensions and postponements, and to place exacting limitations upon all such acts. Plaintiffs' interpretation of the act directly refutes what appears to be a clear cut course of action by the Legislature, and, if accepted, in effect would eliminate from the act one of its essential elements, i. e. a definite limitation as to the time within which actions may be commenced. It is therefore reasonable to assume that the limitations contained in section 19 had the studied approval of the Legislature and were particularly designed to bring order out of a chaotic economic situation. Every reasonable presumption will be resolved in favor of the constitutionality of the act. Hart v. City of Beverly Hills, 11 Cal.2d 343, 79 P.2d 1080; City of Stockton v. Ellingwood, 78 Cal.App. 117, 248 P. 272.

[7] Statutes are not special legislation if they operate "alike upon all persons to whom they apply and apply equally to all persons in the same category within the jurisdiction of the lawmaking power. An act to be general in its scope need not include all classes of individuals; it answers the requirement of the constitution if it relates to and operates uniformly upon the whole of any single class validly selected. * * * It is enough that the subjects covered possess such intrinsic peculiarities as to justify the legislative determination that those subjects require special enactment." 5 Cal.Jur. 794-95.

[8-10] The power to impose reasonable periods of limitations is unquestioned. The statute of limitations is purely a matter of legislative creation, and the Legislature may prescribe the different periods of time within which different species of obligations may be enforced. 16 Cal.Jur. 396, et seq. In view of the well established law on this question the suggested construction becomes artificial. A similar situation is found in Bakersfield Home Building Co. v. J. K. McAlpine Land & Development Company, Ltd., 26 Cal.App.2d 444, 79 P.2d 410, 412, in which the court said:

"Clearly, however, the courts are not at liberty to refuse to apply unambiguous language in a statute which involves no absurdity nor any necessary inconsistency with its general purpose; nor may they indulge in mere speculations to the effect that the legislature meant something other or less than what it said. They may not depart from the literal construction of the statute unless they can be reasonably assured that the legislature meant to say something different from what it appears to have said."

[11] We find nothing ambiguous nor absurd in the language, punctuation or previous interpretation of said section 19, and therefore we have no need to speculate in regard thereto.

Plaintiffs further rely on the cases of Bakersfield Home Building Company v. J. K. McAlpine Land & Development Company, Ltd., supra; Everts v. Newhouse, Inc., Ltd., 28 Cal.App.2d 407, 82 P.2d 703, and Rust v. Hill, 17 Cal.2d 517, 110 P.2d 657, 658. We are entirely in accord with these cases. However, there is a definite factual distinction between those cases and the one which now confronts us. In Rust v. Hill, supra, the creditor had sold the property in April, 1935, before the effective date of the act in June, 1935, and therefore the date of expiration was gauged by the date of sale, and not by the maturity of the obligation. The facts in each of the other cases brought them squarely within the provisions of the appropriate Moratorium Act, and therefore the right to maintain such actions was rightfully upheld.

Appellants further contend that granting relief to the debtor makes necessary an extension of the statute of limitation for the creditor. This is true, and as the court also stated in Rust v. Hill, supra: "The provisions of the acts under consideration demonstrate that their primary purpose was to afford relief to debtors by postponement of sales and forfeitures of their interests in real property which were bound as security for the discharge of their obligations. The extensions thereby made available to creditors were complementary and co-ordinate and were granted to them to protect their interests, which otherwise might be jeopardized by the delays invoked by debtors pursuant to the terms of the acts. Sec. 31, Trust Deed and Moratorium Act of 1935 * * *; Bennett v. California Trust Co., 6 Cal.2d 381, 57 P.2d 914; Harris v. Fitting, supra [9 Cal.2d 117, 69 P.2d 833]."

This fact has also been recognized by the Legislature in each of the acts which has been passed. Whenever a postponement has been given to the debtor a like extension of time has been granted the creditor. However, when no postponement has been allowed to the creditor, neither has an extension been allowed the debtor. It should be noted further that the first of said moratorium acts (Stats.1933, chap. 263, p. 795) referred only to section 337 of the Code of Civil Procedure, while each succeeding enactment incorporated each of the preceding moratorium acts.

[12, 13] The effect of section 19 of the act of 1937 was to extend only those actions which would have expired by virtue of subdivision 1, section 337 of the Code of Civil Procedure, during the effective dates of the act—in other words, those actions which accrued between May 5, 1937, and October 1, 1937. Nor could it have been extended by later acts. Therefore, since the present action did not come within the extension of the 1937 act, it could not be further extended by the 1939 act. Wilmans v. Weissman, 38 Cal.App.2d 693, 102 P.2d 382, and Christina v. McLoughlin, 18 Cal.App.2d 410, 413, 63 P.2d 1174.

The demurrer might properly have been sustained. The complaint shows that the action was commenced more than four years after the obligation became due and payable and fails to show wherein the time was extended by the moratorium acts. Christina v. McLoughlin, supra; Wilmans v. Weissman, supra, and Harris v. Fitting, 9 Cal.2d 117, 120, 69 P.2d 833.

However, by reason of the disposition that is made of this appeal on the first contention of appellants, there is no need to determine such question upon this record.

The nonsuit was properly granted, and the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

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57 Cal.App.2d 1017

RAISIN PRORATION ZONE NO. 1, Appellant, v. Porter L. BROWN, Respondent.

Civ. 2619.

District Court of Appeal, Fourth District, California.

Feb. 15, 1943.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Strother P. Walton, of Fresno, for appellant.

Irvine P. Aten, Richard V. Aten, and G. L. Aynesworth, all of Fresno, for respondent.

PER CURIAM.

The decision of the Supreme Court of the United States in Parker, Director of Agriculture, et al. v. Brown, 63 S.Ct. 307, 87 L.Ed. 315, is controlling upon this appeal. Upon that authority the judgment herein is reversed.

57 Cal.App.2d 1018

RAISIN PRORATION ZONE NO. 1, Appellant, v. Porter L. BROWN, Respondent.

Civ. 2653.

District Court of Appeal, Fourth District, California.

Feb. 15, 1943.

Appeal from Superior Court, of Fresno County; Glenn L. Moran, Judge assigned.

Strother P. Walton, of Fresno, for appellant.

Irvine P. Aten, Richard V. Aten, and G. L. Aynesworth, all of Fresno, for respondent.

PER CURIAM.

The decision of the Supreme Court of the United States in Parker, Director of Agriculture. et al. v. Brown, 63 S.Ct. 307, 87 L. Ed. 315, is controlling upon this appeal. Upon that authority the judgment herein is reversed.

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57 Cal.App.2d 211

In re PIATT'S ESTATE.

PIATT v. NORTON.

Civ. 12307.

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1943.

As Amended on Denial of Rehearing March 20, 1943.

Hearing Denied April 19, 1943.

1. Wills ⚷191

Where will executed by wife before her marriage was silent as to the one who thereafter became her husband, he was entitled to share in her estate on her death, in an amount to which he would have been entitled had the wife died intestate. Probate Code, § 70.

2. Wills ⚷191

Statute providing that if a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision was made for spouse by marriage contract, or unless spouse was provided for in will or in such way mentioned therein as to show an intention to make no provision for surviving spouse, gives surviving spouse that part of the estate to which he or she would be entitled had the other died intestate. Probate Code, § 70.

3. Executors and administrators ⚷17(3)

Husband whom wife married after she executed a will in which he was not referred to, and by which third person was named as executor, was not entitled to appointment as administrator with the consequent right to fees as such. Probate Code, §§ 70, 409, 422.

4. Executors and administrators ⚷17(3)

By use of words "as to the spouse" found in statute, providing that if a person marries after making a will, and spouse survives maker, will is revoked as to the spouse, unless provision was made for spouse, Legislature intended to change preexisting law as to right of a spouse not named in will to be appointed administrator. Probate Code, § 70.

See Words and Phrases, Permanent Edition, for all other definitions of "As to the Spouse".

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Proceeding in the matter of the estate of Mona M. Skinner Piatt, deceased. From an order admitting the will of Mona M. Skinner Piatt, deceased, to probate and granting letters testamentary to L. J. Norton, as executor, J. H. Piatt appeals.

Order affirmed.

Boynton & Boynton, of San Francisco, for appellant.

King & King, of Napa, for respondent.

WARD, Justice.

Appeal from an order admitting a will to probate and granting letters testamentary to respondent L. J. Norton, as executor of the will of Mona M. Skinner Piatt. Appellant and petitioner, J. H. Piatt, husband of the decedent, had filed objections to the granting of letters testamentary to Norton and had petitioned that letters of administration with the will annexed be granted to him.

The question involved is clear cut, and, so far as this record is concerned, purely one of law. It may be stated as follows: "In a case where a party makes a will and later marries and dies leaving a surviving spouse unprovided for is such will revoked by section 70 of the Probate Code insofar as it affects the rights of the surviving spouse to administer on the estate of the decedent?"

[1] Mona M. Skinner, a single woman, executed a will in 1928 in which she named respondent Norton as executor. In 1930 she married appellant, and the couple lived as husband and wife until the latter's death in 1942. The will is silent as to appellant, the surviving spouse. Accordingly he is entitled to share in his deceased wife's estate. Prob.Code, § 70.

Appellant's contention is that he is not only entitled to take the share of the estate to which he would be entitled had his wife died intestate, but that since the will is by operation of law revoked as to him, he is, as a matter of priority, entitled to letters of administration with the will annexed (Prob.Code, §§ 409, 422); in other words, that he is entitled to administer the estate, with the consequent right to fees as such administrator.

[2] Prior to the enactment of the Probate Code in 1931, the Civil Code, sections 1299 and 1300, provided for the complete revocation of the will of a spouse made before marriage where no provision by way of marriage contract had been made for the benefit of the surviving spouse, and he or she had not been provided for by such will or intentionally omitted therefrom. In re Estate of Derruau, 133 Cal. App. 769, 24 P.2d 865. Probate Code section 70, based upon the above Civil Code sections, provides: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." The words "as to the spouse" were added upon the adoption of the Probate Code. It should be noted that section 70 does not merely say that the will "is revoked" as in the Civil Code, but that "the will is revoked as to the spouse." The proper construction to be placed upon the quoted words is that the surviving spouse shall receive that part of the estate to which he or she would be entitled had the other died intestate. In re Estate of Derruau, supra; In re Estate of Rozen-Goldenberg, 1 Cal.App.2d 631, 37 P.2d 132.

Appellant relies upon In re Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443. In that case the issue was whether the share to which the surviving wife was entitled was first liable for the debts of the decedent to the exoneration of the shares of beneficiaries named in the will. Prob. Code, § 750. The language of the court may be interpreted to mean that there was a revocation of the will only insofar as the surviving spouse's right to share in the deceased spouse's property was concerned, and not that there was a revocation for all purposes. The court there said 26 Cal.App.2d page 379, 79 P.2d page 446: "We think it much more natural to assume a continuity of policy, so far as the surviving spouse is concerned, and to construe the limitation on the provision for a revocation of a will by a subsequent marriage, made by the words 'as to the spouse,' not as intended to effect any such abridgement of what under the former statutes would have been the rights of such spouse, but rather *as intended merely to preserve the dispositions of the testator in favor of the beneficiaries under the will in so far as consistent with such rights of the surviving spouse. In so far as it affects Mrs. Haselbud's property rights the decedent's will is, by the express provision of section 70 of the Probate Code, no will at all, but is as to her revoked and eliminated from the situation.*" (Italics added.)

In re Estate of Russell, 43 Cal.App.2d 319, 110 P.2d 718, a case identical factually with the present, except that no valid objections to the appointment of the executor were filed by the surviving spouse, the court, in referring to the Haselbud case said 43 Cal.App.2d pages 322, 324, 110 P.2d page 720: "In that case there was no claim by the widow that the right to administer was a property right; and the executor named in the will acted as such. To us the quoted excerpt from the opinion [Haselbud] merely means that the surviving wife shall be entitled to her share of her deceased husband's estate as fully and completely as though he had died intestate. The quotation is appropriate as to property rights of the widow in the instant case, but we are still confronted with a situation where factually this is only a partial revocation, the will has been admitted to probate and except for the widow's share is otherwise valid as to its dispositions. * * * In regard to the naming of an executor, a testator's desire will be respected, even though not expressed with directness, but reasonably deducible from the language of the will. In re Estate of Henderson, 196 Cal. 623, 639, 238 P. 938."

[3, 4] It is our conclusion that by the use of the words "as to the spouse" found in Sec. 70 of the Probate Code the Legislature, among other things, intended to change the pre-existing law as to the right of a spouse not named in the will to be appointed administrator. Estate of Russell, supra.

The order appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

Hearing denied; CARTER, J., dissenting.

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57 Cal.App.2d 200

DINNEEN v. YOUNGER et al.

Civ. 12250.

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1943.

Rehearing Denied March 20, 1943.

Hearing Denied April 19, 1943.

1. Deeds 🔑208(3)

Proof that owner of realty signed and acknowledged deed to the realty and handed the deed to the grantee named therein established a "prima facie case" of delivery of the deed with intent to make the grant operative immediately as a transfer of title to the realty. Code Civ.Proc. § 1948.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

2. Deeds 🔑194(2)

Presumption of delivery of deed created by proof of signing and acknowledgment of deed and delivery to grantee named in the deed is not conclusive.

3. Deeds 🔑56(2)

The concept of "delivery" involves more than physically handing possession of a deed to the grantee named therein or to someone on the grantee's behalf, and the physical act must be accompanied with the intent to presently pass title, even though right to possession and enjoyment of the realty may not accrue until some future time.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

4. Deeds 🔑56(2)

Rule that physical act of delivery of deed must be accompanied with intent presently to pass title applies not only where possession of the deed is given to a third person but also where such possession is given directly to the grantee named in the deed.

5. Deeds 🔑56(2)

Intention to part with the title to realty described in a deed is indispensable to a legal delivery of the deed, and is the factor that gives vitality to such delivery.

6. Evidence 🔑230(3), 314(1)

Where a valid delivery of a deed is established, subsequent acts and declarations of grantor in disparagement of deed, outside presence of grantee, are not admissible, since such declarations are "hearsay" and "self-serving".

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay" and "Self-Serving Declarations".

7. Deeds 🔑200

Where the question presented is whether an alleged grantor intended to divest himself of title to realty, declarations and acts of alleged grantor, out of the presence of the grantee, after physically delivering possession of the deed to the grantee or to a third person, are admissible as bearing on the question of intent.

8. Evidence 🔑269(2)

Where intent is a material element of a disputed fact, declarations of a decedent made afterwards as well as before an alleged act, indicating the intent with which the decedent performed the act, are admissible in evidence as an exception to the "hearsay" rule and it is immaterial that such declarations are self-serving.

9. Deeds 🔑200

In cases involving alleged delivery of deed, declarations of the alleged grantor, made before and after the making of the deed, are admissible upon the issue of delivery, and it is immaterial that the declarations are in the interest of the party producing the deeds.

10. Evidence ⚿269(3)

In cases of alleged gifts, declarations made by the alleged donor before, contemporaneously with, and subsequent to the alleged gifts are admissible, though the statements are self-serving.

11. Deeds ⚿200

Where husband and wife executed deeds and handed them to each other in presence of notary, but there was no conversation in the notary's presence to indicate the intent of the parties, and notary did not explain to the parties the nature and consequences of the legal delivery of the deeds, such acts of the parties were equivocal and evidence of the subsequent acts of the parties was admissible on the question of intent.

12. Deeds ⚿208(1)

Where physical delivery of deed by wife to husband was equivocal as to wife's intent to transfer title to the realty, evidence of acts of husband and wife explainable only on theory that neither believed that deed in question and contemporaneous deeds from husband to wife affected the title to the realty described therein sustained finding that wife had not intended to pass complete and irrevocable title to the realty described in the deed to husband.

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Rickard B. Dinneen against Donald Younger, as administrator of the estate of Rose B. Dinneen, and others, to quiet title, wherein the named defendant filed a cross-complaint asking that his title as administrator be quieted. From a judgment quieting cross-complainant's title, plaintiff appeals.

Affirmed.

James A. Walker, of Salinas, for appellant.

Paul E. Colegrove, of Santa Cruz, Wyckoff, Gardner & Parker and J. A. Wyckoff, all of Watsonville, Bert B. Snyder, of Santa Cruz, Jerome D. Peters, of Chico, Louis Oneal, of San Jose, and Bias & Bias, of Santa Cruz, for respondents.

PETERS, Presiding Justice.

Plaintiff, Rickard B. Dinneen, brought this action to quiet his title to a parcel of improved real property located in the city of Santa Cruz. One of the defendants, the administrator of the estate of Rose B. Dinneen, deceased wife of plaintiff, cross-complained and asked that his title as administrator be quieted. From a judgment quieting the administrator's title plaintiff prosecutes this appeal.

Plaintiff claims title to the property, known as the Church Street property, by virtue of a deed of gift from his wife alleged to have been duly executed and delivered to him on July 14, 1932. Defendants do not deny that such a deed was executed by Rose Dinneen on that date, and do not deny that such deed was handed by Rose Dinneen to plaintiff, it being their contention that such deed was not handed to plaintiff with the intent to make a legal delivery. The trial court found that Rose Dinneen, on July 14, 1932, "signed and handed to said plaintiff" a deed naming plaintiff as grantee to the Church Street property, but that "it was not the intention of said Rose B. Dinneen, also known as Rose Clayton, deceased, when she handed said deed to said Rickard B. Dinneen, nor at any other time, to divest herself of the present title to said real property, nor was it then, nor at any other time, her intention to vest the present title to said real property in the said grantee named in said deed; that said deed was never delivered * * *," and by handing the deed to plaintiff Rose Dinneen did not "part or intend to part with her title in fee simple to the said described real property." The sole question presented on this appeal is whether that finding is supported by legal, competent evidence.

It should be here noted that in the event the judgment is affirmed plaintiff is not entirely divorced from any interest in the property in question for he has an interest as an heir of his wife.

The facts are as follows: Plaintiff, who was then fifty-eight years old, and Rose Dinneen, who was then at least sixty, were married early in July of 1932. Although plaintiff was not entirely clear as to the facts, it appears that on July 13, 1932, plaintiff and Rose Dinneen went to George Penniman, a notary public, and asked him to draw up gift deeds for the deeding from one to the other of certain parcels of real property owned by each as their separate property. Rose Dinneen owned the Church Street property, valued at about $12,000, and subject to a $3,200 encumbrance. Plaintiff owned three parcels of property referred to as the Monterey property, the San Jose property and the Wildwood property. The total value of these three parcels was much less than the value of the equity in the Church Street property. On July 14, 1932, in the presence of Penniman, Rose Dinneen signed the deed naming plaintiff as grantee of the Church Street property, acknowledged her signature, and physically handed the deed to her husband. Plaintiff likewise executed certain deeds, and handed to his wife, in the presence of Penniman, gift deeds to the three parcels owned by him. None of the deeds was ever recorded. Plaintiff was unable to produce the deed to the Church Street property at the time of trial. He testified that, after receiving the deed, he placed it in a pocket of his automobile, and several months later put it in a deed box to which he alone had the keys; that later one of the keys was lost; that he then discovered the deed was gone; that he has never found it; that he does not know what became of it.

From plaintiff's testimony, the exact nature of the transaction that occurred on July 14, 1932, is not entirely clear. The deeds were all gift deeds. However, plaintiff apparently contends that the transaction was a business trade, that is, that he traded his property for that of his wife. Just why they should engage in such a deal does not appear. From all the testimony, and the reasonable if not inevitable inferences therefrom, it seems apparent that the deeds were executed and handed over in an abortive attempt to make a testamentary disposition of the property, and that neither the grantors nor grantees intended or believed that they were parting with or receiving title. This was the conclusion of the trial court.

Plaintiff testified that immediately after his marriage to Rose Dinneen they decided to make an extended motor trip; that the deeds were prepared and handed to the respective grantees as above described; that the circumstances under which the deeds were prepared were that "We were going on this trip and she said 'It will take quite a bit of money for the trip.' 'Well,' I says, 'I don't want to spend too much,'—I had between two and three thousand dollars at the time. She says 'Well, we will make deeds to each other; that way,' she said, 'you will be sure of a home at all times.' I said 'All right, and I will give you deeds to my property,' and that was the understanding." He testified that the Monterey property was reasonably worth $3,500; that the San Jose property was valued at $2,500, and the Wildwood lots were worth $600 or $700. This testimony as to value, as well as most of plaintiff's other testimony, was impeached by testimony produced by defendants (hereafter referred to) of such a nature that it frequently caused the trial judge to express doubt as to the credibility of the witness.

It is the contention of plaintiff that the above evidence conclusively establishes a valid legal delivery to him of the deed in question. Defendants, while admitting that the above evidence established a prima facie case of delivery, contend that the evidence produced by them, particularly relating to the acts of the parties subsequent to the execution of the deeds, supports the finding above quoted. Plaintiff urges that since the "delivery" was "established," nothing done or said by the parties after such delivery could change the effect of such delivery, and that all the evidence concerning the subsequent acts and declarations of the parties was inadmissible, citing such cases as Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St. Rep. 186; and Shaver v. Canfield, 21 Cal. App.2d 734, 70 P.2d 507. This question presents the pivotal problem involved on this appeal.

[1-5] There can be no doubt that upon proof that Rose Dinneen signed and acknowledged the deed and handed the same to the grantee, the plaintiff established a prima facie case of complete execution—that is, of delivery with intent to make the grant operative immediately as a transfer of title. § 1948, Code Civ.Proc.; Burkett v. Doty, 176 Cal. 89, 167 P. 518; Towne v. Towne, 6 Cal.App. 697, 92 P. 1050; Thomas v. Fursman, 177 Cal. 550, 171 P. 301; Merritt v. Rey, 104 Cal.App. 700, 286 P. 510. The presumption of legal delivery, thus created, is not conclusive. The concept of delivery involves more than merely physically handing possession of the deed to the grantee or someone on his behalf. Piercy v. Piercy, 18 Cal.App. 751, 124 P. 561; Baker v. Baker, 9 Cal. App. 737, 100 P. 892. The act of delivery must be accompanied with the intent that the deed shall become presently operative as such, that is, must be accompanied with the intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time. (See cases collected 9 Cal.Jur., p. 153, § 52.) The rule applies not only where possession of the deed is given to a third person, but also where such possession is given to the grantee directly. Marple v. Jackson, 184 Cal. 411, 193 P. 940; Stone v. Daily, 181 Cal. 571, 185 P. 665; Hefner v. Sealey, 175 Cal. 18, 164 P. 898; Cox v. Schnerr, 172 Cal. 371, 156 P. 509; Bias v. Reed, 169 Cal. 33, 145 P. 516; Kenney v. Parks, 137 Cal. 527, 70 P. 556. Intention to part with title is indispensable—that is the factor that gives vitality to the delivery. Ruiz v. Dow, 113 Cal. 490, 45 P. 867; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas.1916E, 703, and see cases cited 9 Cal. Jur. § 52 at p. 155, fns. 19 and 20.

[6, 7] It is also clear that where a valid delivery is established, subsequent acts and declarations of the grantor in disparagement of his deed, outside the presence of the grantee, are not admissible. Such declarations or acts are hearsay and self-serving. See cases cited infra. But when the very question presented is whether or not the alleged grantor intended a valid delivery—that is, intended to divest himself of title—his declarations and acts made and done outside the presence of the grantee after physically delivering possession of the deed to the grantee or to a third person, are admissible as bearing upon the vital question of intent. This problem has frequently been before the courts of this state. The leading case is Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas. 1916E, 703, where an exhaustive review of the authorities is to be found. The court concluded as follows (page 648 of 170 Cal., page 7 of 151 P.):

"It is, of course, well settled that acts and declarations of a grantor made after he has parted with the title to property and in disparagement of it are inadmissible when made in the absence of the grantee, and it is the claim of appellants that the conduct and declarations of Williams after the deed was handed to Kidd were inadmissible as contravening this rule.

"But here the very question was whether Williams had ever parted with title to the property. This was the main issue in the case; the claim of respondents being that there had been no delivery of the deed with intent on the part of Williams to do so. The conduct and declarations of Williams covered a period subsequent to the making of the deed and while Kidd held it as a depositary, and we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during that period were properly admissible as bearing on the issue as to whether there had been a delivery of the deed. All these matters had some tendency to show that there was no intention on the part of Williams to deliver it except as a part of a testamentary scheme which he had abandoned.

"In support of their contention that these acts and declarations of Williams just referred to were inadmissible reliance is had by appellants on Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St.Rep. 186. If that case is to be construed as holding that, where the issue is whether or not the grantor so delivered his deed as to convey title, the acts and declarations, in short, the conduct, of the deceased grantor cannot be given in evidence in disproof of delivery, then we think that Bury v. Young should be overruled as contrary to sound reason and to the great weight of authority."

It is true that the Williams case involved delivery to an escrow holder, but the rule is applied whether delivery be direct to the grantee or is made to a third person on his behalf. For a few of the cases where the rule has been applied to various factual situations see Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; Fisher v. Oliver, 174 Cal. 781, 164 P. 800; DeCou v. Howell, 190 Cal. 741, 214 P. 444; Rees v. Rees, 191 Cal. 399, 216 P. 1006; Rocha v. Rocha, 197 Cal. 396, 240 P. 1010; Cummings v. Eiszler, 70 Cal.App. 67, 232 P. 723; Kinney v. Kinney, 71 Cal.App. 192, 234 P. 913; Beyerle v. California Surety Co., 120 Cal.App. 236, 7 P.2d 1034; Manwell v. Board of Home Missions, etc., 122 Cal.App. 599, 10 P.2d 787; Belser v. American Trust Co., 125 Cal.App. 344, 13 P.2d 951; Jean v. Jean, 207 Cal. 115, 277 P. 313; Northern California Conference Ass'n, etc., v. Smith, 209 Cal. 26, 285 P. 314; Watt v. Copeland, 92 Cal.App. 161, 267 P. 928; Morgan v. Matthieson, 103 Cal.App. 510, 285 P. 325; Meeker v. Spencer, 41 Cal.App. 400, 182 P. 782; Goodman v. Goodman, 212 Cal. 730, 300 P. 449; Barcroft v. Livacich, 35 Cal.App.2d 710, 96 P.2d 951.

[8-10] Mr. Justice Traynor, in the recent case of Whitlow v. Durst, 20 Cal.2d 523, page 524, 127 P.2d 530, page 531, succinctly stated the applicable rule as follows: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. [Citing cases.] Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gift are admissible though the statements be self-serving." See, also, annotations in 105 A.L.R. 398, particularly page 410 et seq.; Ann.Cas.1916E, 713; see, also, 19 Cal.L.Rev. 231, 251; 26 Cal. L.Rev. 631, 632.

[11] These cases establish beyond a doubt that where the very question at issue is whether the grantor intended a legal delivery, the subsequent acts and declarations of the parties are admissible. When a grantor or grantee subsequently deals with the property in a manner inconsistent with the theory of an effective delivery, such fact is of considerable importance in determining their probable intent. There are cases, of course, where the facts surrounding the delivery of physical possession of the deed are so conclusive that no other conclusion is possible but that a legal delivery was intended. In such event, the delivery cannot be attacked. Such are the cases relied upon by plaintiff. But the present case does not present such a situation. Here the notary testified there was no conversation in his presence to indicate the parties' intent. He did not explain to the parties the legal nature or consequences of a legal delivery. All we know is, that the parties executed the deeds and handed them to each other. Such "delivery" is equivocal. It could mean that the parties intended to part with title. It could also mean that in view of the dangers of the contemplated trip the parties intended the deeds to operate as wills and did not intend a present passage of title. Under such circumstances, evidence of their subsequent acts was clearly admissible on the issue of intent.

In the instant case, such subsequent acts, if they do not conclusively establish that there was no intent on the part of the respective grantors to divest themselves of title, to say the least amply support the finding to that effect. Some of these acts are as follows:

The purported delivery of the deeds took place on July 14, 1932. Rose Dinneen died August 14, 1937, and plaintiff became administrator of her estate. He served as such until December of 1939 when defendant Younger became administrator. In 1934 plaintiff sold the Monterey property, which he had testified was worth in 1932, $3,500, for $1,000. The purchaser paid $300 in cash and paid the balance in stock of a corporation. Although, according to plaintiff's story, he had deeded this property to his wife two years before, this stock was issued in the name of the plaintiff alone. This stock was called in by the issuing corporation in 1940. The proceeds so received were placed by plaintiff in his own bank account, and he has never accounted or offered to account to defendant, the present administrator, for this sum. He did not list the stock in his petition for letters of administration or in any of the three accounts filed by him before his resignation as administrator.

In April, 1937, the San Jose property, supposedly deeded by plaintiff to his wife, was sold to Ralph Skoog. Plaintiff had testified that in 1932 this property was worth $2,500, yet it was sold to Skoog for $950, $250 cash, and the balance was secured by a promissory note and deed of trust. The deed of trust named plaintiff as sole beneficiary and the note named plaintiff as payee. Rose Dinneen joined in the deed to Skoog. Skoog testified that no mention was ever made to him of any unrecorded deed, and that the matter of installment payments was discussed with plaintiff and not with his wife. Payments on the secured note were made by Skoog before and after Rose Dinneen's death. Plaintiff testified that he had accounted to the estate of his wife for these payments, but the production of his accounts showed that, although he was administrator, he had never accounted for these payments, and had not listed the note and deed of trust as an asset of the estate.

So far as the Wildwood property is concerned, that had not been sold at the time of the present trial. However, plaintiff did not list it in his petition for letters or in his accounts as an asset of the estate.

So far as the Church Street property—the parcel directly involved in this action—is concerned, the evidence shows that in November, 1934, the encumbrance on that parcel was renewed, and that the application for such renewal was signed by Rose

Dinneen alone, although her husband did sign the deed of trust. After his wife died and plaintiff became administrator he made no claim that the Church Street property belonged to him. In his petition for letters, under oath, he alleged that the estate owned the property. In the inventory he listed the property as community property of himself and his wife. In his first and subsequent accounts he listed rentals of the Church Street property received by him as administrator of the estate. In the estate proceeding the Church Street parcel, plus the furniture in the house located thereon, were listed as practically the sole assets of the estate. He testified that he did all this under oath, after disclosing all the facts concerning the deed from his wife to his then attorney, and upon his advice. The attorney called as a witness, after the privilege had been waived, testified that no such disclosure had been made to him by plaintiff, and that he had prepared the petition for letters, the inventory and the accounts in complete ignorance of the existence of the deed.

There was other evidence that supports the inference that plaintiff never believed he had title to the Church Street property until shortly before the filing of the present action in December, 1939. In September of 1939 there was tried before the same judge who tried the instant case a case brought by an alleged legatee of Rose Dinneen to establish an allegedly lost will in which she claimed to have been devised the Church Street property. Plaintiff, as administrator, opposed that action and appeared as a witness. In his pleadings and testimony he made no mention of the existence of a deed from his wife to himself, although, if such existed, it would have immediately terminated that proceeding. Just prior to the death of Rose Dinneen plaintiff told the winess Ellingson, son-in-law of the deceased, that he, the plaintiff, had a deed to the property, and when Ellingson asked him how he had secured the deed the plaintiff replied that prior to the honeymoon trip plaintiff and Rose Dinneen decided to make deeds to each other, that "you know in taking a trip anything might happen, just in case anything did happen to one or the other of us the property would be taken care of."

So far as the acts of Rose Dinneen are concerned, it is to be noted that she did not protest when plaintiff took the stock received for the Monterey property in his own name, nor did she protest when the note and deed of trust taken from Skoog were made out in the name of plaintiff alone. She alone signed the application for the renewal of the loan on the Church Street property.

[12] There is no need to refer to any other testimony. The acts and conduct of plaintiff and his wife can be explained only on the theory that each believed the deeds executed on July 14, 1932, in no way affected their ownership of the respective parcels. Certainly, such evidence demonstrates that the participants in the transaction never felt or acted as if the deeds were operative to pass title. The above acts offer the safest and most indicative evidence of their respective intents in giving the deeds. Such evidence clearly supports the finding that there was no intent on the part of Mrs. Dinneen to pass complete and irrevocable title to plaintiff.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

57 Cal.App.2d 1023

DEENEY v. HOTEL & APARTMENT CLERKS' UNION.

No. 1563.

Appellate Department, Superior Court, City and County of San Francisco, California.

Feb. 18, 1943.

1. Associations 🔑20(2)

Under the Code permitting actions against associations, an action of law may be brought against an association not engaged in commercial business. Code Civ. Proc. § 388.

2. Partnership 🔑63, 197

Although a partnership is not a legal entity for all purposes, it is to be regarded as a legal entity to the extent that an action will lie against the partnership as such for the purpose of securing a judgment against it.

3. Partnership 🔑219(1, 4)

A judgment secured against a partnership as such is binding on the joint property of the associates, and upon the individual property of the party or parties served with process.

4. Associations ⚷20(2)

The legal entity theory has been adopted as respects actions against unincorporated associations. Code Civ.Proc. § 388.

5. Trade unions ⚷1

Labor unions are not organized to carry on business for profit and do not constitute "partnerships". Civ.Code, § 2400.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

6. Trade unions ⚷9

Where a judgment is secured against a trade union as such, a writ of execution may be issued against the joint property of members, and if there is no such property an action may be brought against union members for an accounting by a member procuring the judgment.

7. Trade unions ⚷4

One trade union member could not bring an action at law for a money judgment against another union member. Code Civ.Proc. § 388; Civ.Code, §§ 2416, 2426.

◆

Action by Roger P. Deeney against Hotel & Apartment Clerks' Union, etc., and others for a money judgment. From a judgment dismissing the action, the plaintiff appeals.

Affirmed in part and reversed in part.

Edmund J. Holl, of San Francisco, for appellant.

Henry B. Lister, of San Francisco, for respondent.

McWILLIAMS, Judge.

In this action the plaintiff sued defendants Hotel and Apartment Clerks and Office Employees' Union Local No. 283, and Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America, and C. L. McDonough who was alleged to be the agent and representative and vice-president of said Union. The nature of plaintiff's claim other than that he asked for a money judgment is not important in view of the one issue raised on this appeal. In his complaint plaintiff alleged that the two defendants other than McDonough were voluntary unincorporated associations composed of more than two persons associated together in business and transacting such business under the names above mentioned. Plaintiff also alleged that at all times mentioned in his complaint he was a member in good standing of Local No. 283. The defendants filed an answer in the case and subsequently filed a notice of motion to dismiss the action. The notice stated that the motion would be made on the ground that the court had no jurisdiction of the action by reason of the fact that it was one at law brought by a partner against his co-partners under the provisions of section 388 of the Code of Civil Procedure and that the only action that could properly be brought by the plaintiff against his co-partners under the circumstances of the case was one in equity in the Superior Court for an accounting and a dissolution under sections 2416 and 2426 of the Civil Code. The motion to dismiss was granted on the ground that the court had no jurisdiction of the subject matter of the action. From that order the plaintiff has appealed. Counsel for defendants present the same argument somewhat amplified in this court as appears to have been presented in the court below.

We cannot concur in the reasoning of counsel for defendants or in the ruling of the lower court so far as the two associations are concerned.

[1] We first take up the argument of defendants that the two associations are not engaged in business and hence may not be sued as associations since section 388 of the Code of Civil Procedure is limited by its terms to associations engaged in business. In support of this contention they cite Swift v. San Francisco S. & E. Board, 67 Cal. 567, 8 P. 94. The irrelevancy of that case is made apparent by a reading of the opinion of the Supreme Court in the case of Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291. The reasoning of the court in the latter case is not to be disposed of as counsel for defendants endeavor to dispose of it by saying that the case was not a law action but involved an application for a writ of prohibition. This is made clear by the case of Herald v. Glendale Lodge, 46 Cal.App. 325, 189 P. 329, in which it was held that an association need not be engaged in commercial business in order to authorize an action against it under section 388.

[2, 3] Defendants next contend that the two associations are partnerships and that

a partnership not being a legal entity may not be sued under section 388. In the first place even if they were to be regarded as partnerships it has long since been settled in California that although a partnership is not a legal entity for all purposes it is to be regarded as a legal entity to the extent that an action will lie against the partnership as such for the purpose of securing a judgment against it. The judgment secured in such a case is binding on the joint property of the associates and upon the individual property of the party or parties served with process. John Bollman Co. v. S. Bachman & Co., 16 Cal.App. 589, 117 P. 690, 122 P. 835; Artana v. San Jose Scavenger Co., 181 Cal. 627, 185 P. 850.

[4] As was pointed out by our Supreme Court in the Jardine case (supra) whereas the law is not yet settled in all states having statutes similar to section 388 of our Code of Civil Procedure whether an unincorporated association is to be considered an entity for the purposes of suit or whether it is to be considered that the statute merely permits an action to be brought against the associates in the name of the association in this state the entity theory has been definitely adopted.

[5] The fact that the two associations here involved happen to be labor unions as is not only pointed out but emphasized by defendants does not improve their situation. In fact it militates against the position taken by them. This follows because labor unions not being organized to carry on a business for profit do not constitute partnerships. Civ.Code, section 2400. Also see Brower v. Crimmins, 67 Misc. 68, 121 N.Y.S. 648.

A contention somewhat similar to the one here made by defendants was advanced in the comparatively recent New York case of People v. Herbert, 162 Misc. 817, 295 N.Y.S. 251, 253. The defendants in that case had been indicted for the embezzlement of funds of a certain union. They set up the defense that they were not subject to prosecution by reason of the fact that the union was a partnership and that they, being members of that partnership, had title to the funds of the union jointly with all of the members. The court held that the contention was unsound. Said the court:

"It may be conceded that partnerships and labor unions have some characteristics in common. Thus, they are both unincorporated associations; and their members have a peculiarly distinctive form of joint title to their respective property, although in neither case is the title that of joint tenants or of tenants in common.

"But there are at the same time certain important differences between them. The purpose of a partnership is essentially to enable its members, as principals, to conduct a lawful business, trade, or profession. Such business, trade, or profession is to be carried on for the pecuniary gain of the partners. No one may become a partner without the consent of all the partners. In our state, this rule is a statutory one, for the Partnership Law, § 40, subd. 7, provides that: 'No person can become a member of a partnership without the consent of all the partners.'

"This principle of personal selection of one's partners is substantially the doctrine of delectus personarum. Sugarman, Law of Partnership, § 22. The number of members in a partnership is invariably small.

"On the other hand, a labor union is a combination of working men formed, not for the conduct of a lawful business, trade or profession for the pecuniary gain of its members; but for the purpose of securing, by united action, the most favorable wages and conditions of labor, and of otherwise improving their economic and social status. * * * It is well known that the membership of labor unions in many instances runs into the thousands; their members are widely scattered and have not the facilities and opportunities for daily collaboration which partners have. Furthermore, the principle of personal selection which is an indispensable one in the case of a partnership does not apply to a labor union, for it is not required that one may become a member thereof only with the consent of all the other members."

Also see Grand International Brotherhood of Locomotive Engineers v. Couch, 236 Ala. 611, 184 So. 173, 175. In that case the plaintiff brought an action for breach of contract against the defendant association. It urged in defense that the plaintiff being a member of the association could not sue it since he would in effect be bringing suit against himself and that the relationship between the two was such that only in equity could he, as a member of the association, sue the company. Said the court:

"This may be the rule as to partnerships for commercial purposes, notwithstanding section 5722, Code [Code 1940, Tit. 7, §

141], permitting a suit against it without joining the partners. * * * But a different rule obtains in respect to nonprofit fraternal, charitable or mutual aid associations, when a statute so authorizes."

The court pointed out that the defendant was an unincorporated union and held that the action would therefore lie. The section of the Alabama Code referred to is substantially the same as section 388 of our Code of Civil Procedure.

The procedural difficulty growing out of permitting the plaintiff to secure a money judgment against the defendant associations that is conjured up by counsel is not a substantial one.

[6] If the plaintiff should secure a judgment against either or both of the associations he would be authorized under section 388 to procure the issuance of a writ of execution against the joint property of the associates. If there was no such property it might then be necessary for him to bring his suit in the Superior Court against his associates for an accounting. This was the view taken of a somewhat similar problem under a somewhat similar statute of the state of New York. See Westcott v. Fargo, 61 N.Y. 542, 19 Am.Rep. 300, cited and followed in Saltsman v. Shults, 14 Hun. 256.

The cases relied upon by defendants do not, in our opinion, support their views. In the case of Gorman v. Russell, 14 Cal. 531, the Supreme Court did not hold that the association there involved was actually a partnership but instead that it partook "of the nature of a partnership" rather than being a charity as was claimed by the respondents in that case. The other cases cited by defendants are likewise not, in our opinion, applicable to the situation here involved.

[7] Our views as set out above obviously do not apply insofar as defendant McDonough is concerned. As to him we consider that the argument of respondents is sound.

It is therefore ordered that the judgment of the lower court be affirmed insofar as defendant McDonough is concerned and reversed insofar as the two defendant associations are concerned.

FOLEY and GRIFFIN, JJ., concur.

HOBBS v. TRANSPORT MOTOR CO.
(two cases).

HENRICS v. TRANSPORT MOTOR CO.
Civ. 12153.

District Court of Appeal, First District,
Division 2, California.
Feb. 17, 1943.

Rehearing Denied March 19, 1943.
Hearing Granted April 15, 1943.

1. Automobiles 🔑339

Where owner permitted use af automobile by prospective buyer for purpose of trying it out or obtaining parents' consent to purchase, operation of automobile to test battery from permittee's automobile was foreign to purpose for which owner's consent was obtained and constituted a criminal offense. Vehicle Code, § 504, St.1937, p. 617.

2. Evidence 🔑89

Where uncontradicted testimony showed automobile driver was violating law by using automobile for a purpose entirely different from and beyond purpose for which owner's consent to its use was obtained, persons injured by negligent operation of automobile could not rely on presumptions of innocence and obedience to law to establish owner's liability on theory of "permissive use". Vehicle Code § 504, St.1937, p. 617; Code Civ.Proc., § 1963, subds. 1, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Permissive Use".

3. Automobiles 🔑192(1)

A substantial violation of limitation as to place or purpose for which owner of automobile permits use thereof by another terminates original consent and absolves owner from liability for injuries subsequently caused by permittee's negligent operation of automobile. Vehicle Code, § 504, St.1937, p. 617.

4. Automobiles 🔑192(7)

Dealer permitting prospective buyer of automobile to drive it for purpose of trying it out or of obtaining parents' consent to purchase was not liable for injuries caused by negligent operation of automobile by permittee for purpose of testing battery from permittee's automobile which permittee installed without dealer's knowledge. Vehicle Code, § 504, St.1937, p. 617.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Separate actions by Frank W. Hobbs, Helen Lee Hobbs and Clara Henrics against the Transport Motor Company and another for personal injuries sustained in an automobile accident. The three actions were consolidated for trial and tried by a jury. From judgments in favor of plaintiffs, the named defendant appeals.

Judgments reversed.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for appellant.

Arthur Joel and Robert L. Dreyfus, both of San Francisco, for respondents.

SPENCE, Justice.

Three plaintiffs brought separate actions to recover damages for personal injuries sustained in an automobile accident. The three actions were consolidated for trial and were tried by a jury. Judgments were entered against defendant Rodrigues, the driver, and defendant Transport Motor Company, the owner of the car in all three actions. The defendant owner appeals from the judgments entered against said defendant owner.

The actions were prosecuted against the defendant owner upon the theory that the defendant driver was operating the automobile with the consent of the defendant owner at the time the accident occurred. The defense of the defendant owner was based upon the claim that its purported consent was obtained by fraud and that, in any event, the subsequent deviation by the defendant driver from the purpose for which the defendant owner's original consent was obtained nullified any such consent even if such consent had been validly obtained in the first instance.

Considerable animosity between the defendants was manifested at the trial. The defendant owner claimed that while the defendant driver obtained its consent to use the car upon his representation that he was an intending purchaser, said defendant driver had no intent other than the criminal intent to obtain the car for the purpose of stealing the battery therefrom. During the trial the defendant driver made no attempt to defend against the claims of plaintiffs but confined himself to a defense against the claim of his codefendant regarding the claimed intent to steal. Counsel for the defendant driver admitted negligence and admitted that plaintiffs were entitled to verdicts against the defendant driver. He devoted his argument to convincing the jury that the defendant driver had no intent to steal and further to urging the jury to return verdicts against the defendant owner as well as against the defendant driver. In view of our conclusions regarding the subsequent deviation of the defendant driver from the purpose for which the defendant owner's original consent had been obtained, we deem it unnecessary to discuss the defendant owner's claims with respect to fraud in obtaining its original consent.

There was a slight conflict in the evidence concerning the express request made by the defendant driver in obtaining the defendant owner's original consent. The defendant driver testified that he requested the use of the car for the purpose of trying it out. The representative of the defendant owner testified that the defendant driver requested the use of the car for the purpose of showing it to his parents and obtaining their approval of his purchase of the car. This conflict is immaterial as the uncontradicted evidence of the defendant driver showed a subsequent deviation from either of said purposes.

The subsequent deviation phase of the defendant owner's defense presents a very unusual state of facts as shown by the uncontradicted evidence. The defendant driver was the owner of a 1939 car which had not been running well. He visited the defendant owner's establishment in the late afternoon and talked about purchasing a car. He testified that he did not intend to turn in his own car and therefore did not advise the defendant owner that he owned one. He left the establishment but returned shortly after dinner. On the return trip, he was accompanied by two companions. He parked his car at a point two or three blocks from the defendant owner's establishment, leaving his two companions with his car. He entered the establishment alone and arranged to use the defendant owner's car for one or the other of the above mentioned purposes. He did not take the car to his home to show it to his parents, although he passed within a few blocks of his home. He first drove the defendant owner's car to the place where his own car was parked and he then drove it some distance to a service station while one of the companions followed in the other car. The trip took about ten or fifteen minutes. At the service station the defendant driver removed the battery from the defendant owner's car and placed it near his own car at the service station. He also removed the battery from his own car and put it in the defendant owner's car in the place from which he had taken the defendant owner's battery. The defendant driver and his companions then started out in the defendant owner's car, using the defendant driver's battery therein. The accident occurred shortly thereafter.

The defendant driver was questioned at some length regarding his purpose in changing the batteries and driving the defendant owner's car equipped with his own battery. The testimony of the defendant driver on this subject follows:

"Q. Why did you take the battery out of this automobile? A. Well, my car—I usually kept it up pretty good, and it was missing, that is, when the motor would hit a certain spot it would start to cut out, and I changed the carburetor and spark plugs and distributor and condensor coil, and it seemed to do that. That was one of the reasons I was going to get rid of it and during the course of that evening somebody said possibly the battery would—when I was talking of getting rid of it and buying a new car, they said maybe that battery wasn't feeding enough amperage or something and that it possibly was the battery that was causing it to miss, and they didn't have a battery at Simas' that would fit my car and rather than go and make a deal without making sure it wasn't the battery, why, we decided I would try to—try the battery right then and there because it would have been awful silly—.

"Q. Which battery is that. A. Try my battery in their car because their car was running right, and if it still ran—.

"Q. What kind of a car did you have? A. A. '39 Ford.

"Q. What kind of a car did you take out? A. A '40."

The defendant driver denied that he had any intention of stealing the defendant owner's battery at any time. He further testified on the subject:

"A. I was trying my battery to see how it was going to react in their car, to see if that was what was making my car miss at high speed. * * *

"Q. Where did you go? A. Well, we went out to try to see if this other car would miss. We wanted to see—maybe that was what was wrong with my car."

All the above quoted testimony was developed when the defendant driver was called as a witness for plaintiffs.

[1, 2] We may assume, as contended by plaintiffs, that the purpose of the defendant driver in removing the batteries was merely to try out his own battery in the defendant owner's car rather than to steal the battery of the defendant owner. It is obvious, however, from the testimony upon which plaintiffs rely that the trip, made after leaving the service station and on which the accident occurred, was made not for the purpose of trying out the defendant owner's car but was made solely for the purpose of trying out the defendant driver's battery. Such purpose was wholly foreign to any purpose for which the defendant owner's consent had been obtained, and the acts of the defendant driver, even in the absence of any intent to steal the battery, constituted a criminal offense. Vehicle Code, § 504, St.1937, p. 617. Plaintiffs suggest that they may rely upon certain presumptions of permissive use, citing Lanfried v. Bosworth, 45 Cal.App.2d 408, 114 P.2d 406, and Prickett v. Whapples, 10 Cal.App.2d 701, 52 P.2d 972, but the presumptions relied upon are the presumptions that a person is innocent of crime or wrong, (Code of Civ.Proc., § 1963, sub. 1), and that the law has been obeyed. Code of Civ.Proc., § 1963, sub. 33. The authorities cited have no application here as the uncontradicted testimony showed that the defendant driver had violated the law (Vehicle Code, § 504) and was using the car for a purpose entirely different from and beyond the purpose for which consent to the use of the car had been obtained.

[3, 4] We are of the view that the rules set forth in Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, are controlling here. The court there said on page 528 of 10 Cal.2d, on page 1052 of 75 P.2d: "On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, in so far as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission." It is not claimed here that the defendant driver had any permission, express or implied, to remove the defendant owner's battery from its car or to use the car for the purpose of testing the battery of the defendant driver, and the provisions of section 504 of the Vehicle Code created a limitation upon the purpose for which the defendant owner's original consent was given. We are of the opinion that the actions of the defendant driver constituted a substantial violation of that limitation, thereby terminating the original consent and making the subsequent use at the time of accident without the permission of the defendant owner.

In view of these conclusions, it becomes unnecessary to discuss the other points raised by the defendant owner.

The judgments against the defendant Transport Motor Company, a corporation, are and each of them is reversed.

NOURSE, P. J., concurred.

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57 Cal.App.2d 290

TERRILL v. SHEPHERD et al.

Civ. 6783.

District Court of Appeal, Third District, California.

Feb. 23, 1943.

Hearing Denied April 22, 1943.

1. Execution 🔑73

Affidavit showing that law firm to which collection of judgment was entrusted employed usual procedure that would be taken in average law office to collect a judgment where records revealed no assets belonging to judgment debtor was sufficient to warrant granting application for issuance of execution more than five years after entry of judgment. Code Civ. Proc. §§ 681, 685.

2. Execution 🔑73

Extreme diligence to enforce judgment within five years after entry thereof is not necessary to entitle judgment creditor under statute to issuance of execution thereafter, and judgment creditor is not required to institute proceedings supplemental to execution to compel judgment debtor to appear in court to answer concerning his property. Code Civ.Proc. §§ 681, 685.

3. Execution 🔑73

Trial court should not order issuance of execution more than five years after entry of judgment in absence of proof of diligent effort to enforce judgment within five year period during which judgment creditor is entitled to execution as matter of right. Code Civ.Proc. §§ 681, 685.

4. Execution ⟹73

Where judgment debtor's ownership of property subject to execution was successfully concealed from judgment creditor until more than five years after entry of judgment, issuance of execution after lapse of such five year period was not barred by "laches" or the existence of an "adequate remedy at law". Code Civ.Proc. §§ 681, 685.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches" and "Adequate Remedy at Law".

5. Execution ⟹73

Where judgment creditor was unable with due diligence to discover assets of judgment debtor subject to execution until debtor's death, fact that failure to enforce judgment during debtor's life by levying upon debtor's interest in property owned in joint tenancy which was lost at debtor's death worked a hardship on heirs did not preclude issuance of execution more than five years after entry of judgment. Code Civ.Proc. §§ 681, 685.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by George M. Terrill against J. P. Shepherd and H. A. Forsyth to recover a balance allegedly due for services rendered, wherein a money judgment was rendered in favor of plaintiff against the last named defendant. From an order directing issuance of execution more than five years after entry of judgment, Jess T. Forsyth, as administrator of the estate of F. A. Forsyth, deceased, appeals.

Order affirmed.

Harry T. Kyle, of Santa Rosa, for appellant.

J. N. DeMeo, of Santa Rosa, for respondent.

HAWKINS, Judge pro tem.

This is an appeal from an order granting leave to enforce a judgment after five years under the provisions of section 685 of the Code of Civil Procedure.

The motion was presented and submitted in the trial court upon two affidavits.

The affidavit of J. N. De Meo, on behalf of respondent, alleges:

"1. That H. W. A. Weske, attorney at law, was the attorney for the plaintiff in the above entitled action in all the proceedings had therein until the date of death of said H. W. A. Weske on August 29, 1939.

"2. That at all times during the proceedings had in the within matter, J. N. De Meo was associated with and assisted H. W. A. Weske in the proceedings had herein to the date of death of said H. W. A. Weske, and following the decease of said H. W. A. Weske, was engaged and now is engaged as the attorney for plaintiff in the within action.

"3. That heretofore, to-wit: on the 29th day of March, 1934, judgment was rendered against F. A. Forsyth, now deceased, in the sum of $2806.50, with interest thereon at the rate of 7% per annum from March 29, 1934, until paid; that to the date of the death of said H. W. A. Weske, he was entrusted with the collection of the said judgment and that during all such times said J. N. De Meo, affiant herein, was familiar with the actions of said H. W. A. Weske in connection with the said judgment, and that from the date of rendition of said judgment to the said death of H. W. A. Weske, said affiant at the instance and direction of said H. W. A. Weske did search the records of the County of Sonoma to determine whether there were any assets belonging to the said defendant, F. A. Forsyth, subject to execution; and that affiant was unable to find any such assets. That the plaintiff herein from time to time made inquiry of said H. W. A. Weske and affiant of the whereabouts of the said judgment debtor and whether the records of this county showed any assets subject to execution belonging to said judgment debtor and that upon the reception of said inquiries the said H. W. A. Weske and affiant would search said records for property belonging to said judgment debtor and have at all times been unable to find property upon which execution may be levied.

"4. That since the decease of said H. W. A. Weske, said J. N. De Meo has further searched the records of the said County of Sonoma and has been unable to find assets belonging to the said judgment debtor until the decease of said F. A. Forsyth.

"5. That affiant is familiar with all proceedings had herein from the rendition of said judgment to the present date and that affiant avers that no execution was issued under said judgment for the reason that the issuance and levy of such execution would have been a futile act. That said H. W. A. Weske and affiant have used diligent efforts to discover any assets of said judgment debtors and were left in sole charge of the collection of said judgment, and that at all times herein mentioned, the plaintiff herein was a resident of the City and County of San Francisco and ill and unable to personally conduct an investigation of the possible assets of said defendants and to the knowledge of affiant has caused one A. A. Moran to endeavor to locate the said judgment debtors and any assets they may have subject to execution; and that said A. A. Moran has made inquiries in connection with the same, but has been unable to discover any assets of said judgment debtors or either of them subject to execution.

"6. That the said judgment together with interest thereon as rendered herein remains wholly unpaid and that the sum of $2806.50 with interest thereon at the rate of 7% per annum from March 29, 1934, until paid, is due and unpaid to the plaintiff.

"7. That affiant is informed and believes and therefore states upon information and belief that at the time of the rendition of said judgment and almost continuously since then the said F. A. Forsyth, deceased, has been absent from the County of Sonoma where said judgment was rendered."

The affidavit of Jess T. Forsyth, on behalf of appellants, alleges:

"That he is the duly appointed, qualified and acting administrator of the estate of Frederick Allen Forsyth, deceased, and further states as follows:

"I.

"In 1934 plaintiff brought action against J. P. Shepherd and F. A. Forsyth for a balance claimed to be due for services rendered. No service was had upon Shepherd and the action marched to trial and judgment against Forsyth in Sonoma County on April 2, 1934. Plaintiff was then and ever since has been and is now a duly licensed and practicing physician in the City of San Francisco, fifty miles away. Forsyth, who was then a resident of Bakersfield, California, was unable to be present at the trial owing to the serious illness of his wife, who shortly thereafter died. No notice of the entry of this judgment ever was served upon Forsyth or upon his attorneys.

"II.

"No writ of execution ever was issued for the enforcement of this judgment, and no steps of any kind were taken to proceed in compliance with the provisions of Section 681 of the Code of Civil Procedure, and no steps ever were taken to require the judgment debtor to answer concerning his property.

"III.

"Forsyth was a resident of California at the time of entry of the judgment and remained continuously a resident of the state from that time until his death. He died intestate on March 9, 1941, leaving him surviving as his sole heir his son, F. A. Forsyth, Jr., who is entirely without means and is dependent upon his earnings as a laborer. During all of period from judgment until death, Forsyth's mother and brother and numerous close relatives resided in Santa Rosa, Sonoma County, the place where said judgment was entered. All of them knew where he resided, and any of them could have furnished his address to the judgment creditor if he had seen fit to make such inquiry. Furthermore the judgment debtor was a resident of said Santa Rosa, residing at 819 Third Street, in said city, continuously during all or nearly all of the years 1938 and 1939. During all of the time from the date of the entry of said judgment until the date of his death in 1941 no demand ever was made upon him by the judgment creditor or by any one in the creditor's behalf for payment of said judgment, and there is nothing in the record to show that the judgment ever was brought to his attention.

"IV.

"On June 23, 1937, the judgment debtor became the owner of an undivided one-half as joint tenant of a promissory note of A. H. Dukes for $10,500.00, secured by trust deed upon real estate in Sonoma County, California, as described in book 380 of official records of said Sonoma County at page 19 thereof, and he remained the owner thereof until his death. The maker of said note was and is solvent and the security adequate, and at all of said times the interest therein so acquired by said judgment debtor was of the value of $4250.00 and more, being approximately twice the amount of the said judgment. The assignment of said note and trust deed was placed on record in said county on January 26, 1940, in book 494 of official records at page 84 thereof.

"V.

"On June 23, 1937, the judgment debtor became the owner of an undivided one-half as joint tenant of a promissory note of George J. Reading for the sum of $4000.00 and interest, payment of which note was secured by trust deed upon real estate in said Sonoma County described therein, which was recorded in book 428 of official records of said Sonoma County at page 225, and he remained the owner of said interest in said promissory note from said last mentioned date until the 17th day of February, 1940, at which time he became the sole owner thereof as hereinafter stated. The assignment of said note and trust deed was duly recorded in the office of the county recorder of said county on January 26, 1940, in book 494 of official records at page 83.

"On February 17, 1940, decedent became the sole owner of said last mentioned promissory note and remained the owner thereof until his death. The assignment of said promissory note to decedent was duly recorded in the office of the county recorder of said Sonoma County on February 19, 1940, in book 493 of official records at page 397 thereof.

"No part of the sum evidenced by said promissory note ever was paid, and the same remained payable to decedent at all the times from the date of said assignments last above mentioned until his death, and at all times the said promissory note was of the full value of $4000.00 and interest. Now it constitutes the principal part of the Forsyth estate."

As grounds for reversal appellant asserts:

1. That the affidavit of respondent did not set forth sufficient reasons for his failure to proceed in compliance with the provisions of section 681 of the Code of Civil Procedure;

2. That the trial court abused its discretion in granting plaintiff's motion. As these two grounds are inseparably connected, they will be treated together.

[1, 2] Respondent's affidavit, though lacking in detail, appears to us to be sufficient. It indicates about the usual procedure that would be taken in the average law office to collect a judgment where the records revealed no assets belonging to the judgment debtor. Extreme diligence is not demanded nor is there anything in the law which requires the judgment creditor to institute proceedings supplemental to execution to compel the judgment debtor to appear in court to answer concerning his property.

[3] Respondent has contended that it was not necessary to file affidavits showing reasons for his failure to proceed under section 681 of the Code of Civil Procedure, and that notwithstanding any imperfections in such affidavits or even the entire absence thereof the granting of the order was within the sound discretion of the court. As authority for his contention he has cited Butcher v. Brouwer, — Cal.App.2d —, 121 P.2d 800, and Peers v. Stoll, 32 Cal.App.2d 511, 90 P.2d 119. In view of recent decisions by the Supreme Court of this state, respondent's position in this contention is not tenable. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210.

Appellant suggests that a court of equity should have refused to grant relief in this case because respondent has an adequate remedy at law, and he also invokes the aid of the doctrine of laches.

[4] During the life of the judgment, the judgment debtor had assets, but he concealed them from respondent until the statute of limitations had run. Under these circumstances, while it is true that respondent had a remedy at law, we can scarcely agree that it was adequate, nor do we see how a court of equity could hold that respondent was guilty of laches in failing to take action when he had every reason to believe that his efforts would have been futile.

[5] Appellant complains of the injustice done to the heirs of decedent judgment debtor and urges that respondent, by appropriate action might have levied upon the subsequently lost joint-tenancy property of said judgment debtor in his lifetime and thus could have preserved the remaining property for his estate. It is sufficient answer to this to inquire why, if decedent was interested in preserving his estate for his heirs, he took the prop-

erty in joint tenancy in the first place, or why, having done so, he did not take steps to convert his joint tenancy interest into an inheritable estate before it was lost by his demise.

We find no abuse of discretion by the trial court.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

57 Cal.App.2d 612

HUTCHASON v. MARKS et al.

Civ. 13759.

District Court of Appeal, Second District, Division 3, California.
March 11, 1943.

1. New trial 🔑102(3)

On motion for new trial as to defendant in whose favor nonsuit had been granted, plaintiff's claim that "newly discovered evidence" regarding a trust was wholly unknown should have been supported by more than plaintiff's naked assertion on the subject in view of facts that in pleadings plaintiff had referred to such trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

2. New trial 🔑102(3)

An order granting new trial on ground of "newly discovered evidence" was an abuse of discretion where there was no attempt to explain how the unknown became known and no showing that if even a slight effort had been made it could not readily have become known before or during the trial.

3. New trial 🔑102(3)

To merit new trial on ground of "newly discovered evidence," moving party must show some effort to discover the evidence before and not after a judgment has been entered.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Arthur Hutchason, administrator of the estate of Virginia Hutchason, deceased, substituted party plaintiff for Virginia Hutchason, against Ben W. Marks, also known as B. W. Marks, Roland Cummings, and others for cancellation of certain instruments and for damages because plaintiff was allegedly defrauded of property. From an order granting the plaintiff a new trial, the last named defendant appeals.

Reversed.

See, also, Cal.App., 128 P.2d 573.

Joseph Musgrove, of Los Angeles, for appellant.

Bailey & Poe, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

In Slemons v. Paterson, 1939, 14 Cal.2d 612, pages 615, 616, 96 P.2d 125, page 127, the Supreme Court reversed an order granting a new trial on the ground of newly discovered evidence (which was, that the Patersons had been absent from the state), and in doing so made these observations which are particularly pertinent to this case: "The only reason stated in plaintiffs' affidavit for failing to discover and produce this evidence upon the trial is that they did not know that the Patersons had been absent from the state during said period, and that prior to the time that they consulted their new attorney, neither of the plaintiffs knew of the relevancy of any such absence of defendants. This does not constitute a legal excuse for failure to discover and present the evidence at the trial. Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 37 P. 934; Klockenbaum v. Pierson, 22 Cal. 160. Plaintiffs do not claim that they could not have discovered the facts as well before the trial as after, had they been aware of their importance. * * * It seems clear in the case at bar that the plaintiffs' affidavit is, as a matter of law, insufficient to support an order granting a new trial on the ground of newly discovered evidence.

"While the granting or denial of a motion for a new trial upon the ground of newly discovered evidence is generally a matter within the discretion of the trial court, and such an order will be affirmed unless a clear abuse of discretion is shown, this rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion. Such is the situation in the case at bar. The affidavit of plaintiffs is so lacking in essential particulars that it afforded no basis for the exercise of the discretion of the trial court in granting the motion.

"* * * It does not appear from plaintiffs' affidavit that they made any effort whatever to obtain the evidence prior to the trial. If the evidence had been obtained and presented, the issues presented by the pleadings could have been finally determined without further delay or additional expense to the parties. It is a matter of public interest that there be an end to litigation and that a new trial should not be granted for the purpose of enabling a party to produce further evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial. Sec. 657, subd. 4, Code Civ. Proc. The affidavits supporting the motion must show that there has been no lack of diligence. [Citing cases.]"

The appeal before us is from an order granting a new trial as to defendant Roland Cummings, in whose favor a nonsuit had been granted. The nature of the action is portrayed in Hutchason v. Marks, Cal.App. 1942, 128 P.2d 573, where we declined to dismiss this appeal. The minute entry of the order recites that it was argued and granted upon the ground of newly discovered evidence. Respondent's brief claims no support of the order other than the newly discovered evidence and we may assume that there is none. The only support for the motion for a new trial was an affidavit made by the plaintiff, who, as the administrator of the estate of Virginia Hutchason, had been substituted in her stead upon her death. The affidavit is not lengthy; omitting the caption, the subscribing clause and the exhibit, it reads: "Arthur Hutchason being first duly sworn deposes and says: that he is the plaintiff in the above entitled matter; that since the trial thereof there has come to the knowledge of affiant new and important evidence for plaintiff, the existence of which was at the time of said trial, and before, wholly unknown to plaintiff.

"That said newly discovered evidence is not of a cumulative character and would produce a different result, upon another trial as to the judgment rendered herein granting a nonsuit in favor of defendant Roland Cummings; that said newly discovered evidence consists of the declaration of trust creating the so-called 'Morley Trust' under which defendant Arthur P. Morley acted as trustee for defendant Roland Cummings and others.

"That a copy of said declaration of trust is attached hereto as Exhibit A. (signed) Arthur Hutchason."

[1-3] Plaintiff's claim that this "newly discovered" evidence was "wholly unknown" to him, should have been supported by something more than his naked assertion on the subject, in view of the facts that in the opening paragraph of the first amended complaint the defendant Morley is alleged to be "trustee of that certain trust denominated 'Morley Trust'" and in paragraph VII of the same pleading reference is made to the Morley Trust, and to a document, annexed as an exhibit to the amended complaint, which appears to be signed by the "Morley Trust by B. W. Marks, Manager." But if we accept as binding upon appeal the statement that plaintiff did not know of the existence of a declaration of trust, without which a trust of whose existence he was well aware could not come into being, there still remains not even a feeble attempt to explain how the unknown became known, and no showing that if even a slight effort had been made it could not just as readily have become known before or during the trial, as afterwards. The exhibit attached to the complaint suggested that defendant Marks was manager of the trust. He was a witness at the trial, the last one on the stand before the motion for a nonsuit on behalf of defendant Roland Cummings was made and granted. No question was asked him about the creation of the trust. Plainly, unless the principle is to be abandoned that to merit a new trial on the ground of newly discovered evidence the moving party must show some effort to discover the evidence before and not after a judgment has been entered, the plaintiff's motion was so lacking in support that the trial court had no place upon which to stand in order to exercise its discretion.

The order appealed from is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

57 Cal.App.2d 145

CECIL, Director of Department of Agriculture, v. GALLO et al.

Civ. 6934.

District Court of Appeal, Third District, California.

Feb. 15, 1943.

1. Appeal and error ⚷103

No appeal lies from order striking portion of answer. Code Civ.Proc. § 963.

2. Appeal and error ⚷78(3)

Where clerk's transcript did not disclose that final judgment had been entered, appeal from order striking portions of answer would be dismissed. Code Civ.Proc. § 963.

◆

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge Assigned.

Action by W. J. Cecil, as Director of the Department of Agriculture, etc., against Ernest Gallo and others. From an order striking certain portions of the answer to the first-amended complaint, defendants appeal.

Appeal dismissed.

Edward T. Taylor, of Modesto, for appellants.

Earl Warren, Atty. Gen., Wm. T. Sweigert, Asst. Atty. Gen., W. R. Augustine, Deputy Atty. Gen., and Jefferson E. Peyser, of San Francisco, for respondent.

PER CURIAM.

Respondent brings this cause before us by way of motion to dismiss the appeal taken by appellants from an order striking out certain portions of defendants' answer to plaintiffs' first amended complaint. The clerk's transcript does not disclose that a final judgment has been entered.

[1, 2] On previous occasions this court has had before it similar questions. See Jordan v. Associated Discount Corp., 10 Cal.App.2d 96, 51 P.2d 1108, and Couch v. McGregor, 19 Cal.App.2d 633, 66 P.2d 159. We find nothing in the present case to take it out of the well established rule that no appeal lies from such order. Tedford v. San Diego Electric Ry. Corp., 79 Cal.App. 505, 249 P. 1093; § 963, Code Civ.Proc.

Respondent's motion is granted and the appeal is dismissed.

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57 Cal.App.2d 178

PHILPOTT v. ROBINSON et al.

Civ. 2993.

District Court of Appeal, Fourth District, California.

Feb. 16, 1943.

Appeal and error ⚷1152

In action to quiet title, where plaintiff, on two defendants' appeal from judgment quieting title in third defendant, conceded that plaintiff's trust deed, under which appellants were trustee and beneficiary, remained fully effective lien on realty involved, judgment need not be reversed for error in dismissing action as to appellants, since any doubt as to effect of judgment can be removed by modifying it without necessity of retrial. Code Civ.Proc. § 581.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action to quiet title by Margaret Philpott against Beatrice Friedman, W. L. Pollard and Anna M. Glass. From a judgment quieting title in defendant Friedman and enjoining plaintiff and all persons claiming under her from asserting any interest in or lien on realty involved, defendants Pollard and Glass appealed, after which, on the death of defendant Glass, Theresa Robinson, as executrix of deceased's will, was substituted for deceased as appellant.

Judgment modified and affirmed as modified.

W. L. Pollard, of Los Angeles, in pro. per., and H. E. Gleason, of Los Angeles, for appellants.

Jesse Lee Grantham, John M. Coudures, and Alva D. McGuire, all of Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title. The defendant Friedman filed an answer asserting an interest in the property adverse and superior to that of the plaintiff. W. L. Pollard and Anna M. Glass, who were served as John Doe One and Jane Doe One, respectively, filed answers in which it was alleged that Pollard was trustee and Anna M. Glass was beneficiary under a deed of trust covering the property in question which was executed by the plaintiff and on which $1,120, with certain interest, remained unpaid. Each of these answers prayed that the rights of these defendants should be protected, and that any decree awarding title should be made subject to the unpaid balance on this trust deed.

At the trial of the action, over the objection of the defendants W. L. Pollard and Anna M. Glass, the court granted the plaintiff's motion to dismiss the action as to those defendants and the other fictitious defendants. In accordance with a stipulation between the plaintiff and the defendant Friedman, a judgment was entered quieting title to the property in the defendant Friedman and enjoining the plaintiff and all persons claiming under her from asserting any interest in or claiming any lien upon the real property or any part thereof. From this judgment the defendants Pollard and Glass have appealed.

The appellants contend that that portion of the judgment which enjoins all persons claiming under the plaintiff from asserting any rights in or lien upon said real property adversely affects their rights under the trust deed and divests them of these rights without their having had any opportunity to be heard. It is further argued that the trial court had no right to dismiss the case as to these defendants, over their objection, since they asked for affirmative relief. This contention has considerable merit. § 581, Code Civ.Proc.; Calhoma Oil Corp. v. Conniff, 207 Cal. 648, 279 P. 771; Swanson v. Siem, 7 Cal.2d 267, 60 P.2d 281.

On the other hand, the respondent expressly concedes that this trust deed is still as fully effective as if this action had never been instituted, and argues that the result achieved by the judgment is exactly the same as it would have been had the action not been dismissed as to the appellants. While the trial court erred in dismissing the action as to these appellants the respondent's concession makes it unnecessary to reverse the judgment. Any doubt or uncertainty as to the effect of the judgment can be cleared up by amending and modifying the judgment without the necessity of a retrial of the action.

A portion of the second paragraph of the judgment is amended and modified by inserting therein an exception so that as modified the same shall read: "that the claim of plaintiff Margaret Philpott, and all who claim title under her in and to said real property, with the exception of W. L. Pollard and Theresa Robinson, as executrix of the Last Will and Testament of Anna M. Glass, Deceased, are without right whatever, and that said plaintiff has no right, title, interest, claim or estate whatsoever in or upon said real property, or any part thereof, and said plaintiff, and all persons claiming under her, except W. L. Pollard and Theresa Robinson, as such executrix, are hereby enjoined and debarred from claiming or asserting any estate, right, title, interest in, or claim or lien upon said real property, or any part thereof." As so modified, the judgment is affirmed, the appellants, however, to recover their costs.

MARKS and GRIFFIN, JJ., concurred.

57 Cal.App.2d 307

COHAN et al. v. BRODIE et al.

Civ. 13935.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1943.

Hearing Denied April 22, 1943.

1. Appeal and error 🔑1002

Reviewing court will not weigh conflicting testimony and may not disturb findings of fact of jury if such findings are supported by substantial evidence.

2. Appeal and error 🔑930(1)

In determining whether jury's findings are supported by the evidence, reviewing court must consider the evidence in the light most favorable to respondents.

3. Automobiles 🔑244(42)

Testimony that plaintiffs' automobile was being negligently driven in center lane of three-lane highway at excessive rate of speed when it collided head-on with defendant's automobile, although such testimony was sharply contradicted by plaintiffs' evidence, supported verdict for defendant.

4. Appeal and error 🔑1069(3)

Where court in response to jury's request made after some deliberation for a repetition of instruction as to verdict to be rendered in case of a finding of contributory negligence stated that contributory negligence makes it impossible for a plaintiff to win a verdict, failure to add that such negligence must proximately contribute to injuries was not prejudicial to plaintiffs, where subject was fully covered in general instructions.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge pro tem.

Action by Ione Elizabeth Cohan and another against Jean McKee Brodie and another for damages resulting from an automobile collision, which action was consolidated with a separate action by Jean McKee Brodie against Ione Elizabeth Cohan and others for damages resulting from the same collision. Trial of the actions resulted in verdicts in favor of defendants in both cases, and from the adverse judgment in the first action, Ione Elizabeth Cohan and another appeal.

Judgment affirmed.

Kenneth J. Murphy and Louise Mason, both of Los Angeles, for appellants.

Joseph A. Ball, of Long Beach, and C. F. Jorz, of Los Angeles, for respondents.

W. J. WOOD, Justice.

The litigation in which the present appeal is being prosecuted resulted from an automobile accident which occurred in the evening of August 15, 1941, on Lakewood Boulevard near Long Beach. At that time R. E. Lawrence was driving a Dodge automobile south on Lakewood Boulevard and Jean Brodie was driving a De Soto car a short distance behind the Dodge and in the same direction. Mrs. Byrtle Burrow was driving a Pontiac car on Lakewood Boulevard in a northerly direction and a short distance behind her and travelling in the same direction Ione Elizabeth Cohan was driving a Packard car owned by her husband, Albert Cohan. At the point of the accident Lakewood Boulevard is a paved highway 30 feet in width, divided into three 10-foot lanes. On the east side of the boulevard there is a 10-foot shoulder and on the west side of the boulevard there is a 20-foot shoulder. The Brodie car collided with the Cohan car but the witnesses are not in agreement as to the point on the highway at which the collision occurred. Mr. and Mrs. Cohan filed an action for damages, naming Mrs. Brodie and Mr. Lawrence as defendants. Mrs. Brodie filed a separate action in the Long Beach Department of the superior court, naming Mr. and Mrs. Cohan and Mr. Lawrence as defendants. The two actions were consolidated for trial, resulting in verdicts in favor of the defendants in both cases. Mr. and Mrs. Cohan are prosecuting the present appeal from the judgment entered against them in the case which they instituted as plaintiffs.

Appellants contend that the verdict is without substantial evidentiary support and that the evidence shows conclusively that the negligence of respondent Brodie was the sole proximate cause of their injuries. Among the witnesses upon whose testimony appellants rely is Mrs. Burrow, the driver of the car preceding their own car. Mrs. Burrow testified that the Brodie car suddenly turned into the middle lane, struck the left fender of her own car and went on and struck the Packard car which was behind her. At that time her own car was in the right hand lane. Mr. and Mrs. Cohan, who were returning from their honeymoon trip, testified that they were travelling at about 25 or 30 miles per hour in the right hand lane; that when the Brodie car was about 150 feet away, travelling at about 60 miles per hour, it "swung in toward the center lane" and struck the Cohan car broadside. But the occupants of the Cohan and Burrow cars were not the only witnesses to testify and a very different version of the circumstances of the accident is presented by the testimony of the occupants of the other two cars. Mrs. Brodie testified that it was raining and the highway was slippery; that she was driving south on the highway at a speed of approximately 25 miles per hour; that the car ahead of her driven by Mr. Lawrence came to a sudden stop; that in order to avoid striking the Lawrence car she applied her brakes and turned into the center lane; that at that time she saw the Cohan car travelling toward her in the center lane at a speed of approximately 40 to 45 miles per hour; that the driver of the Cohan car was not looking at the road but was looking at, or kissing, her companion. Mr. Lawrence, although he denied that he stopped his car, testified that he observed the Cohan car about 200 feet in front of him, that it "pulled into the center lane" to pass the car ahead and that it was travelling at a speed of from 40 to 45 miles per hour.

[1-3] No rule is more thoroughly established than the rule that a reviewing court will not weigh conflicting testimony. We may not disturb the findings of fact of the jury if they are supported by substantial evidence. The jury could draw reasonable inferences from the evidence presented to them and base its findings thereon. In determining whether the findings are supported by the evidence we must consider the evidence in the light most favorable to respondents. By crediting the testimony of Mrs. Brodie the jury could reasonably find that Mrs. Cohan negligently drove in the center lane at an excessive rate of speed. We are satisfied that the implied findings of the jury which were favorable to respondents are amply supported by the evidence.

[4] We find no merit in the contention of appellants that they were prejudiced by the refusal of the trial court to reread an instruction requested by the jury. After the jury had retired to deliberate they returned to the court and the foreman, Mr. Stilgenbaur, stated that there was "confusion among certain members of the jury as to the finding of the jury, which they think is the proper one to be filed." There was some discussion by the court and the foreman in which reference was made to the fact that there were two consolidated cases. The record discloses: "Mr. Stilgenbaur: Will the court please reread that portion of the instructions which deals with the verdict which shall be rendered by the jury, in case the jury feels that there is contributory negligence, that portion of the instructions? The Court: The instruction that I can read to you, but in any case if you have found that a plaintiff is contributorily negligent, that plaintiff cannot win a verdict. Contributory negligence makes it impossible for a plaintiff to win a verdict. Does that answer it or do you want the instruction read? Mr. Stilgenbaur: It answers it as far as I am concerned." There was further discussion by the court and some of the jurors. We quote from the record the following which occurred immediately before the jury retired to resume deliberations: "The Foreman: I would like to know whether each one of them understand it. The Court: If there is anything further you want to clarify, now is the time to ask me, any of you. All right. You may go back again and take ballots just as quickly as you reasonably can and see if you can reach a conclusion." From the record before us it is apparent that the jury wished to have reread that portion of the instructions "which deals with the verdict * * * in case * * * there is contributory negligence." It is to be noted that none of the jurors asked the court to reread the instruction which defined contributory negligence. Obviously, the jury was seeking information as to the proper verdict to be rendered in case of a finding that there was in fact contributory negligence. The court answered the request of the foreman by plainly stating that contributory negligence makes it impossible for a plaintiff to win a verdict. In doing so the court did not misstate the law. Appellants contend that in answering the question of the foreman the court should have added the element of proximate cause and should have informed the jury that contributory negligence which proximately contributed to the injury would prevent a verdict in favor of a plaintiff. The court had in its general instructions to the jury fully and fairly defined contributory negligence and had given the jury ample instructions on the subject. It was not necessary for the court to include all of the elements of contributory negligence in answering the question of the foreman. If the court had misdirected the jury we would have a different problem but in this instance the court did not misdirect the jury. The most that can be said in favor of appellants' contention is that in the court's answer to the foreman's request a single element of the doctrine of contributory negligence was omitted. This element was clearly given in another instruction. The omission, if it can be called such, was unquestionably cured by the general instruction on the subject which had been given to the jury. Miner v. Dabney-Johnson Oil Corp., 219 Cal. 580, 28 P.2d 23.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

57 Cal.App.2d 115

HUMBOLDT COUNTY v. KAY et al.

Civ. 6882.

District Court of Appeal, Third District, California.

Feb. 11, 1943.

Hearing Denied April 8, 1943.

1. Appeal and error ⊂⇒102

Order sustaining demurrer to cross-complaint was not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Appeal and error ⊂⇒103

Order striking out cross-complaint was an "appealable order".

3. Appeal and error ⊂⇒78(3)

Order which provided that motion to strike cross-complaint was granted, and which was signed by the court and filed, was a "final order", from which an appeal would lie.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

4. Pleading ⊂⇒354(2)

Where alleged defect in cross-complaint was curable by amendment, trial court was not justified in striking out the cross-complaint.

5. Appeal and error ⊂⇒1079

Respondents could not expect District Court of Appeal to give any greater weight to point than they themselves gave to it in their briefs, or to determine a question only incidentally raised by them, and which they apparently did not consider of sufficient consequence to justify more than passing consideration.

6. Counties ⊂⇒98(3)

The fact that surety on bond of county clerk took no steps under statute to be relieved of liability on the bond did not render it liable for alleged conversions by the county clerk after the filing of a new bond by county clerk with new sureties, if the new bond was valid. Pol.Code, § 972.

7. Officers ⊂⇒128

A surety, in order to procure its release, need not take action both under statute providing for securing release from liability on bond with consent and cooperation of public official for whom bond was given, and under statutes dealing with release by compulsion. Pol.Code, §§ 970, 972–975.

8. Pleading ⊂⇒149

In action by county against county clerk and sureties to recover for alleged conversion by county clerk of county's money, cross-complaint of one of sureties which sought recovery over against other sureties sought "affirmative relief" with relation to contracts sued on by county within meaning of statute and was authorized. Code Civ.Proc. § 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Relief".

9. Pleading ⊂⇒147

The purpose for allowing cross-complaints is to have a complete determination of a controversy among the parties in one action, thus avoiding circuity of action. Code Civ.Proc. § 442.

10. Pleading ⊂⇒147

Right to proceed by way of cross-complaint depends on whether matter set up therein bears a necessary relation to the matter constituting the cause of action, and, if such relation be present, it is immaterial that the relief sought is independent of that prayed for in the complaint. Code Civ. Proc. § 442.

11. Pleading ⊂⇒147

A "cross-complaint" need not tend to diminish plaintiff's recovery but may demand affirmative relief distinct from that demanded by the complaint. Code Civ. Proc. § 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Complaint".

12. Statutes ⊂⇒243

The statute relating to cross-complaints should be given a liberal interpretation. Code Civ.Proc. § 442.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by the County of Humboldt against Fred M. Kay and others, the Maryland Casualty Company, and John N. Chain, M. D., and others to recover for the alleged conversion by Fred M. Kay while county clerk of Humboldt County of moneys allegedly belonging to the county, wherein the Maryland Casualty Company filed a cross-complaint. The court sustained a demurrer, both general and special, to the cross-complaint, and granted motion to strike the cross-complaint, and the Maryland Casualty Company appeals.

Order striking cross-complaint reversed.

Treadwell & Laughlin, of San Francisco, H. L. Ricks, of Eureka, and Russell E. Barnes, of San Francisco, for appellant.

Delos A. Mace, of Eureka, for respondents.

ADAMS, Presiding Justice.

Appeal from an order sustaining a demurrer to a cross-complaint and granting a motion to strike out said cross-complaint.

Plaintiff's amended complaint alleged that defendant Kay, the county clerk of plaintiff county, had converted to his own use certain moneys belonging to the county; that prior to said conversion and on October 11, 1934, Kay, as principal, and defendant Maryland Casualty Company, as surety, had made, executed and delivered a bond conditioned for the faithful performance by said Kay of all of the duties of his office as county clerk; also that prior to said conversion and on January 28, 1936, Kay, as principal, and certain named individual defendants to the action, as sureties, had made, executed and delivered to plaintiff county a bond conditioned for the faithful performance by said Kay of all of the duties of his office as county clerk. Copies of both bonds were attached to said amended complaint and incorporated therein by reference, and it was further alleged that while said bonds were in full force and effect Kay had effected the conversion aforesaid. It was further alleged that plaintiff was unable to determine from which of said defendants it was entitled to redress, and for that reason, pursuant to order of court, it had joined the defendant Maryland Casualty Company in its amended complaint, with the intent that the question as to which of defendants was liable, and to what extent, might be determined between the parties. Judgment was prayed against said defendants and each of them.

Defendant Maryland Casualty Company filed an answer in which it denied that its bond was in force or effect during the period when the alleged defalcations took place, denied such defalcations for lack of information or belief, and set up as a special defense, that, wishing to be discharged from liability it and Kay had procured its discharge as surety, and Kay had executed the new bond on January 28, 1936; that said bond had been approved by the judge of the superior court, recorded in the records of the county, and filed in the office of the county treasurer; and that by reason thereof all of the liability of Maryland Casualty Company had ceased prior to any defalcations by defendant Kay. Further answering and by way of cross-complaint against the defendants who were the sureties on the bond of January 28, 1936, the casualty company alleged the giving of its bond on October 11, 1934, but further alleged that on January 28, 1936, it wished to be discharged from liability and that cross-defendants orally agreed with it, for a valuable consideration, to assume the liability of the casualty company thereafter accruing, and thereupon, on January 28, 1936, executed the bond attached to the complaint. This cross-complaint further alleged that a dispute had now arisen between the casualty company and the cross-defendants, that said cross-defendants denied their obligation under said bond and their obligation and agreement to assume and pay any liability accruing against the casualty company under its bond after the 29th day of January, 1936, and that an actual controversy existed between said parties with respect to their several liabilities under said bond and under said agreement; that said cross-defendants at all times well knew that the casualty company relied on its agreement with said cross-defendants, and knew that after January 29, 1936, it never collected any premiums upon the bond given by it; also that they well knew that said casualty company never took any further or other proceedings to be relieved from its liability under said bond, by reason of its reliance upon their agreement and their liability under their said bond; and if said agreement had not been made and if said cross-defendants had not executed said bond cross-complainant would have taken other proceedings to be relieved from its liability under said bond; and that in the meantime the said official (county clerk) had become insolvent and unable to discharge his obligations to the county or his obligation to pay premiums on said bond, and that by reason of the premises the cross-defendants were estopped to deny their liability under the bond executed by them.

The prayer of the answer and cross-complaint was that plaintiff take nothing;

that it be adjudged that cross-defendants were bound to assume and pay any obligation of the county clerk to the county; "that it be adjudged that if, for any reason, this defendant is required to discharge any part of said obligation it is entitled to recover the amount paid from said cross-defendants."

A demurrer, both general and special, was interposed by cross-defendants, who also filed notice of motion to strike the cross-complaint on the ground that it is not a cross-complaint authorized by law, and is irrelevant and redundant. Thereafter the court sustained the demurrer and granted the motion to strike, whereupon cross-complainant filed this appeal.

[1, 2] It is contended by respondents (cross-defendants) that the orders appealed from are not appealable. Insofar as the order sustaining the demurrer is concerned, this is true. Jordan v. Associated Discount Corp., Ltd., 10 Cal.App.2d 96, 51 P.2d 1108; Scott v. Security Title Ins. & Guarantee Co., 9 Cal.2d 606, 72 P.2d 143, 117 A.L.R. 1049. As to the order striking out the cross-complaint the decision in Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39, seems to be controlling. While in Yandell v. City of Los Angeles, 214 Cal. 234, 4 P.2d 947, it was held that the order striking out the cross-complaint filed in that action was not a final judgment subject to appeal, the court said, 214 Cal. at pages 235, 236, 4 P.2d at page 947:

"Defendant relies mainly upon Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39, where an appeal from an order striking out a cross-complaint was permitted. In that case, however, the cross-complaint was filed by several *defendants* against *other defendants,* and the parties in the cross-action were, of course, not identical with those in the main action. The court held that, as to the cross-complaining defendants, the order was a final determination of their cause of action against the other defendants, and that it was severable from the judgment in the main action. In the instant case we have no such situation. Where the parties to both actions are the same, it cannot be said that such an order is a complete determination of the cause." (Italics by the court.)

[3] Assuming, then, that the order striking out the cross-complaint in the present action is an appealable order, we are presented with the question whether the trial court in striking it out committed reversible error. Respondents contend that no order was entered pursuant to the court's ruling on the motion to strike, and for that reason this appeal is not permissible. There is no merit in this contention. The order of the court was: "The motion to strike * * * is hereby granted." Said order was signed by the court and filed. 18 Cal. Jur. 663, 664. It is plain that it was intended to be and was a final order.

The next question is whether the facts alleged in the cross-complaint constitute a cause of action proper to be set up as a cross-complaint. Respondents urge that the cross-complaint was properly stricken out because it does not state a cause of action for the reasons that (1) it attempts to incorporate the two bonds by reference to the exhibits attached to the complaint; (2) it relies upon an *oral* agreement of cross-defendants to assume the liability of the Casualty Company and such an agreement cannot rest in parol; (3) cross-complainant did not take steps to be relieved of liability on its bond under the provisions of section 972 of the Political Code; and (4) the cross-complaint is improper because all of the issues in the cross-action can be determined under the pleadings in the main suit.

[4] Without deciding whether or not the cross-complaint is sufficient in its allegations regarding the bonds, it is enough to say that if insufficient the defect is one curable by amendment, and did not justify the striking out of the cross-complaint. Furthermore the motion to strike was not based upon the insufficiency of the cross-complaint in this behalf, but upon the ground that it "is not a cross-complaint authorized by law, and contains, in its entirety, irrelevant and redundant matter," and we assume that the order striking it was based upon the same ground.

[5] As to the second contention, that the agreement of cross-defendants to assume the liability of cross-complainant after January 28, 1936, being an oral agreement, is within the statute of frauds, it does not appear that this objection was raised in the trial court, nor are we cited to any authority except a quotation from Stratton v. Hill, 134 Mass. 27, which is not helpful in view of the provisions of section 1973 (2) of the Code of Civil Procedure and section 2794 of the Civil Code of California. The cross-complaint alleges that the said oral agreement was for a valuable consideration, which would appear

to bring into play the provision of section 2794 (4), *supra,* that a promise to answer for the obligation of another is deemed an original obligation and need not be in writing where the promise is upon a consideration beneficial to the promisor. Respondents cannot expect this court to give any greater weight to this point than they themselves give to it in their briefs, or to determine a question only incidentally raised by them and which they apparently did not consider of sufficient consequence to justify more than passing consideration.

[6, 7] As to the point made by respondents that cross-complainant did not take steps under section 972 of the Political Code, to be relieved of liability on its bond, the cross-complaint alleges the filing of a new bond by Kay, which action, assuming the validity of the new bond, relieved the Casualty Company of liability thereafter accruing on its bond. It is not necessary for a surety, in order to procure its release, to take action under both section 970 and sections 972–975, supra, the former evidently providing for securing release with the consent and cooperation of the public official for whom a bond is given, and the latter by compulsion. Obviously where an official voluntarily gives a new bond, it is unnecessary to take steps to compel him to do so.

[8] The final question presented is whether the cross-complaint alleges matters proper to be set up by way of cross-complaint. Section 442 of the Code of Civil Procedure provides that whenever a defendant seeks affirmative relief against any party relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, he may, in addition to his answer, file at the same time, a cross-complaint. The cross-complaint in this action seeks affirmative relief, for it asks that if it be adjudged for any reason that cross-complainant must discharge any part of the obligation of the county clerk for which plaintiff is suing, it may be adjudged that cross-complainant is entitled to recover from cross-defendants, under their agreement with cross-complainant, the amount which it is required to pay to the county. It relates to the contracts sued upon by plaintiff, and the transaction and transactions upon which the complaint is based.

[9] The fundamental reason for allowing cross-complaints is to have a complete determination of a controversy among the parties in the one action, thus avoiding circuity of action.

[10-12] The opinion in Eastin v. Roberts, Carpenter & Co., 19 Cal.App.2d 567, 570, 66 P.2d 224, 225, states: "It has been said that the right to proceed by way of cross-complaint depends upon whether the matter set up therein bears a necessary relation to the matter constituting the cause of action, and, if such relation be present, it is immaterial that the relief sought is independent of that prayed for in the complaint; that the cross-complaint need not tend to diminish the plaintiff's recovery but may demand affirmative relief distinct from that demanded by the complaint. Hanes v. Coffee, 212 Cal. 777, 300 P. 963; California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297. By virtue of an enforceable promise to the debtor to pay his debt, the promisor becomes as between the parties the true debtor, while the promisee occupies the relation of surety, and the creditor may enforce the original obligation against either or both. Civ.Code, §§ 1559, 2854; Kreling v. Kreling, 118 Cal. 413, 50 P. 546. These relations are most frequently illustrated in cases which involve the assumption of mortgages. In this connection it has been said that, in order to avoid circuity of action and protect the mortgagor as the intermediate party from being compelled to pay the debt, and then to proceed for redress against the mortgagee who has assumed the mortgage debt, equity permits the mortgagee to bring all parties who are liable before the court and have their rights adjusted in a single suit. Hopkins v. Warner, 109 Cal. 133, 41 P. 868." Also, see Thorpe v. Story, 10 Cal.2d 104, 134, 135, 73 P.2d 1194; Martin v. Hall, 219 Cal. 334, 337, 26 P.2d 288. We note that in Thorpe v. Story, supra, the cross-complaint therein filed asked, among other things, a declaration of the rights and liabilities of the parties. A broad and liberal interpretation of section 442 of the Code of Civil Procedure was there approved.

Respondents assert that the trial court will be able to make a complete determination of the matters alleged in the cross-complaint in the present action, on the trial of the main issue; but obviously if the court should find for some reason that the individual sureties are not liable on their bond, and that liability attaches under the bond of cross-complainant, no issue of liability of the cross-defendants to cross-complainant under their alleged oral agreement could be determined under the pleading in the main action, but a separate action would be necessary. The cross-complaint is relied upon to obviate such necessity, and to secure a declaration of the rights of the parties to the alleged oral agreement in the one action.

The order striking the cross-complaint is reversed.

THOMPSON, J., and SCHOTTKY, J. pro tem., concurred.

57 Cal.App.2d 153

PEOPLE v. BUCCHIERRE et al.

Cr. 2244.

District Court of Appeal, First District,

Division 1, California.

Feb. 16, 1943.

Hearing Denied March 15, 1943.

1. Criminal law 🔑1171(1)

In prosecution for criminal conspiracy, conduct of district attorney in disclosing that a defendant and others had criminal records did not require reversal in view of fact that jury knew of the defendant's record and trial court clearly indicated to jury that evidence relative to criminal records of the others was not pertinent to the issue and instructed jury to disregard such evidence. Pen.Code, § 182.

2. Conspiracy 🔑48

In prosecution for conspiracy to violate the Employment Agency Act, where there was no evidence that either defendant was unaware that license was necessary, the people were entitled to have the jury determine from all the circumstances whether defendants realized that they were engaged in the commission of substantive offense. Pen.Code, § 182; St.1937, p. 230 et seq., and p. 232, § 1550 et seq., and § 1581.

3. Conspiracy 🔑48

In prosecution for conspiracy to violate the Employment Agency Act, whether there was an agreement between the defendants to commit a conspiracy was for the jury. Pen.Code, § 182; St.1937, p. 230 et seq., and p. 232, § 1550 et seq., and § 1581.

4. Conspiracy 🔑47

An unlawful conspiracy need not be proven by direct evidence.

5. Conspiracy 🔑23

The association of persons with an honest intent is not "conspiracy" and one of the tests on a conspiracy trial is whether the accused acted in ignorance without criminal intent.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

6. Criminal law 🔑823(5)

In prosecution for conspiracy to violate the Employment Agency Act, absence from instruction of statement that there must be a corrupt motive or intent did not require reversal where the defect was cured by other instructions. Pen.Code, § 182; St.1937, p. 230 et seq., and p. 232, § 1550 et seq., and § 1581.

7. Criminal law 🔑824(1)

Where court fairly charges the jury on matters pertaining to essential issues but fails to give some specific instruction that may be of advantage to one side, such failure, in absence of a request for specific instruction, is not ordinarily prejudicial error.

8. Criminal law 🔑93

A conspiracy to violate the Employment Agency Act by conducting an employment agency without securing a license is punishable under second penal paragraph of statute describing particular types of activities the conspiracy to do which constitutes criminal conspiracy, and therefore the superior court had jurisdiction of such offense. Pen.Code, §§ 182, 435; St.1937, pp. 232, 234, 240, §§ 1581, 1583, 1584, 1596, 1648.

9. Statutes 🔑231

The words "as in this code provided", as used in Penal Code, section 182, providing that conspirators who commit any felony shall be punished in the same manner and to the same extent as in this code provided for punishment of commission of the felony, refer to the Penal Code and not to the recodification. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "As in This Code Provided".

10. Constitutional law ⚷70(1)

Any change in provisions of statute providing punishment for criminal conspiracy is strictly a "legislative function". Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Legislative Function".

11. Statutes ⚷212

The legislature is presumed to have enacted the Employment Agency Act in view of existing laws and decisions. Labor Code, § 1550 et seq., St.1937, p. 230 et seq.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Louis Bucchierre and others were convicted of conspiracy to violate the Employment Agency Act, and they appeal.

Affirmed.

John B. Ehlen, of San Francisco, for appellants.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WARD, Justice.

Appeal from a judgment of conviction in a prosecution for conspiracy as defined in Penal Code, section 182, the object of the conspiracy being to violate the Employment Agency Act, Labor Code, § 1550 et seq., St.1937, p. 230 et seq. The indictment contains the usual allegations of knowledge, confederation, agreement, etc., and then sets forth that in violation of section 1581 of the Labor Code, St.1937, p. 232, the accused operated and conducted an employment agency without procuring a license therefor from the Labor Commissioner.

The first of four alleged overt acts is a fair sample of the asserted scheme or plan of operation. It is set forth in the indictment as follows: "And in pursuance of such conspiracy and to effect the object and purposes thereof, and between the 1st day of July 1941, and the 13th day of January 1942, to-wit: on or about the 15th day of July 1941, at the said City and County of San Francisco, State of California, defendant, Louis Bucchierre, proposed to one, Theodore Friend, that he and other persons could arrange to have said Theodore Friend accepted as a member of the Ship Painters Union, Local 961, and could thereafter obtain employment for him as a ship-painter in one of the various shipyards in or about the City and County of San Francisco, State of California in consideration of a fee or charge, in the sum of One Hundred and Eighty Five Dollars in lawful money of the United States of America which said One Hundred and Eighty Five Dollars was to be paid in installments of Twenty Five Dollars per week; that thereafter, towit: on or about 1st day of August 1941, the defendants, Louis Bucchierre and Joseph P. Cato, and each of them, did in fact arrange and obtain membership in the Ship-Painters Union, Local 961, for the said Theodore Friend, and thereafter, and on or about the 8th day of August 1941, the said defendants, and each of them, and divers other persons, whose names and numbers are to this Grand Jury now unknown, did obtain for said Theodore Friend, employment as a ship-painter at the Bethlehem Shipbuilding Company in the said City and County of San Francisco, State of California, and that therefor and in consideration of the services performed by said defendants and each of them, and by divers other persons whose names and numbers are to this Grand Jury now unknown, the said Theodore Friend, paid to the said defendants, and each of them, the total sum of One Hundred and Eighty Five Dollars in lawful money of the United States of America."

Appellant Cato and one Harry C. Vale were shop stewards at a local shipyard, and served upon the examining board of a local ship painters' union. Vale was appointed also to act as sergeant at arms for the union upon discovery that the delegated sergeant at arms was not a citizen. The duties of the examining board are to see that applications for membership are properly filled out and that the applicants have paid their initation fees and dues. It is their further duty, after ascertaining the experience and ability of applicants as painters, to pass upon their eligibility, and in many instances they act as sponsors for them. When an applicant is dispatched for work he reports to the personnel department of the shipyard; "he goes through the formality—they take his picture and his pertinent data regarding the fact of whether or not he is a citizen, and so forth, and then surrenders one of those slips to the shipyards, and they keep that as part of their permanent record. When he goes onto the actual job he meets the shop steward * * * who is the focal point of the men on the job. If there is anything in the way of disturbances, the man himself usually does not take it up with his leader man or foreman; he calls the attention of the shop steward to the situation and asks he do something about it."

Appellant Bucchierre is not a member of the painters' union, but is in fact employed as janitor in an office building. There is testimony that from time to time he informed men desiring work in the shipyards that he could get them accepted as members of the painters' union (membership in a labor union being a prerequisite to obtaining employment), and secure jobs for them upon the payment of an initiation fee to the union of $50 and dues at the rate of $2.05 a month. In addition, an amount represented as the cost of obtaining the job was charged, which amount varied somewhat in different instances, and was sometimes increased during the negotiations, sometimes following conversations between appellants in the presence of the applicant but in the Italian language which he did not understand. No receipts were given by Bucchierre for payments so made to him. In one instance a request for a receipt was refused by Bucchierre with the explanation that he gave none for the reason that he had to share the money with someone else.

Among the men so contacted by Bucchierre was one Bernzott who testified relative to a conversation held by him with Bucchierre at the latter's apartment:

"A. At that time we were talking about working, and Bucchierre asked me if I could paint, and I said 'very little.'

"Q. You said very little? A. Yes. So he asked me if I would like to get on at the Bethlehem Steel.

"Q. What did you say? A. I said I didn't think I could make it; I didn't have the experience.

"Q. I see. What did he say? A. He said he could arrange to get me in the union, and I would be able to get in.

"Q. What did you say? A. I said I would think it over.

"Q. Was there anything said at that time of the expenses of getting into the union or getting into the shipyards? A. Yes, I inquired about that, and he said it would cost $150.00 plus $52.00 for initiation fee. * * *

"Q. What did you say when Bucchierre told you that? A. I told him I would think it over.

"Q. What did Bucchierre say? A. Bucchierre told me to come back again later.

"Q. Did you return again to see him? A. I did, sir.

"Q. Did you have any further conversation about going into the union and going into the shipyards? A. As far as I remember, I told Louis I would like to try to get in then. * * *

"Q. Did you say anything to him about whether or not you had the money to put up for the initiation fee? A. He mentioned it would cost $50.00, that I would have to pay when I went over for initiation. I said I didn't have it. * * *

"Q. What did he say? A. He mentioned that he would loan me the $52.00 * * *.

"Q. Directing your attention to the night of September 23rd, I will ask you whether or not you were initiated into the union that night as indicated here on your application * * * September 23rd, 1941? A. I believe so, sir.

"Q. Where were you initiated? A. On 14th and Guerrero.

"Q. On 14th and Guerrero. The Building Trades Temple? A. Yes.

"Q. With whom did you go over to the Building Trades Temple that night? A. With Mr. Bucchierre.

"Q. Where did you meet Mr. Bucchierre that night? A. In his apartment.

"Q. On Golden Gate Avenue? A. Yes, sir.

"Q. How did you go from his apartment on Golden Gate Avenue to 14th and Guerrero? A. We walked over, sir. * * *

"Q. Arriving there, did Mr. Bucchierre put you in touch with any member of the union, or introduce you to any people? A. He introduced me to several fellows there.

"Q. Were you initiated? A. Yes, sir.

"Q. Did Mr. Bucchierre ever give you the $52.00 in your hand? A. No, sir.

"Q. When you were initiated, did it come to your knowledge that your initiation fee and two dollars dues had been paid? A. Yes, sir.

"Q. You had not paid those yourself? * * * A. No, sir.

"Q. They must have been paid by somebody else because you didn't pay them? A. Evidently.

"Q. Directing your attention, then, to November 6th, 1941, I will ask you whether or not you were given a job or dispatched to a job at the Bethlehem Shipbuilding Company at that time? A. Yes, November 6th.

"Q. Prior to November 6th, 1941, or about that time, who was it that notified you that there was a job for you at the Bethlehem Shipbuilding Company? A. I received a phone call * * * I was not at home, but I was informed by my landlord that Louis Bucchierre had rung up to tell me to come down, that he had some news for me about a job.

"Q. Did you go and see Louis Bucchierre as a result of receiving that information? A. Yes, sir.

"Q. What, if anything, did Louis Bucchierre say to you on that occasion about a job? A. He told me that I would go to work the next day, the 6th, and to report down to the union office.

"Q. Report at the union office. Did you report there on the 6th? A. Yes, I did.

"Q. November 6th? A. Yes.

"Q. Were you given this dispatching sheet, a couple of other sheets to take to the Union Iron Works? A. Yes.

"Q. You went to work and worked there ever since? A. Yes.

"Q. Did Bucchierre ever talk to you about how that $150.00 that it would cost you for the job, and $52.00 he loaned you for initiation fees and dues had to be paid back? A. $25.00 a week.

"Q. He told you $25.00 a week? A. Yes.

"Q. Directing your attention to the week following your employment at the Bethlehem Shipyards, did you go to Bucchierre and make your first payment of $25.00? * * * A. After my first week's work, yes, sir.

"Q. I will ask you at that time whether or not there was any request by you for a receipt for the $25.00 that you paid? A. Yes, sir.

"Q. What did Bucchierre say when you asked him for a receipt for the $25.00? A. He doesn't give a receipt.

"Q. Did he make a suggestion to you as to how to keep track of the money you paid? A. Yes, on the stub of each check we receive.

"Q. He told you to keep track of it on the stub of your own checks that you received? A. Yes, sir.

"Q. At that time, fixing the date as November 15th, 1941, I will ask you whether or not there was any demand made of you by Louis Bucchierre to give him a promissory note or a memorandum of the balance you owed him after paying the $25.00? A. Yes, there was.

"Q. Did you as a result of that demand write out any wording, memoranda or acknowledgment of the indebtedness? A. Yes, I did.

"Q. Who dictated that? A. Louis did himself.

"Q. I show you here a note or a memorandum, and ask you—can you recognize that and tell us whose handwriting it is? A. Yes, that is my own handwriting.

"Q. Is that the thing that you wrote at Louis Bucchierre's dictation on the night of November 15th, 1941? A. Yes, sir, that is right, sir.

"Q. That is the occasion of you giving the $25.00 payment. A. Yes, sir.

"Q. And it acknowledged a balance of indebtedness to him from you, is that right? A. That is right."

All of the witnesses told in substance the same story as to plan and design. One, apparently quite friendly to Bucchierre, after having testified that he paid $185 for the job, stated that "It was a loan of $50.00 with interest * * * and $130 besides that." There was further testimony that if on account of illness, or for other reason, the repayment of the loans by Bucchierre was delayed, he became very angry and asked the borrowers whether they would prefer to go back to W. P. A. One witness at a morning session gave testimony favorable to Bucchierre, but at his father's request returned to the witness stand in the afternoon and told an entirely different story, testifying that what he had said in the morning was upon Bucchierre's solicitation.

The financial secretary and assistant business agent for the union testified that at one time Bucchierre came to the union office and, stating that he had loaned certain men money to join the union, demanded to know why they had not been put to work. He "made a comment like this" to the financial secretary's predecessor there present: "What kind of a game are you playing?" This witness further testified that at one time, because of weather conditions and because of the abundance of skilled men available, he had recommended to the union that no new applications to membership be accepted, which recommendation the union adopted; that subsequently when applications already on file were presented at a class for initiation, he noticed that some of the names had not been among those previously given Vale and Cato; he also noticed that these new names were credited with payment of their initiation fees in full. He testified that upon examination he noticed that some of these applications had been originally filed by other persons, and part of the initiation fees already credited; that data had been erased from the applications as originally filled out and new data to cover the new applicants substituted therefor. On such applications, Vale and Cato appeared as members of the investigation committee, and Cato appeared on some also as a sponsor. There was testimony by some of these applicants that they had contacted both appellants in connection with negotiations to join the union and obtain employment in the defense industries.

At times Cato met the applicants for admission to the union through Bucchierre at the latter's home and elsewhere, and the evidence shows that some of those passed upon by Cato as a member of the examining board had no painting experience. There was testimony by one of such applicants, who also testified as to the amount he paid Bucchierre for his job, as follows:

"Q. Directing your attention to the next night, Monday night, July 15th, 1941, at about 7:30 o'clock, did you in fact go over to Bucchierre's home at 1273 Golden Gate Avenue? A. I did.

"Q. Did you meet Bucchierre there? A. Yes, I did.

"Q. Did anybody else come in later? A. Nobody.

"Q. How did you go to Oakland? A. Cato come over in his car and we went over.

"Q. Cato came in later, is that correct? A. We met him downstairs. * * *

"Q. I see. Cato took you and Bucchierre in his automobile, did he? A. Yes, he did.

"Q. Where did he take you? A. Over to Oakland. * * *

"Q. I see. Were you initiated that night? A. Yes, I was.

"Q. You are now a member of Ship Painters Union, Local 961? A. That is right.

"Q. You were initiated on the night of July 15th, 1941, in Oakland, is that correct? A. That is correct.

"Q. Now, Mr. Rochlin—by the way, did you pay your $52.00 that night? A. Yes, I did.

"Q. Prior, before July 15th, 1941, did you at anytime receive an application to fill out for membership, or initiation into the union? A. Yes, I did.

"Q. Was that days or weeks before July 15th, 1941? A. Weeks. * * *

"Q. Who gave you the application to fill out? A. Mr. Bucchierre * * *.

"Q. How did you fill it out—yourself, or what happened about it? A. Well, he gave me the application, and he gave me Cato's address, and I went over to Cato's house and Cato helped me fill it out.

"Q. Did you have any conversation with Cato when Cato helped fill it out—did you have any conversation with Cato about your experience as a painter? * * * A. Yes, he asked me how many years I had of experience as a painter, and I told him 'None.' He said, 'Put down three years.' * * *

"The Court: You filled that application out yourself, did you? A. No, I just signed my name to it.

"Q. Who filled it out? A. Cato did."

One witness testified that following his employment Cato came to him in the shipyard and stated that Bucchierre owed him $25. He requested that the witness pay him (Cato) the money the witness still owed Bucchierre. The money was accordingly paid Cato. Another witness testified that he paid part of the fee charged to Cato, and that Bucchierre requested that the balance be paid to him (Bucchierre) direct.

The plan or scheme adopted by appellants to injure the employers, the union and the applicants for membership thereto is one easy to be rectified as shown by the apparent cessation of those practices upon the assumption of office by a new secretary-treasurer.

Before taking up the main points advanced by the appellants for reversal of the judgment, we may dispose of one, apparently brought forward as an afterthought. In their closing brief they urge prejudicial misconduct on the part of the district attorney in that he "brought out the fact that Harry C. Vale, one of the members on the Union's Examining Board, together with appellant Cato, was an ex-convict, and emphasized the point in his argument * * *; in view of the fact that the District Attorney improperly brought out that the appellant Bucchierre was held for the Immigration Authorities * * *; and in view of the fact that the District Attorney, with even greater impropriety, brought out the fact that the appellants had previously been in trouble with the Federal Authorities." No analysis of the circumstances under which the alleged misconduct occurred is contained in this brief, nor is any case cited by appellants in support of this contention.

[1] An examination of the record reveals evidence by defendant Cato of his participation in other offenses. In this regard, one argument presented by him was that he would not be involved in a matter of this nature while he was still on parole. In some instances, in the matters called to our attention, no objection appears to evidence of this kind, but wherever one was presented, the court ruled in favor of the defendants and instructed the jury to disregard plaintiff's offer of proof. While the conduct of the district attorney may in some instances not be approved, in view of the fact that the jury knew of Cato's record, and that the trial court clearly indicated to the jury that evidence relative to the criminal record of others was not pertinent to the issue, and instructed the jury to disregard it, we may not direct a reversal herein.

It is contended that the People failed to prove two essential elements of the criminal conspiracy as alleged, namely, guilty knowledge as to license requirements, and agreement. Both questions are issues of fact.

[2] It was stipulated that appellants did not have a license, and the defense was based not upon any claim that they were not guilty of the substantive offense, but rather, that there was no evidence sufficient to prove a conspiracy. No evidence appears that either defendant was unaware that a license was necessary under the law of this state. In the absence of such claim the People were entitled to have the jury determine from all the facts and circumstances as presented whether the defendants realized that they were engaged in the commission of the substantive offense.

[3] Whether there was an agreement between the parties named in the indictment to commit a conspiracy is a question of fact. The testimony heretofore related, as it appears in the record, amply supports the charge of conspiracy. To accomplish the scheme Bucchierre needed a confederate in the union. That he was successful is shown by the meeting of Cato and the applicants in Bucchierre's quarters, the transportation by Cato of the applicants to the place of initiation, alteration of the application blanks, the sponsoring of preferred applicants, advice to insert false information in the application, and, finally, the collection of part of the fee in a few instances direct from the applicant.

[4, 5] An unlawful conspiracy need not be proven by direct evidence. People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506; People v. Gregory, 12 Cal.App.2d 7, 54 P. 2d 770; People v. Dal Porto, 17 Cal.App.2d 755, 62 P.2d 1061, 63 P.2d 1199. The association of persons with an honest intent is not conspiracy, and one of the tests on a conspiracy trial is, did the accused act in ignorance without criminal intent? In other words, did they honestly entertain a belief that they were not committing an unlawful act? People v. Eiseman, 78 Cal. App. 223, 248 P. 716.

[6] After instructing on the provisions of section 1581 relative to the conduct of an employment agency, the court further instructed: "* * * if you find beyond a reasonable doubt from all of the evidence in the case that the defendants, or either of them, by agreement between themselves or with any other person, however or wherever that agreement was made to pursue a plan to do any of the things described in section 1551 of the Labor Code [St.1939, p. 2110], without having a license so to do, as required by section 1581 of the Labor Code of California, and that anything was done by either of them by way of an overt act, or act toward the accomplishment of such plan, then it will be your duty to return a verdict of guilty as charged in the first count of the indictment against the defendants, or either of them, as the case may be." It is contended that the absence from the instruction of a statement that there must be a corrupt motive or intent, requires a reversal. Whatever criti-

cism may be aimed at this instruction, standing alone, the defect was cured by other instructions.

[7] The jury was instructed that "conspiracy is a combination of two or more people together to do an unlawful act"; that "mere association * * * does not create a conspiracy"; "that it is not unlawful for two or more people to agree to do something that can be done lawfully by one person"; "it is the joint intention of all of them to do something unlawful that makes the crime"; that the defendants "must have had a common intent, amounting to an express or implied agreement or tacit understanding between them to commit the crime as charged herein." All of the preceding quotations from instructions are taken from those given at the request of at least one of appellants. If they desired further instructions on the subject of knowledge and intent, it was their duty to present them to the court. When the court fairly charges the jury on matters pertaining to the essential issues, but fails to give some specific instruction that may be of advantage to one side, such failure, in the absence of a request for such specific instruction is not ordinarily prejudicial error. People v. Warren, 16 Cal.2d 103, 104 P.2d 1024.

[8] The principal point raised on this appeal is whether the superior court had jurisdiction over the trial of the case. Section 182 of the Penal Code in five subdivisions describes particular types of activity, the conspiracy to do which constitutes criminal conspiracy. The first subdivision covers that to commit any crime. The fifth provides: "To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws." The two following paragraphs of the section prescribe the punishment: "When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively.

"When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

In People v. Vanderpool, 20 Cal.2d 746, 128 P.2d 513, in approving certain conclusions reached in Doble v. Superior Court, 197 Cal. 556, 241 P. 852, the court said (20 Cal.2d at pages 748, 749, 128 P.2d at page 514): "* * * by virtue of the designation and inclusion of the phrase 'in this code,' the first penal paragraph is referable to conspiracies to commit felonies and acts injurious to public morals only when the punishment for the commission of such felonies or acts is prescribed by some provision of the Penal Code. Under all other circumstances, said the court, the second penal paragraph controls. * * * If the offense is not a crime against public morals, or being such, if it is not made punishable under some provision of the Penal Code, then a conspiracy to commit it is punishable under the second penal paragraph of section 182 as either a felony or a misdemeanor and is one within the jurisdiction of the superior court." In the Vanderpool case a conspiracy to violate the Small Loan Act (Stats.1939, ch. 1045, p. 2886, Deering's Gen.Laws, 1939 Supp., Act 7700) was classified as injurious to public morals. A conspiracy to violate section 1581 of the Labor Code by conducting an employment agency without securing a license should likewise be classified as within the provisions of section 182. The act provides that the labor commissioner shall be satisfied of the good moral character of an applicant before issuing a license and shall have the power to revoke a license of one who has ceased to be of good moral character. Labor Code, §§ 1583, 1584, 1596, St.1937, pp. 232, 234.

It was held in the Vanderpool case that the judgment of conviction should be reversed for the reason that the Small Loan Act did not specify the punishment for a violation of its terms; that recourse to the Penal Code was therefore necessary, and that the punishment was that provided by section 182 thereof. The Employment Agency Act specifically defines a violation of the substantive act to be a misdemeanor and sets forth the punishment (Labor Code, § 1648, St.1937, p. 240) without reference to any section of the Penal Code. The provision for punishment in the Employment Agency Act differentiates it from the Small Loan Act, and the holding in the Vanderpool case. The punishment for a conspiracy to violate the Employment Agency Act being within the second penal paragraph of Penal Code, section 182, the superior court had jurisdiction of the offense alleged in the indictment. People v. Vanderpool, supra; Doble v. Superior Court, supra.

[9-11] Appellants contend that "the offense charged herein was actually punishable under section 435 of the Penal Code at the time the indictment herein was returned, but said section was by the 1941 legislature, repealed and placed in the Business and Professions Code, section 16240 [St.1941, p. 720]." The record indicates appellants are in error. The indictment was presented and filed January 26, 1942. Penal Code section 435 was repealed (Stats. 1941, p. 717, ch. 61) effective on the ninety-first day after June 14, 1941. Appellants urge that there is no inherent reasonableness in changing the punishment for such conspiracy merely because of a recodification. The words "as in this code provided" (Penal Code, § 182) refer to the Penal Code. Doble v. Superior Court, supra; Kahrs v. County of Los Angeles, 28 Cal. App.2d 46, 82 P.2d 29; People v. Vanderpool, supra. Any change in the provisions of section 182 would be strictly a legislative function. The Legislature is assumed to have enacted the Employment Agency Act in view of existing laws and decisions. Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424; Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449.

The judgment is affirmed.

KNIGHT, J., concurred.

PETERS, Presiding Justice (concurring).

I concur in the reasoning and conclusions contained in the opinion prepared by Mr. Justice WARD. The most debatable problem involved is whether the charged offense was a misdemeanor or a felony. The problem arises because of the unfortunate terminology employed in section 182 of the Penal Code. It provides, among other things, that when the defendants conspire to commit any act injurious to the public health or public morals "they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said * * * act." Thus, a conspiracy to commit a misdemeanor injurious to public morals which is made punishable by the Penal Code, constitutes but a misdemeanor (Doble v. Superior Court, 197 Cal. 556, 241 P. 852; People v. Vanderpool, 20 Cal.2d 746, 128 P. 2d 513), but, under the same cases it is held that, if the conspiracy is to commit misdemeanors injurious to public morals that are made punishable by some code or statute other than the Penal Code, the conspiracy can constitute a felony. In recent years, with the increased codification of many phases of our law, it is purely a matter of chance whether the misdemeanor is made punishable by the Penal Code or by some other code or statute. Whatever justification may once have existed for such a differentiation no longer exists. It would seem that the problem is one that well might be studied by the legislature and curative legislation passed if the legislature determines that to be desirable.

So far as the alleged prejudicial misconduct of the district attorney is concerned it should be noted that the point is raised for the first time in the appellants' closing brief filed by permission of the court after oral argument. The result is, that in the normal course, the attorney general has had no opportunity to answer the contention. Such practice should not be condoned.

Moreover, the appellants mention the point at but one page of their brief and simply refer to the pages of the transcript where the alleged misconduct occurred. No analysis of the circumstances under which the alleged misconduct occurred is contained in the brief, nor is the fact mentioned that every time appellants' counsel objected and asked the trial court to direct the jury to disregard the question the objection was sustained and the jury directed. Not one case is cited by appellants in support of this contention. Under such circumstances I do not feel that this court is required to seriously consider the point.

The evidence shows that appellants and Vale engaged in a form of enterprise that is subject to the strongest condemnation. They entered into a deliberate and intentional conspiracy to prey upon and deceive the union and the employers, and to prey upon prospective employees. The activities of these appellants are fully and fairly described in the majority opinion. That they knew they were violating the law requiring a license is a reasonable inference from the evidence.

57 Cal.App.2d 146

KALKRUTH et al. v. RESORT PROPERTIES, Ltd.

Civ. 2961.

District Court of Appeal, Fourth District, California.

Feb. 15, 1943.

1. Appeal and error 🔑994(3), 1012(1)

Plaintiffs' credibility and the weight to be given their testimony are questions addressed to trier of facts.

2. Fraud 🔑58(1)

In action to quiet title and recover damages for fraud, evidence that purchasers were sold one lot after they had been shown, and when they believed they were buying another, sustained finding of fraud.

3. Limitation of actions 🔑100(11)

Where a stranger informed purchaser that he had built on wrong lot, purchaser immediately consulted president of vendor corporation and the president made measurements and assured purchaser that everything was all right, action for damages for fraud instituted more than three years thereafter, but less than three years after purchaser discovered correct legal description of lot on which he had constructed cabin, was not barred by three-year statute of limitations. Code Civ.Proc. § 338, subd. 4.

4. Limitation of actions 🔑100(11)

As regards running of limitations, where purchaser has only a suspicion of fraud and vendor, who has defrauded the purchaser, lulls the purchaser into a sense of security by both words and conduct, the vendor should not be permitted to assert that the purchaser has lost his rights by waiving the suspicion and accepting the reassurances of the vendor that no fraud had been perpetrated.

5. Principal and agent 🔑158

An innocent principal which has limited the authority of its agent in contract is protected against an action for damages for fraud of the agent, but if principal participates in the fraud, it cannot escape liability.

6. Corporations 🔑426(11)
Fraud 🔑31

Where purchasers were sold one lot after they had been shown and when they believed they were buying another, and where, even if vendor corporation had no knowledge of agent's fraud at time of sale, general manager and principal stockholder of vendor corporation investigated suggestion that purchaser's cabin was on wrong lot, and assured purchaser that no mistake had been made, the vendor corporation was liable for damages suffered by purchasers who were not limited to action for rescission of contract and return of purchase price.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action to quiet title for damages for fraud by Albert E. Kalkruth and others against Resort Properties, Ltd. Judgment for plaintiff, and defendant appeals.

Affirmed.

Grant Holcomb, of San Bernardino, and George C. Lyon, of Los Angeles, for appellant.

Guthrie & Curtis, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiffs' title to real estate and awarding them damages in the sum of $790.50 because they were sold one certain lot after they had been shown, and when they believed they were buying another. We will refer to Resort Properties, Limited, as the defendant.

Defendant presents four grounds for reversal of the judgment: (1) That the findings of fraud are not supported by the evidence; (2) that the action is barred by the statute of limitations; (3) that plaintiffs discovered the falseness of the representations in 1935 and had no right to thereafter rely upon them or any other representations of defendant; (4) that under the contract, if fraud be assumed, plaintiffs had a cause of action for rescission and return of the purchase price paid but could recover no damages.

Defendant was the owner of Lakebrook Park, near Lake Arrowhead in San Bernardino County. In 1928, Lot 1 in Block 9, had been sold to Terry V. Davenport.

On September 20, 1930, H. B. Washburn, who was then tract manager and agent for defendant, showed plaintiffs several lots in Lakebrook Park. On that day a written conditional sales contract for the sale of Lot 2 in Block 9 was executed, with Albert E. Kalkruth named as purchaser and defendant as seller. The purchase price was $240, to be paid in instalments. The purchase price was paid and Loretta S. Kalkruth became the record owner of the property. Lot 2 in Block 9 adjoins Lot 1 in Block 9 on the west.

Plaintiffs began the erection of a cabin in 1931. Various improvements and additions were made. The final improvement was the completion of a kitchen in 1936. Plaintiffs spent $934 in the erection of their cabin. It was built on Lot 1 in Block 9 instead of Lot 2, which, according to their contract they had purchased. In 1938, Mr. and Mrs. Davenport notified plaintiffs that they were the owners of Lot 1 in Block 9 and took possession of it together with the cabin which plaintiffs had built. This action was filed on September 13, 1940.

The foregoing facts are not in serious dispute.

Plaintiffs testified that Washburn showed them Lot 1 in Block 9 and represented to them that it was Lot 2 in Block 9; that they were ignorant of the legal descriptions of the lots, believed this representation was true and relied upon it; that they did not learn of its falsity until 1938. The trial court found on proper supporting evidence that fraud had been committed; that the reasonable market value of Lot 2 was $150, or $90 less than the value of Lot 1 which plaintiffs believed they were purchasing; that the reasonable market value of the cabin erected by plaintiffs was $934, less $233.50 depreciation; that plaintiffs had been damaged by the fraud in the sum of $790.50 for which amount judgment was given.

[1, 2] The attack on the sufficiency of the evidence is directed principally at the evidence of the plaintiffs and their conduct. It goes to their credibility and the weight to be given their testimony. Such questions are addressed to and settled by the trier of fact. They testified they were shown Lot 1 by the agent and were told by him it was the lot they were purchasing while as a matter of fact they were sold Lot 2 which they did not want. The trial judge accepted this evidence as true and it is legally sufficient to support the finding of fraud. Sherratt v. Hellman Commercial Trust & Savings Bank, 112 Cal.App. 542, 297 P. 582.

The trial court found on supporting evidence that plaintiffs were in possession of Lot 1 without knowing its correct legal description and had no notice or knowledge that it was not the lot they had purchased until July, 1938. As the complaint was filed on September 13, 1940, clearly the cause of action was not barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure, as the complaint was filed well within three years after the discovery of the fraud, unless there be merit in the contention next considered.

Defendant urges that the statute of limitations had run and that plaintiffs could not rely on any further representation made by defendant through its officers or agents because Albert E. Kalkruth learned of the fraud and misrepresentations in 1935 from Charles M. Wells. Kalkruth described this occurrence as follows:

"Q. Describe what occurred? A. Well I was working in the rear bedroom nailing on lath and finishing, and Mr. Wells walked in, and I didn't know him, and I was dumbfounded when he unfolded a map along side of me and said 'Kalkruth, you have built on the wrong lot.' In fact the hammer fell out of my hand. I didn't know what to say. I said 'I have built on the right lot,' and I said I was going after Mr. Lyon, Which I did.

"Q. What did you do? A. I went down the road, down that hill, and some way I located Mr. Lyon.

"Q. How long a period did it take you to locate him? A. I think it was about three hours difference from the time Mr. Wells spoke to me and the time Mr. Lyon got in touch with me.

"Q. Did you have a conversation with Mr. Lyon at that time? A. I did.

"Q. What was the substance of that conversation? A. I explained to him what Mr. Wells had told me, and I had a metallic tape and Mr. Lyon and I started six or seven lots down Hemlock Drive and measured up to this lot that was shown to me and sold to me, and he said I was safe, that everything was O. K. so I went ahead later on and finished the bedroom and even added the kitchen, and there was nothing more said about it until 1938.

"Q. You say this conversation and measurement of the lot took place in July of 1935? A. That is right.

"Q. Had you been told by any person, any person whomsoever, prior to that date that your cabin was built on the wrong lot? A. No sir.

"Q. After July of 1935 when was the next time any person told you you were built on the wrong lot? A. It was either the month of July or August. I think if I am correct the latter part of July, 1938."

Defendant argues that this evidence establishes knowledge of the fraud by plaintiffs more than five years before the action was filed and that they thereafter could not rely upon any representation made by defendant's officers by whom they had been defrauded, citing Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Smith v. Martin, 135 Cal. 247, 67 P. 779; Feak v. Marion Steam Shovel Co., 9 Cir., 84 F.2d 670, 107 A.L.R. 583; Phillips v. Baker, Tex.Civ.App., 114 S.W.2d 421; Turman v. Holmes, 29 Cal.App.2d 198, 84 P.2d 225.

[3, 4] We do not believe the rules announced in those cases should be strictly applied to the facts of this case. John Lyon was the president, general manager and principal stockholder of defendant. When Wells, a stranger to Kalkruth, said the cabin had been built on the wrong lot, Kalkruth immediately and naturally consulted a man who should have knowledge of the facts, namely, the president of the vendor corporation who was active in the management of its affairs. Lyon and Kalkruth returned to the cabin and made measurements. Lyon, who should have known the true facts, assured Kalkruth that everything was all right. We see nothing unusual in Kalkruth accepting this assurance as true as against a statement of a stranger to the contrary. We believe that when, as here, the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated. This rule was applied in Curtis v. Title Guarantee etc., Co., 3 Cal.App.2d 612, 40 P.2d 562, 566, 42 P.2d 323, where it was said:

"Respondent testified that when she saw the University buildings were not being constructed, she talked to an agent of respondent [appellant], who explained the delay by informing her that representatives of the University were in the East raising money. This apparently quieted her fears and she made her payments. Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract, the vendor cannot urge the failure of the vendee to rescind within the time during which the vendee's fears of fraud have been lulled by such representations. Cooper v. Huntington, supra [178 Cal. 160, 172 P. 591]." See, also, Lozier v. Janss Investment Co., 1 Cal.2d 666, 36 P.2d 620.

The contract of sale contained the following provision: "It is agreed that the Seller is not responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not set forth herein. * * *"

Defendant urges that under the law now prevailing in this state, and first announced in Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, the quoted clause of the contract left plaintiffs with only an action for rescission of the contract and return of the purchase price and denied them an action for damages resulting from the fraud of the agent. See, also, Lozier v. Janss Investment Co., supra, Greenberg v. Du Bain Realty Corp., 2 Cal.2d 628, 35 P.2d 579, 42 P.2d 628; Graham v. Los Angeles, etc., Bank, 3 Cal.2d 37, 43 P.2d 543; Harnischfeger Sales Corp. v. Coats, 4 Cal.2d 319, 48 P.2d 662; Weiner v. Roof, 10 Cal.2d 450, 74 P.2d 736; Weiner v. Roof, 19 Cal.2d 748, 122 P.2d 896; Curtis v. Title G. & T. Co., supra; Wagaman v. Clifford F. Reid, Inc., 5 Cal.App.2d 168, 42 P.2d 678; Schroeder v. Dickinson & Gillespie Corp., 6 Cal.App.2d 175, 44 P.2d 425.

The reason for the application of the rule in cases where the principal has limited the authority of the agent in the contract of purchase is thus set forth in Greenberg v. Du Bain Realty Corp., supra:

"In these later cases the rule is now firmly established that a rescission of contract may be had against even an innocent principal because of unauthorized misrepresentations by his agent, even though the rescinding party had notice of the agent's lack of authority. In those decisions, we endeavored to, and believe we did, make it clear that the basis for our conclusion is the equitable rule against unjust enrichment. As stated by the author of the concurring opinion in the Wylie case: 'The rule proceeds upon the theory that an innocent principal so contracting may not be permitted to enrich himself by reason of his agent's fraud, and that any property received by such principal is held by him as a constructive trustee for the person defrauded.'"

[5] Running through all these cases is the fact that it is only the innocent principal which has limited the authority of its agent in the contract of purchase that comes within the rule protecting the principal against an action for damages for fraud. If the principal participates in the fraud, then the fraud becomes its own and it cannot escape liability.

[6] Here, while there is no showing that the principal had knowledge of the fraud at the time of the sale, or the execution of the contract, it did learn of it at a later date. Kalkruth presented the matter to John Lyon, the president, general manager and principal stockholder of defendant, who investigated the suggestion that the cabin was on the wrong lot, made measurements and assured Kalkruth that no mistake had been made. This was while Kalkruth was working on a bedroom which was being added to the cabin and before the construction of a kitchen.

Defendant argues that the fraud was committed by the agent at the time of the sale; that it was complete at that time; that subsequent knowledge could not affect or change the liability of defendant.

While this may be true in some cases, the argument may not be applied here. A principal with knowledge may adopt the fraud of its agent. After it does, it can hardly be called an innocent principal. Here, defendant, through one of its responsible officers, learned of the fraud and reaffirmed it. Thereafter plaintiffs expended more time and money in improving the property. It would seem that the fraud of the agent became the fraud of the principal under the rule in Longway v. Newbery, 13 Cal.2d 603, at page 613, 91 P.2d 110. Under these circumstances defendant should be held liable for the damages suffered by plaintiffs.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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57 Cal.App.2d 167

In re WHITNEY.

Crim. 1813.

District Court of Appeal, Third District, California.

Feb. 16, 1943.

1. Constitutional law ⚷90, 274

"Freedom of speech and of the press" are fundamental personal rights and liberties, and mere legislative preferences or beliefs respecting matters of public convenience that might support regulations directed at other personal activities are insufficient to justify legislative interference with exercise of such rights. Const. Cal. art. 1, §§ 9, 10; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech" and "Freedom of the Press".

2. Constitutional law ⚷90, 91, 274

That citizens had been annoyed by addresses made in city parks and on other public grounds did not warrant interference with rights of freedom of speech and public assemblage by ordinance prohibiting such addresses except by permit of city manager. Const. Cal. art. 1, §§ 9, 10; U.S.C.A. Const. Amend. 14.

3. Constitutional law ⚷90, 91, 274

A city ordinance prohibiting the making of public address upon public grounds except by permit of city manager, which ordinance by its terms was prohibitory conferring on city manager discretion absolutely to deny permit, was void on its face as violating constitutional rights of "freedom of speech" and "assemblage". Const. Cal. art. 1, §§ 9, 10; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Assemblage".

4. Habeas corpus ⚷29

One arrested for violation of city ordinance that was void on its face as denying constitutional rights of freedom of speech and assemblage was entitled to discharge from custody upon habeas corpus. Const. Cal. art. 1, §§ 9, 10; U.S.C.A. Const. Amend. 14.

Original proceeding in the matter of the petition of Anita Whitney for a writ of habeas corpus to secure release from custody.

Writ of habeas corpus granted and petitioner ordered discharged from custody.

Andersen & Resner, of San Francisco, for petitioner.

A. L. Wirin, of Los Angeles, Arthur Garfield Hays, Osmond K. Fraenkel, and Clifford Forster, all of New York City, Wayne M. Collins, of San Francisco, Clarence E. Rust, of Oakland, and E. W. Camp and Fred Okrand, both of Los Angeles, as Amici Curiae on behalf of petitioner.

Hugh B. Bradford, City Atty., of Sacramento, for respondent.

THOMPSON, Judge.

This is a petition for a writ of habeas corpus filed in this court subsequent to the arrest of petitioner for the alleged violation of a Sacramento city ordinance. The petitioner was admitted to bail and the city of Sacramento has made its return to the petition.

Petitioner was arrested on October 4, 1942, in the Sacramento City Plaza, which is one of the city parks, by police officers of the city of Sacramento. On this occasion, petitioner, who was a candidate for the office of Controller of the State of California, was attempting to speak in support of her candidacy for such office and in support of the platform of the Communist party in connection with the forthcoming general election.

The arrest was made for the alleged violation of Ordinance No. 638, Fourth Series, of the city of Sacramento, which provides as follows:

"An ordinance making it unlawful to make public address, discharge firearms, expose for sale any goods, erect booths or stands on public grounds without permit, and making this ordinance an emergency measure to take effect immediately.

"Be It Enacted by the Council of the City of Sacramento:

"Section 1. No person shall, in or upon any of the public grounds make any public address, discharge any cannon or firearm, expose for sale any goods, wares, or merchandise, erect or maintain any booth, stand or show, except in accordance with a permit from the City Manager.

"Section 2. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not exceeding One Hundred Dollars ($100.00) or by imprisonment in the City Jail for a period not to exceed Thirty (30) days.

"Section 3. This ordinance is hereby declared to be an emergency measure and shall take effect immediately, such emergency being that public parks and grounds in the City have been made the location for speeches and addresses to the annoyance of the citizens and the said annoyance will undoubtedly increase if such public addresses are not prohibited and give rise to public disturbances.

"Passed: September 20, 1934.
"Effective: September 20, 1934.
Thos. P. Scollan,
Mayor,

"Attest:
"H. G. Denton, City Clerk."

Petitioner, at the time of her arrest, had made no attempt to obtain a permit from the city manager in accordance with the provisions of section 1 of the city ordinance, and it is because of this failure that the arrest was made.

It is contended that the ordinance in question is void and unconstitutional upon its face as being violative of the Fourteenth Amendment to the Constitution of the United States, and article I, sections 9 and 10, of the Constitution of the State of California, in that said ordinance denies freedom of speech and assemblage. It is urged that said ordinance by its terms is prohibitory and cannot be deemed one of regulation. Petitioner also asserts that the ordinance was administered, enforced, and applied, as against her, in an unconstitutional manner, as the evidence fails to disclose any public disturbance or disorder.

The respondent, city of Sacramento, urges that the ordinance is to be viewed as a regulatory measure enacted under the police power of the municipality and in conformity with the mandate of the due process clause of the Fourteenth Amendment to the Constitution. It is the position of respondent that the determination of the validity of the ordinance should be from a consideration of the ordinance as regulatory rather than as affecting the constitutional guarantees of free speech.

The language of "Ordinance No. 638, Fourth Series," which is pertinent to the question raised by the petition in the instant case is contained in section 1 thereof, and is as follows: "No person shall, in or upon any of the public grounds make any public address * * * except in accordance with a permit from the City Manager."

Section 3 of the ordinance indicates the purpose in view in the passage thereof and is contained in the language already quoted which refers to the annoyance of citizens resulting from speeches and addresses which have been made in the public parks and grounds.

It is the province of this court to determine the question as to whether the quoted language of Ordinance No. 638 prohibits freedom of speech and assemblage in violation of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of California. It should be stated, preliminarily, that any ordinance which requires the procuring of a permit as a condition precedent to making a public address "in or upon any of the public grounds" should necessarily be examined for the purpose of determining a possible infringement upon the right of freedom of speech. Such an approach to an ordinance would be particularly necessary where as in the instant case the provisions of the ordinance fail to indicate that the procuring of a permit is simply for the purpose of regulating public addresses with respect to the proper time and place. Ordinance No. 638 does not specify that a permit from the city manager is required for the purpose of preventing a conflict as to the time or place of public addresses which might be made. Nor does the ordinance by its terms confine its application to the "City Plaza Park" or any other particular park or grounds within the city of Sacramento, but on the contrary its provisions prohibit the making of a public address "in or upon *any* of the public grounds" within the city of Sacramento. (Italics ours.)

In the case of Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, strongly relied upon by petitioner, the validity of a similar municipal ordinance was before the Supreme Court for consideration and was there declared unconstitutional. The ordinance in the Hague case, passed by Jersey City, New Jersey, required the obtaining of a permit for a public assembly in or upon the public streets, highways, public parks, or public buildings of the city. The Director of Public Safety was authorized by the terms of the ordinance, for the purpose of preventing riots, disturbances or disorderly assemblage, to refuse a permit after investigation of the facts. The opinion of the Director of Public Safety was the controlling factor in refusing or granting the permit. This ordinance was declared unconstitutional in the following language, found 307 U.S. at page 516, 59 S.Ct. at page 964, 83 L.Ed. 1437, of the opinion: "We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."

It must be conceded that the intended purposes set forth in the provisions of the Jersey City ordinance, in the preventing of riots, disturbances, and disorderly assemblage, do constitute, at least upon the face of the ordinance, some good cause for the requirement of a permit in order to allow a public assembly.

The provisions of the Sacramento city ordinance, under consideration, do not, however, even purport to set up such a standard in justification of official action authorizing the granting or the refusal of a permit for the making of a public address. It is true that section 3 of the Sacramento ordinance does indicate that an emergency situation has arisen in regard to public parks and that citizens are annoyed by public addresses which take place. Such a statement, within the provisions of the ordinance, set forth for the purpose of justifying the granting or refusal of a permit do not, however, in our opinion even conform to the standard embodied in the Jersey City ordinance. The Sacramento ordinance is more restrictive in its terms than the Jersey City ordinance.

We are aware of the fact that the Sacramento city ordinance reads practically word for word with the old Boston Commons ordinance which was considered by the Supreme Court in Davis v. Commonwealth of Massachusetts, 167 U.S. 43, 44, 17 S.Ct. 731, 42 L.Ed. 71, and that the Supreme Court at that time, in 1897, declared the Boston Commons ordinance to be constitutional. It is also true that Mr. Justice Roberts in the opinion in the Hague case, supra, did use language in referring to the ordinance considered in the Davis case, which apparently distinguished the old Boston Commons ordinance from the Jersey City ordinance which was declared unconstitutional. Further language used by Mr. Justice Roberts indicates however that a consideration of the Boston Commons ordinance at that time might have resulted in a contrary conclusion. That language, 307 U.S. at page 515, 59 S.Ct. at page 964, 83 L.Ed. at page 1436, of the opinion in the Hague case, supra, is as follows: "We have no occasion to determine whether, on the facts disclosed, the Davis case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

Although the Supreme Court by its opinion in the Hague case, supra, does not specifically reverse its decision in the Davis case, supra, it is our opinion that, in effect, just such a result is the only reasonable interpretation of the decision of the court in the Hague case. The language of the opinion in the latter case, which declares the Jersey City ordinance unconstitutional, is not susceptible to any other reasonable conclusion.

An ordinance prohibiting the distribution of leaflets and other literature, except by permit from the city manager, was declared void by the Supreme Court in the case of Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 667, 82 L.Ed. 949, in an opinion delivered by Chief Justice Hughes. This ordinance, enacted by the city of Griffin, Georgia, so far as pertinent, provided as follows:

"Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin."

At page 451 of the opinion in 303 U.S., 58 S.Ct. at page 668, 82 L.Ed. at page 953, we find the following language:

"The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case were of that character. The ordinance embraces 'literature' in the widest sense. * * * We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor."

The Sacramento city ordinance, like the ordinance of the city of Griffin, which was considered in the Lovell case, is in our opinion of the same character, one imposing censorship on the freedom of speech, and the motive inducing its adoption thereby becomes unimportant.

In the case of Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, an ordinance quite similar in nature and purpose to the one which was considered by the court in the Lovell case, supra, was also declared void. In commenting upon this ordinance passed by the Town of Irvington, New Jersey, the court, 308 U.S. at page 163, 60 S.Ct. at page 151, 84 L.Ed. at page 165, of the opinion said:

"As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."

[1] And on page 161 of 308 U.S., 60 S.Ct. at page 150, 84 L.Ed. at page 164, of this same opinion we find this very strong and convincing language:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. * * *

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

[2] The language quoted from the Schneider case, referring to legislation respecting matters of public convenience, does in our opinion apply quite aptly to the consideration of the validity of the Sacramento city ordinance. Section 3 of the ordinance specifies as an only reason for the prohibition of public addresses, except by permit, the annoyance to the citizens as a result of such speeches and addresses. Freedom of speech is one of those rights which is vital to the maintenance of a democratic form of government, and an ordinance which prohibits the right of public speech upon public grounds, except by special permit, simply because of the stated reason that citizens have been annoyed, is therefore insufficient and unconstitutional.

Respondent earnestly contends that late decisions of the Supreme Court of the United States indicate a changed view from that announced in the Lovell case, supra, and that a consideration of the Sacramento ordinance at this time by the Supreme Court, in view of late expression, would result in declaring such ordinance valid. In support of this argument the respondent relies upon the decisions in Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, and Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691, 141 A.L.R. 514, in which cases the Supreme Court held valid municipal ordinances regulating the distribution and sale of certain literature, and advertising matter.

The ordinance before the court for consideration in the Valentine case, supra, was passed by the city of New York, and made a part of the Sanitary Code. The ordinance prohibited distribution in the streets of the city of all commercial and business advertising matter. Chrestensen, a resident of Florida, was exhibiting a submarine which had formerly been a part of the United States Navy. In connection with the exhibit, he had prepared handbills advertising the boat and soliciting visitors for a stated admission fee. On his attempt to distribute the handbills he was advised that his action would violate the city ordinance, but that he might freely distribute handbills solely devoted to "information or a public protest." Chrestensen then prepared a double-faced handbill which on one side contained commercial advertising matter pertaining to the submarine and on the other side a protest against the action of the City Dock Department in refusing wharfage facilities for the exhibition of the submarine. The city police restrained the distribution of these handbills, and their action under the authority of the city ordinance was upheld in the following language found, 316 U.S. at page 54, 62 S.Ct. at page 921, 86 L.Ed. at page 1265, of the opinion: "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. * * * If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct. * * * It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance."

In the language of the Supreme Court, the ordinance in the Lovell case, supra, "embraces 'literature' in the widest sense," and did not restrict its prohibition to the distribution on the streets of the city of "purely commercial advertising," as was true with the ordinance considered by the court in the Valentine case, supra. The decision of the court in the Valentine case does not lend support to the contention of respondent.

The ordinance for consideration before the court in the Opelika case, supra, as was true with the ordinance considered in the Valentine case, is primarily directed to the distribution of commercial advertising matter and the sale of literature. The ordinance simply regulates the activities of the individuals involved in carrying on these commercial transactions by exacting a reasonable and non-discriminatory license fee, and only in that indirect manner may the ordinance be deemed to limit the constitutional rights of freedom of religion, freedom of speech, and freedom of the press.

This conclusion as to the construction of the ordinance is found in the language of the court, 316 U.S. at page 596, 62 S.Ct. at page 1239, 86 L.Ed. at page 1701, 141 A.L.R. 514, of the opinion, which reads as follows: "Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge. But when, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded. To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles. * * * Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press. * * * If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. These are not taxes on free will offerings. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid."

We are unable to agree with respondent in its contention that the Supreme Court has by its decisions announced in the Valentine and Opelika cases abandoned its position or previous views as declared by that court in the opinion rendered in the case of Lovell v. Griffin, supra. We are also unable to discover any language in the later cases which lends support to or upholds the validity of the Sacramento City ordinance which is before us for consideration.

[3] Sacramento City Ordinance No. 638, Fourth Series, for reasons which have been previously stated, is void upon its face. It denies the constitutional right of freedom of speech and assemblage in violation of the Fourteenth Amendment to the Constitution of the United States, and article I, sections 9 and 10, of the Constitution of the State of California.

The ordinance by its terms is not regulatory but on the contrary it is prohibitory. The provisions thereof fail to indicate that comfort or convenience in the use of the city parks and grounds is a consideration for the enactment of the ordinance. Contrary to the contention of respondent, the provision requiring the procuring of a permit from the city manager confers upon him the discretion of absolutely denying such a permit. The ordinance, also, by its terms applies generally to all Sacramento public parks and grounds.

We do not deem it necessary to comment on other cases cited by respondent. Those cases do not in our opinion contain any language which is contrary to our conclusion in regard to the validity of the Sacramento city ordinance. In view of our conclusion that the ordinance is invalid upon its face, it is unnecessary to consider further the contention of petitioner regarding the question of unconstitutional administration of the ordinance.

[4] Petitioner has been denied her constitutional rights of freedom of speech and it is therefore ordered that the writ of habeas corpus be granted and that the petitioner be discharged from custody.

ADAMS, P. J., and SCHOTTKY, J., pro tem., concurred.

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SHANNON v. THOMAS.

SATT v. SAME.

Civ. 13716, 13717.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1943.

Hearing Denied April 15, 1943.

1. Appeal and error 🔑994(1), 1014
Judgment 🔑199(3)

In determining motion for judgment notwithstanding the verdict, neither appellate court nor trial court is authorized to weigh evidence or judge credibility of witnesses.

2. Appeal and error 🔑934(1)

Reviewing court, when passing upon appeal from judgment for defendant notwithstanding verdict for plaintiff, must read testimony in light most advantageous to plaintiff, resolve conflicts in his favor, give him benefit of every fact pertinent to issues involved which can reasonably be deduced from evidence, and, if it appears from such consideration that there is substantial evidence to support essential elements of plaintiff's case, it must reverse such judgment. Code Civ.Proc. § 629.

3. Judgment 🔑199(3)

In negligence action, law will forbid recovery under verdict for plaintiff only when reasonable minds can draw but one inference which points inevitably to negligence of plaintiff contributing directly or proximately to his injuries.

4. Jury 🔑34(3)

Under constitutional guaranties of "trial by jury," court is justified in taking case from jury and rendering decision itself only when it can be said as a matter of law that no reasonable conclusion is legally deducible from evidence other than would sustain a verdict for party to whom judgment is given and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse or a trial court to set it aside. Const.U.S.Amend. 6; Const.Cal. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial by Jury".

5. Automobiles 🔑216

Person pushing automobile in attempt to get it started was not under duty to turn constantly and repeatedly to observe approach of possible vehicles from rear when drivers of such vehicles could plainly observe him in time to give warning or turn out to avoid a collision.

6. Negligence 🔑136(26)

Issue of contributory negligence is always one of fact for jury except in those cases in which, judged in light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform.

7. Automobiles 🔑245(72)

Where plaintiff, at night, to start automobile with a run down battery, pushed automobile into highway after first turning on lights and looking for approaching traffic and thereafter plaintiff's automobile was struck by defendant's overtaking automobile, whether plaintiff was guilty of contributory negligence which would bar recovery was for jury.

8. Evidence 🔑588

In action arising out of collision of automobiles, claims of each party that physical facts supported by mathematical calculations demonstrated negligence of other party are entitled to but little consideration.

9. Automobiles 🔑167(3)

Where motorist pushing automobile from private premises into highway looked for traffic before entering highway and had crossed center line and was proceeding along highway before collision occurred, Vehicle Code requirement that driver of vehicle, about to enter or cross a highway from a private road or driveway, yield right of way to vehicles approaching on highway, had no application. Vehicle Code, § 553, St.1935, p. 187.

10. Automobiles 🔑167(3)

Purpose of Vehicle Code requirement that driver of vehicle about to enter or cross a highway from a private road or driveway yield right of way to vehicles approaching on highway is to prevent drivers on private roads or driveways from entering highway when another vehicle is approaching so near as to constitute an immediate hazard. Vehicle Code, § 553, St.1935, p. 187.

11. Automobiles 🔑216

Where defendant's automobile struck plaintiff's automobile, which plaintiff was pushing approximately 70 feet from point where plaintiff had completed turn onto highway, and evidence disclosed that plaintiff had determined that turn could be made with reasonable safety before attempting it, Vehicle Code requirement that no person shall turn a vehicle unless such movement can be made with reasonable safety could not be relied upon to show contributory negligence of plaintiff. Vehicle Code, § 544, St.1935, p. 185.

12. Automobiles ⚷204

In determining whether a person involved in an automobile collision was negligent or contributorily negligent for violating Vehicle Code requirement that vehicle be driven upon right half of and as close as practicable to right-hand curb or edge of roadway, juries and trial courts have some discretion and may consider what a person of ordinary prudence would have done under similar circumstances. Vehicle Code, § 525, St.1939, p. 2197.

13. Automobiles ⚷245(72)

Whether person, who was injured while pushing automobile near center of street instead of near curb when automobile being pushed was struck by an overtaking automobile, was guilty of contributory negligence, was for jury. Vehicle Code, § 525, St.1939, p. 2197.

14. Automobiles ⚷245(72)

Whether plaintiff, in pushing automobile on highway at 3 o'clock in the morning while attempting to get it started, blocked normal and reasonable movement of traffic in violation of Vehicle Code, so as to be chargeable with contributory negligence in action for injuries resulting when defendant's automobile collided with plaintiff and plaintiff's automobile, was for jury. Vehicle Code, § 515, St.1935, p. 178.

15. Negligence ⚷1

Negligence is relative to some circumstances of time, place, or persons, so that what would amount to due care under one set of circumstances might be negligence in changed conditions.

16. Automobiles ⚷245(72)

Where only mechanical defect in automobile was a battery run down to such extent that starter would not work, whether plaintiff's pushing of automobile on highway at 3 o'clock in the morning to get it started was such a violation of Vehicle Code prohibition against operation of vehicle unless it was in safe mechanical condition, so as to charge plaintiff with contributory negligence when plaintiff's automobile was struck by defendant's automobile, was for jury. Vehicle Code, § 679, St.1935, p. 225.

17. Negligence ⚷136(9)

Where court cannot say that only inference reasonable minds can draw from evidence is that negligence of plaintiff in violating statute proximately contributed to his injuries, whether violation did proximately contribute to accident, and whether violation was excusable or justifiable, are for jury.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Separate actions by Clyde Leonard Shannon and by Dorothy F. Satt against John A. Thomas, Jr., for injuries sustained by both plaintiffs, and for property damage suffered by plaintiff Shannon when defendant's automobile collided with automobile being pushed by plaintiff Shannon. The cases were consolidated for trial. From judgments for defendant notwithstanding verdicts for plaintiffs, plaintiffs appeal.

Reversed and remanded with directions.

Max Fink and Ray Sandler, both of Los Angeles, for appellants.

Lasher B. Gallagher, of Los Angeles, for respondent.

WHITE, Justice.

These actions were instituted to recover damages on account of personal injuries and property damage sustained by plaintiff Clyde Leonard Shannon, and bodily injuries sustained by plaintiff Dorothy F. Satt in an automobile accident. The cases were consolidated for trial which was had before a jury. At the conclusion of plaintiffs' case defendant moved for a nonsuit upon the ground that each plaintiff was guilty of negligence as a matter of law and further, that as a matter of law such negligence proximately contributed to their injuries and damage. This motion was denied by the court. Following completion of all the evidence defendant moved the court for a directed verdict upon all the grounds urged in support of the motion for a nonsuit. This motion was also denied. After submission of the cause to the jury a verdict was returned for plaintiff Shannon in the sum of $5,000 and for plaintiff Miss Satt in the sum of $100. Following rendition of the verdicts and before entry of judgments thereon, defendant moved the court for judgment notwithstanding the verdicts, basing such motion upon each and all of the grounds stated in the motion for a nonsuit. Judgment was stayed pending determination of the last named motion which was submitted to the court on briefs. Thereafter the motion for judgment notwithstanding the verdicts was granted and accordingly judgment entered in each case in favor of defendant. It is the correctness of such ruling that is challenged by plaintiffs on this appeal.

The complaints charged that the damage suffered by plaintiffs was occasioned by the negligent operation of defendant's automobile and the answer of the defendant in each case in general denied the allegations of the complaints and as a further, separate affirmative and special defense alleged that each plaintiff was guilty of contributory negligence.

For a proper understanding of the questions involved on this appeal, the facts of the case may be thus epitomized: The accident happened about three o'clock on the morning of October 26, 1940. About three hours prior to this time plaintiff Shannon was preparing to drive Miss Satt from his home, where she was a visitor, to her residence but discovered that the battery on his automobile was low and would not turn the motor over and as a result of which he could not start the automobile with the self-starter. He attempted to push it but it was standing upon an incline in the driveway of his home and he was unsuccessful. With the assistance of a truck plaintiff Shannon was finally enabled to start his vehicle and proceeded on his way to transport his co-plaintiff to her home. En route they stopped at Noble's Drive-in Restaurant which is located on Huntington Drive in the County of Los Angeles. The automobile was driven over the driveway on to the restaurant premises and parked on what was described by plaintiff Shannon as "a good, smooth hard pavement." After spending some twenty minutes in the restaurant both plaintiffs returned to the automobile where they encountered the same difficulty in starting it as confronted them previously at plaintiff Shannon's home. With plaintiff Miss Satt occupying the right-hand seat of the automobile plaintiff Shannon, in an effort to start the motor, pushed the automobile from the rear toward Huntington Drive but it stopped before reaching the street. At this point plaintiff Shannon again got into the automobile, attempting to start it with the self-starter but to no avail. He thereupon turned on the automobile lights, asked Miss Satt to move over to the driver's seat, take the steering wheel while he got out of the vehicle and from the rear thereof again pushed the same out on to Huntington Drive. Just as the automobile was entering the highway it stopped again and while part of it was on the highway and the rear of it was upon the restaurant driveway plaintiff Shannon testified he looked to the right, or east, and to the left, or west, on Huntington Drive which afforded him a view of some three blocks and did not see any vehicles approaching from either direction. He then continued from a position at the rear and to the right of the lighted rear light to push the automobile out on to the highway with his co-plaintiff steering it. While engaged in thus pushing the automobile plaintiff Shannon was leaning forward against the read end of the vehicle "looking more to the ground, but never at any time looking to the east" from the time he last started pushing the automobile after surveying the highway to the east and west. Plaintiff's automobile was pushed out on to the highway and over a few feet beyond the so-called white center line of Huntington Drive and the vehicle was facing slightly toward the north curb of the highway when while plaintiff Shannon was pushing it as aforesaid the automobile driven by defendant and coming from the east collided with the rear of plaintiff Shannon's automobile injuring him and plaintiff Miss Satt who was steering the automobile.

[1-4] Plaintiff Dorothy F. Satt testified that as the car she was piloting passed the south curb line and on to Huntington Drive she looked and could see for a distance of two blocks east and west of such highway; that she saw no other automobiles coming in either direction. She testified that from this point plaintiff Shannon pushed the automobile and that it was thereafter continuously in motion until the impact took place. With reference to the headlights on defendant's automobile, plaintiff Miss Satt testified "I saw the lights on Mr. Thomas' car before the impact in the rear view mirror and they seemed to be about two blocks down the road." At the time this witness observed the lights of defendant's automobile the vehicle she was steering was in the northerly part of the south half of Huntington Drive and

about ten or fifteen feet east of the point of impact. She further testified "at the time I saw these lights coming from the east, my car was traveling about three to five miles an hour. The next time I saw the lights, there was a blinding flash of light in the rear view mirror and the impact occurred." Miss Satt further testified that when the collision occurred the automobile which she was steering "was bumped forward in an upright position and went forward a distance of about one hundred feet." She also testified that "up to the time of the impact I had been steering the car to the right in a gradual turn. I was trying to get the car up against the north curb." There was evidence in conflict with some of the foregoing testimony or from which inferences in conflict therewith could have been drawn. However, in reviewing the correctness of an order directing judgment notwithstanding a jury verdict, we must, in accordance with familiar rules (In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579) analyze the proof to determine whether it contains evidence of sufficient substantiality to support the verdicts for plaintiffs, disregard the fact that there is a conflict in such evidence, and give full credit only to that portion of the evidence which tends to support the allegations contained in plaintiff's complaints. We cannot, nor was the trial court authorized, in determining the motion for judgment notwithstanding the verdicts, weigh the evidence or judge of the credibility of witnesses. As we construe section 629 of the Code of Civil Procedure, it is the duty of a reviewing court when passing upon an appeal from a judgment notwithstanding the verdict to read the testimony in the light most advantageous to the plaintiff; to resolve all conflicts in his favor and give to him the benefit of every fact pertinent to the issues involved which can reasonably be deduced from the evidence. If from such consideration it appears that there is substantial evidence to support every essential element of plaintiffs' case, the verdict of the jury cannot be set aside and a judgment notwithstanding the verdict is erroneous. In cases such as the one at bar, it is only when reasonable minds can draw but one inference, and that inference points inevitably to the negligence of plaintiff, contributing directly or proximately to his injuries, that the law will step in and forbid a recovery under the verdict. Preservation of the inviolable right of a litigant to a trial by jury is guaranteed by both the federal and state Constitutions, Const.U.S. Amend. 6; Const.Cal. art. 1, § 7, which accounts for the rule that it is only when it can be said as a matter of law that no reasonable conclusion is legally deducible from the evidence other than would sustain a verdict for the defendant, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, that a court is justified in taking the case from the jury and rendering the decision itself. Landers v. Crescent Creamery Co., 118 Cal.App. 707, 714, 5 P.2d 934; Reinders v. Olsen, 60 Cal.App. 764, 767, 214 P. 268; Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184, 71 A.L.R. 510; Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383.

Upon this appeal, therefore, there is but one question to be determined by us and that is whether the appellants or either of them were as a matter of law guilty of contributory negligence which proximately contributed to their injuries. If this question requires an affirmative answer, then recovery is barred.

[5-7] As to appellant Shannon, respondent earnestly contends that he was guilty of contributory negligence in pushing his automobile from a position of safety on the premises of the drive-in restaurant out on to the public highway, with knowledge on his part that the battery on his vehicle was in such condition that the self-starter would not turn the motor over to start the vehicle. Aside from the provisions of the Vehicle Code, to which we shall later give consideration, we are not persuaded that appellant Shannon's conduct was such that reasonable minds could draw therefrom but one inference and that such inference points inevitably to negligence on his part that contributed proximately to his injuries. Before proceeding out on to the highway appellant Shannon looked in both directions for approaching traffic and saw none; the lights on his vehicle, both front and rear, were lighted. We do not think it was his duty to turn constantly and repeatedly to observe the approach of possible vehicles from the rear when the drivers of such vehicles could plainly observe him in time to give warning or turn out to avoid a collision. Blackwell v. Renwick, 21 Cal.App. 131, 131 P. 94. The situation here present is not akin to that which exists where a pedestrian is about to cross a street and

thereby places himself in the path of danger or suddenly steps out in front of and in the path of an oncoming automobile or walks into the street or upon a railway track without looking at all as was the situation in several of the cases relied upon by respondent. Where, as here, respondent's vehicle collided with appellant Shannon's car which was ahead of respondent there is a tendency to conclude that the driver of the overtaking vehicle was responsible for the collision (2 Cal.Jur. Ten-Year Supp. 299 and cases therein cited). Believing as we do that the situation in the case at bar is one in which reasonable minds might draw different conclusions upon the question of negligence, bearing in mind that the issue of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform, we are constrained to hold that the question as to whether appellant's automobile was being pushed upon and along the highway in a prudent and careful manner was a factual question to be determined by the triers of fact. Much of what was said by this court in Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25, is pertinent to the instant case.

[8] With reference to the claims advanced by both appellants and respondent that some of the evidence given on behalf of the respective parties is inherently improbable because the so-called physical facts, supported by mathematical calculations, clearly demonstrate that the accident occurred by reason of the negligence of the other party thereto, we are not greatly impressed with these arguments for as was said in Nagamatsu v. Roher, 10 Cal.App.2d 752, 755, 756, 53 P.2d 174, 175: "there is no possibility of mathematical exactness in such testimony as to the position and speed of another car. As is well known, such estimates of speed and distance are only approximations and in the nature of things could not be exact. * * * As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element. * * * 'Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred.'" Respondent's contention that appellant Shannon was doing on a through highway in the nighttime exactly the same thing which he could have done with absolute safety on the restaurant premises is answered by the statement that appellant's conduct simply presents a debatable question as to care and prudence, which by its verdict the jury resolved in his favor and against respondent's contention. It certainly cannot be said as a matter of law that the conduct of an automobile driver in pushing his vehicle along the highway and toward the right-hand curb in an effort to start it when his battery failed is not a legitimate and prudent use of the highway. As we view it the most that can be said is that such conduct may or may not amount to negligence according to the time, place and circumstances present, and is therefore a question for determination by the triers of fact.

[9, 10] However, respondent argues that by their conduct both appellants violated several provisions of the California Vehicle Act. In that connection it is urged that appellants transgressed the provisions of section 553 of the Vehicle Code, St.1935, p. 187, which requires the driver of a vehicle about to enter or cross a highway from a private road or driveway to yield the right of way to all vehicles approaching on said highway. We ourselves are not in agreement with respondent's claim in this regard because the record contains evidence that about the time appellants were entering the highway they looked thereon in both directions and saw no automobile on such highway in the direction from which respondent's vehicle later appeared. They then propelled their vehicle across the south half of the highway, made a left turn on the north side of the white middle line and were charting their course at an angle toward the northerly curb when the collision occurred. It is therefore obvious that the collision did not occur as appellants were "about to enter or cross a highway" from a private driveway but happened after appellant's automobile had been pushed beyond the path of the east bound traffic, it having been struck only after it had crossed the white center line and into the channel of the westerly traffic, and while proceeding in a general westerly direction. Jansen v. Sugiyama, 29 Cal.App.2d 717, 85 P.2d 476. Furthermore, this section of the Vehicle Act must be construed in giving effect to the intent of the Legislature as having been adopted to prevent automobile

drivers on private roads or driveways from entering a public highway when another vehicle was approaching upon such highway so near as to constitute an immediate hazard, or in other words, so long as such highway was in use. This was not the case here (Wakefield v. Horn, 109 Cal.App. 325, 293 P. 97), because when appellant's automobile entered the highway respondent's car was some 1,187 feet away, and according to appellants was not upon the highway at all.

[11] The next Vehicle Code section to which we are referred by respondent is section 544, St.1935, p. 185, which requires among other things that no person shall turn a vehicle unless and until such movement can be made with reasonable safety. We fail to perceive the pertinency of this section to the facts in the instant case. There is in the record evidence that appellants looked and determined they could make the turn with reasonable safety, and in fact they had made the turn and proceeded westerly on the northerly side of the highway for some sixty or seventy feet prior to the impact. Manifestly, under this state of the evidence we are not authorized to hold that appellants were guilty of contributory negligence as a matter of law. Furthermore, it must be said that reasonable minds could at least well differ as to whether appellants were justified in assuming they could make the turn with reasonable safety, and it must not be forgotten that appellants had a right to assume that respondent would observe them making the turn on the highway, and therefore slacken his speed or make a turn to the right or left of appellant's vehicle thereby avoiding a collision. Kennedy v. Berg, 18 Cal.App.2d 53, 62 P.2d 1374; Flury v. Beeskau, 139 Cal. App. 398, 33 P.2d 1033.

[12, 13] It is next claimed by respondent that appellants violated section 525 of the Vehicle Code, St.1939, p. 2197, which in substance provides that upon all roadways of sufficient width a vehicle shall, with certain exceptions not here applicable, be driven upon the right half of and as close as practicable to the right hand curb or edge of, such roadway. Plaintiff Miss Satt testified that at the time of and immediately before the collision she was in the process of steering the automobile toward the right hand curb. From the very language of this section it is apparent that the Legislature intended there should be some elasticity in the application of its provisions and therefore the lawmakers did not lay down a definite or rigid rule as to the number of feet or the exact distance a moving vehicle must keep from the right hand curb. Some discretion is therefore left to juries and trial courts to determine from all the facts and circumstances in evidence whether the driver drove "as closely as practicable to the right hand curb or edge" of the highway. In other words it must be held that the triers of fact, in applying the section to a given case, may have resort to the well established rule that what a person of ordinary prudence would have done under similar circumstances can be considered a practicable compliance with the law. Mauchle v. Panama-Pacific International Exposition Co., 37 Cal.App. 715, 174 P. 400; McLellan v. Cocola, 133 Cal.App. 9, 24 P.2d 200. In the case of Wright v. Ponitz, 44 Cal.App. 2d at pages 215, 218, 219, 112 P.2d 25, 27, this court held that whether plaintiffs in pushing their automobile in the lane nearest the center instead of the lane nearest the curb were guilty of contributory negligence was a question of fact to be determined by the court as the trier of fact. We so hold in the case at bar.

[14] Respondent next contends that appellants operated their automobile in violation of section 514 of the Vehicle Code, St.1935, p. 178, which prohibits the driving of any vehicle upon the highway at such a slow speed as to impede or block the normal and reasonable movement of traffic except under circumstances which have no application to the instant case. Respondent asserts that "if the plaintiff's automobile had been traveling at the normal rate of speed ordinarily encountered on through highways the collision would never have occurred." In the light of all the facts and circumstances present in the case at bar, we are impressed that it was for the jury to determine whether appellants in pushing their automobile on the highway in the manner they did, impeded or blocked the normal and reasonable movement of traffic at three o'clock in the morning, or whether, judged in the light of what an ordinarily prudent person would have done under such circumstances, appellants' conduct could be considered a practicable compliance with the law. Furthermore, it was for the jury to determine the important question of proximate cause in

connection with the relation, if any, which appellants' actions bore to the accident and consequent injuries to them.

[15, 16] Section 679 of the Vehicle Code, St.1935, p. 225, is next brought into question by respondent. As it existed at the time of the accident herein, this section forbade the driver of a motor vehicle on any highway unless the vehicle was in such safe mechanical condition as not to endanger the driver, occupants thereof or any person upon the highway. The only mechanical defect in the automobile of appellant was that the battery had run down so that the vehicle could not be started with the self-starter. As we have heretofore pointed out, negligence after all is always relative to some circumstances of time, place or persons, and therefore what would amount to due care under one set of circumstances might be negligence in changed conditions. In the case of Wright v. Ponitz, supra, wherein plaintiffs were charged with contributory negligence for "the placing of the Fike car on the highway after its motor had failed," this court held that the claimed negligence presented a question of fact for determination by the trier of fact. The only effect which the claimed mechanical defect in appellant's automobile had upon the same was as heretofore indicated that it could not be started with the self-starter, and we fail to find in the record any evidence indicating that such defect proximately contributed to the injury sustained, and certainly not sufficient evidence to warrant us in holding as a matter of law that appellants were guilty of contributory negligence. Consequently, the question as to whether or not the Vehicle Code section was violated and such violation contributed directly or proximately to appellants' injuries, was an issue of fact for the jury to determine. Henshaw v. Belyea, 220 Cal. 458, 31 P.2d 348; Bender v. Perry, 37 Cal.App.2d 206, 99 P. 2d 319; Maus v. Scavenger Protective Association, 2 Cal.App.2d 624, 39 P.2d 209.

[17] Much of what we have just said is applicable to the claimed violation by appellants of section 543 of the Vehicle Code, St.1935, p. 185. We feel impelled to here observe that though it be conceded that appellants were guilty of violating any or all of the Vehicle Code sections referred to by respondent, there still remained the vital question of whether or not such violation, if any, was the proximate cause of the accident. Where the court cannot say that reasonable minds could draw but one inference from the evidence and that, an inference, pointing unerringly to the negligence of the plaintiff in violating the statute has proximately contributed to his injuries, then whether or not such violation did proximately contribute to the accident and whether the violation was excusable or justifiable, are questions of fact for the jury to determine. Sharick v. Galloway, 19 Cal.App.2d 693, 66 P.2d 185; Rivera v. Hasenjaeger, 29 Cal.App.2d 431, 85 P.2d 167. In Hilbert v. Olney, 17 Cal.App.2d 135, 138, 61 P.2d 941, 942, the court quoted with approval the following language used in Skaggs v. Wiley, 108 Cal.App. 429, 433, 292 P. 132, "* * * the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury (citing cases), and, when the evidence is conflicting or any reasonable man might differ as to the inferences which ought to be drawn from the evidence, this question is one for the jury (Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 34 P. 84)."

It becomes unnecessary to discuss respondent's claim that appellant Miss Satt was guilty of contributory negligence as a matter of law and that her negligence is imputed to appellant Shannon because from what we have herein said and in obedience to the rules prescribed for us by law with reference to the consideration of evidence in cases wherein the appeal is taken from an order for judgment notwithstanding the verdict, it is manifest that we must hold in the case of appellant Miss Satt as we do in the case of appellant Shannon, that she cannot as a matter of law be held guilty of contributory negligence which contributed proximately to either her or appellant Shannon's injuries.

For the foregoing reasons the judgments are reversed and the causes remanded with directions to the court below to enter judgments upon the verdicts as returned by the jury.

YORK, P. J., and DORAN, J., concurred.

57 Cal.App.2d 605

ROSENFIELD v. VOSPER et al.

Civ. 13613.

District Court of Appeal, Second District,
Division 3, California.

March 11, 1943.

Rehearing Denied April 2, 1943.

See 135 P.2d 579.

1. Costs 🔑264

A verification of costs on appeal was not improper because verifying affidavit purported to be made on information and belief. Code Civ.Proc. §§ 1033–1034.

2. Costs 🔑264

A memorandum of costs on appeal, where properly verified, constituted a prima facie showing sufficient to support allowance of all such items as appeared, on their face, to be for proper and necessary costs on appeal. Code Civ.Proc. § 1034.

3. Costs 🔑247

Costs of trial preceding appeal are not part of costs on appeal, but are recoverable only upon entry of judgment which finally disposes of action in trial court.

4. Costs 🔑254(4)

The fact that certain exhibits included in reporter's transcript were not typewritten, but were reproduced by photostatic process, did not prevent inclusion, as part of costs on appeal, of expense of preparing such exhibits. Code Civ.Proc. §§ 274, 953a.

5. Costs 🔑254(5)

The codal provision that stenographic reporter shall prepare a transcript of phonographic report of trial does not require that reporter himself personally make transcript. Code Civ.Proc. § 953a.

6. Evidence 🔑20(1)

It is common knowledge, in courts, at least, that reporters in busier courts do not personally make transcripts on appeal, but that they use dictation machines and employ transcribers. Code Civ.Proc. § 953a.

7. Costs 🔑254(5)

The codal provision requiring court reporter to write out his transcripts in plain and legible longhand or by typewriter or other printing machine fairly comprehends the photostatic process for making prints of exhibits. Code Civ.Proc. § 269.

8. Costs 🔑254(4)

The requirement of Supreme Court Rule providing that transcripts prepared under Code of Civil Procedure must be typewritten is a matter for convenience and cognizance of appellate court only. Code Civ.Proc. § 953a; Rules of the Supreme Court, rule 7, § 2.

9. Costs 🔑264

Where no objection is made in appellate court to transcript on ground that it is not prepared in proper form, it is too late to do so on objection to otherwise proper costs on appeal.

10. Costs 🔑264

If charge for making photostatic copies of certain exhibits for transcript on appeal could not be estimated on wordage basis, party objecting to amount of costs claimed therefor had burden of showing inapplicability of usual rules. Code Civ.Proc. § 274.

11. Costs 🔑254(1), 264

Under Code of Civil Procedure, cost of reporter's transcript is a proper item of costs on appeal, and it is not necessary to itemize the charges and show necessity of each item. Code Civ.Proc. §§ 953a, 1034.

12. Costs 🔑264

Where appellate court had not authorized reduction of costs because of insertion of unnecessary matter in record, trial court, in taxing costs on appeal, was not authorized to reduce costs because of contention that transcript included many pages of copies of exhibits of which originals could have been sent up to appellate court. Code Civ.Proc. § 1034; Rules of Supreme Court, rule 9, § 1.

13. Costs 🔑264

Affidavit in support of motion to strike verified memorandum of costs on appeal, stating that plaintiff had been informed by reporter that cost of transcript was less than amount claimed, was but "hearsay" and insufficient to overcome verification of the cost bill.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

14. Costs 🔑264

In taxing costs on appeal, fact that item listed as "Reporter's Transcript" appeared under heading "Memorandum of Costs on Appeal" was sufficient to indicate that the transcript was the transcript on appeal.

15. Constitutional law ⚷251

The due process of law provision of Fifth Amendment is not applicable to state action. U.S.C.A.Const. Amend. 5.

16. Constitutional law ⚷317

There was no denial of "due process of law" in award of costs on appeal to defendants on reversal of judgment for plaintiff, notwithstanding that reversal resulted from trial judge's misconduct which plaintiff did not provoke or participate in. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

17. Costs ⚷2

Costs are not a penalty imposed on the losing party for his misconduct, but are in nature of incidental damages allowed to indemnify a party against expense of successfully asserting his rights in court.

18. Costs ⚷224

Costs on appeal are in the discretion of the appellate court. Code Civ.Proc. § 1034.

19. Constitutional law ⚷46(3)
Costs ⚷264

A contention that there was a denial of due process of law in award of costs on appeal to defendants should have been presented to appellate court which awarded costs, and its judgment making award was conclusive in subsequent proceeding taxing costs. Code Civ.Proc. § 1034.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Adolph B. Rosenfield against Sidney C. Vosper, and others. From an order of the Superior Court of Los Angeles County taxing costs, the plaintiff appeals.

Order modified and as so modified, affirmed.

Adolph B. Rosenfield, of Long Beach, for appellant.

D. A. Boone and James T. Satchell, both of Long Beach, for respondents.

SHAW, Justice pro tem.

On a former appeal by defendants in this action a judgment in favor of plaintiff was reversed and the defendants were awarded their costs on appeal, the sole ground of reversal being misconduct of the trial judge. Rosenfield v. Vosper, 1941, 45 Cal. App.2d 365, 114 P.2d 29. Thereafter defendants filed their verified memorandum of costs in the sum of $1,961.90, plaintiff made a motion to strike this memorandum and to tax costs, and the trial court made an order taxing and allowing costs in the sum of $1,932.30, from which this appeal is taken by plaintiff.

[1, 2] Plaintiff's first contention is that the memorandum of costs was not properly verified because the verifying affidavit purported to be made on information and belief, and hence the memorandum affords no support for the judgment for costs and should have been stricken. Section 1034 of the Code of Civil Procedure provides that a memorandum of costs on appeal must be "verified as prescribed by the preceding section." This doubtless refers to section 1033, which was the next preceding section when the language just quoted was first placed in section 1034, but the meaning would not be altered if the cross-reference were pointed at section 1033½, which has since intervened, for it contains the same provisions as section 1033 in regard to the subject of the cross-reference. Section 1033 authorizes a verification by the party's attorney, "stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding." The verification here was so made, and, being authorized by the statute, must be accepted as sufficient, regardless of rules that affidavits made on information and belief are not sufficient for various other purposes. Being thus properly verified, the memorandum constitutes a prima facie showing sufficient to support the trial court's decision in allowing all such items as appear, on their face, to be for proper and necessary costs on appeal. 7 Cal.Jur. 296, 297; Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 1928, 205 Cal. 6, 10, 269 P. 525; Haydel v. Morton, 1937, 18 Cal.App.2d 695, 64 P.2d 954.

[3] The first four items claimed in the cost bill were for costs in the trial court, including costs of the trial preceding the former appeal. The court allowed $119.50

on account of these costs. This was error, as respondents now concede. Such costs are not part of the costs on appeal; they are recoverable only upon entry of the judgment which finally disposes of an action in the trial court. Monson v. Fischer, 1933, 219 Cal. 290, 26 P.2d 6; Atchison, etc., Ry. Co. v. Superior Court, 1939, 12 Cal.2d 549, 554, 86 P.2d 85.

[4-9] Plaintiff objects to any charge for certain exhibits included in the reporter's transcript on the ground that they were not typewritten but were reproduced by a photostatic process. The objection is based in part on the ground that the reporter could not himself, as reporter, make these photostatic copies, and in part on the ground that section 274, Code of Civil Procedure, fixes the reporter's charge only for words, not for photographs. Section 953a of the Code of Civil Procedure, which covers the matter of preparation of the record on appeal when the reporter's transcript method is used, provides that, "The stenographic reporter shall * * * prepare a transcript of the phonographic report of the trial, including therein copies of all writing offered or received in evidence * * *." This provision does not require that the reporter himself personally make this transcript. It is a matter of common knowledge, in the courts, at least, that reporters in the busier courts do not do this; they use dictation machines and employ transcribers to write the transcripts. This practice is consonant with section 953a, for when the reporter adopts and certifies his transcribers' work he does, in legal effect, "prepare" it. No reason appears why the same rule cannot be applied where the reporter engages a photographer to make a photostatic copy of an exhibit. It should be noted that section 269, Code of Civil Procedure, requires the reporter to write out his transcripts "in plain and legible longhand, or by typewriter, or other printing-machine." Giving these words a reasonable construction to make them effective in all cases, they may fairly comprehend the photostatic process for making prints of exhibits. Rule VII, section 2, of the Rules of the Supreme Court does, it is true, provide that transcripts prepared under section 953a, Code of Civil Procedure, must be typewritten; but this is a matter for the convenience and cognizance of the appellate court only. If no objection is made there to the transcript on the ground that it is not prepared in proper form, it is too late to do so on objection to otherwise proper costs on appeal.

[10] We need not determine what rule should be applied in reference to the cost of copying exhibits, such as maps, diagrams and pictures, which contain few or no words. There is nothing in the record to show that the photostatic reproductions complained of contained anything other than words. As far as appears the proper charge for them could be estimated on the wordage basis provided in section 274, Code of Civil Procedure. If the facts were otherwise, the burden was upon plaintiff to show them and this he failed to do.

[11] Plaintiff further contends that defendants should have itemized their charge for reporter's transcript and shown the necessity of each item. Where the record is prepared under section 953a, Code of Civil Procedure, the cost of a reporter's transcript is made a proper item of costs on appeal, by section 1034, Code of Civil Procedure. No further itemization of that expense was necessary, and the verified cost bill constituted a sufficient showing in support of it, under the rule above stated.

[12] In support of his motion plaintiff made affidavit that the reporter's transcript included a large number of pages of exhibits, of which the originals could have been sent up to the appellate court and thus the expense of copying them could have been avoided. This could have been done by the appellant in the former case under Rule IX, section 1 of the Supreme Court Rules. But section 1034, Code of Civil Procedure, provides that "The appellate court may reduce costs in case of the insertion of unnecessary matter in the record." This refers to the appellate court passing on the appeal in which costs are awarded, and removes the subject from the jurisdiction of the trial court, except to carry out any direction made by such appellate court. Here the appellate court made no order on this matter on the former appeal.

[13, 14] In the affidavit in support of his motion plaintiff stated that he had been informed by the reporter that the cost of the transcript was less than the amount claimed by the defendants therefor. This was but hearsay and was not sufficient to overcome the verification of the cost bill. A further objection is that it does not appear that the reporter's transcript mentioned in the cost bill was the transcript on

appeal. But this item, while listed simply as "Reporter's Transcript," appears under a heading "Memorandum of Costs on Appeal," and this is sufficient to indicate the nature and purpose of the transcript as a transcript on appeal.

[15-17] Finally, plaintiff argues that to tax costs against him on a reversal resulting from misconduct of the trial judge, which the plaintiff did not provoke or participate in, is not due process of law and is contrary to the Fifth Amendment to the United States Constitution. The Fifth Amendment is not applicable to state action, and if plaintiff means to invoke the Fourteenth Amendment, or the similar provision of our state Constitution (Art. I, § 13), he does not so state. But assuming such to be his intention, no authority is cited supporting his contention and we know of none. The opinion on the former appeal (45 Cal.App.2d 365, 114 P.2d 29) discloses that the facts regarding the reason for the reversal are as claimed by plaintiff. But his contention here overlooks the nature of costs. They are not a penalty imposed on the losing party for his misconduct. "They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court." 20 C.J.S., Costs, § 1, p. 257; Purdy v. Johnson, 1929, 100 Cal.App. 416, 418, 280 P. 181. "Costs are a part of the burden of litigation, and no litigant is deprived of a constitutional right by statutes which impose such costs upon him." Daniel v. Daniel, 1921, 116 Wash. 82, 198 P. 728, 731, 27 A.L.R. 177, 181.

[18, 19] Section 1034, Code of Civil Procedure, plainly provides that "the prevailing party on appeal shall be entitled to his costs," with exceptions not material here, and even in the excepted cases costs are in the discretion of the appellate court, which, in this case, awarded them to the prevailing party on the former appeal. Even if the contention made here had merit, it should have been presented to the court on the former appeal. The judgment awarding costs, made on that appeal, is conclusive here.

The order taxing costs is modified by reducing the amount of costs allowed thereby from $1,932.30 to $1,812.80 and as so modified it is affirmed, the appellant to recover his costs of this appeal.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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57 Cal.App.2d 296

BELLING v. CROTER.

Civ. 12166.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1943.

Rehearing Denied March 26, 1943.

Hearing Denied April 23, 1943.

1. Equity ⚷65(2)

As very foundation of equity forum is good conscience, any really unconscientious conduct connected with controversy to which person guilty thereof is a party justifies equity court in closing its doors to him.

2. Equity ⚷65(1)

The burden is on one seeking equitable relief to prove his clean hands, and ordinarily he may not rely on defendant's unclean hands.

3. Equity ⚷65(2)

A party guilty of wrongdoing with respect to matter in which he seeks equitable relief will not be denied aid of equity court, if he was one least at fault and party against whom relief is sought was guilty of wrongdoing in respect to same matters and most at fault.

4. Equity ⚷65(2)

The rule that one guilty of wrongdoing with respect to matters in which he seeks equitable relief will not be denied aid of equity court, if he was party least at fault and other party was guilty of wrongdoing in respect to same matters and most at fault, is ordinarily invoked where party seeking relief is not free moral agent and his participation in wrongdoing was result of other party's undue influence, menace, or duress.

5. Trusts ⚷102(1)

A "confidential relation" ordinarily arises where one person reposes confidence in another's integrity and party voluntarily accepting or assuming to accept confidence reposed in him by another can take no advantage from his acts relating to such other's interest without other's knowledge or consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation".

6. Equity ⚿65(1)

Equity, in administering its remedies, regards not only accomplished facts, but also intent and purpose of parties' acts.

7. Equity ⚿65(2)

The "unclean hands" principle applies to cases of intent to defraud as well as those in which such intent has ripened into accomplishment.

See Words and Phrases, Permanent Edition, for all other definitions of "Unclean Hands".

8. Equity ⚿65(2)

In suit to establish partnership between parties and require accounting of its profits by defendant, trial court's finding that plaintiff caused and permitted all indicia or evidence of his ownership of partnership interest to be executed in name of defendant alone for purpose of concealing such interest from plaintiff's creditors, and that certain instruments indicating defendant's sole ownership of business were executed with plaintiff's knowledge, consent, and co-operation in accordance with such purpose, held sufficient to sustain conclusion of law that plaintiff was not entitled to aid of equity court because he did not come into court with "clean hands".

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Max Belling against J. Croter to establish the existence of a partnership and require accounting of its profits. Judgment for defendant, and plaintiff appeals.

Affirmed.

McKee Tasheira & Wahrhaftig, Ridley Stone, Jr., and Myron Harris, all of Oakland, for appellant.

Theodore Golden and James R. Agee, both of Oakland, for respondent.

WARD, Justice.

This is a suit brought by plaintiff against defendant to establish the existence of a partnership, which defendant denied, and for an accounting of its profits. The trial court found from the evidence that the plaintiff had not come into court with clean hands, and upon this ground denied him the equitable relief sought. It is the contention of plaintiff, appellant herein, that the maxim, he who comes into equity must come with clean hands, was erroneously applied.

Appellant contends generally on this appeal that whatever blame attaches to his conduct in the transaction between the parties, the respondent was as much or even more to blame than he, and this particularly by reason of the relationship of trust and confidence existing between them, and that consequently the court erred in denying him relief. Appellant does "not contend that the findings are unsupported by sufficient evidence," but "that all the facts found, all presumed to have been based on sufficient testimony, indicate that the conclusion of the court was error."

The trial court found with particularity and in detail the grounds upon which its conclusion of unclean hands is based. In view of appellant's concession that they are supported by sufficient evidence, we set forth the findings as they appear in the record:

"That on May 10th, 1940, plaintiff filed the above entitled action for equitable relief as set forth in his complaint on file herein, reference to which is hereby made and by such references incorporated herein; that in such action plaintiff alleged that on or about August 22nd, 1929, plaintiff and defendant entered into an oral agreement of co-partnership for the purpose of engaging in the retail furniture business; that it is true that at said last mentioned time plaintiff had a number of creditors to whom he then owed moneys; that with the intention and for the purpose of concealing from said creditors his interest in the said co-partnership and said furniture business, plaintiff caused, allowed and permitted all indicia and evidence of ownership in and of said furniture business to be executed in the name of defendant alone and as though defendant was the sole owner; that with the knowledge, consent and cooperation of plaintiff and in accordance with plaintiff's said purpose, there were executed, in the month of August, 1929, the following instruments:

"1. On August 22nd, 1929, a Bill of Sale of the stock in trade and fixtures, with which said furniture business was commenced, executed to defendant alone, as the 'Buyer.'

"2. On August 25th, 1929, a Certificate of Individual Doing Business Under a Fictitious Name was executed by defendant alone; that said Certificate recited that defendant was 'the sole owner and proprietor of said (furniture) business'; that said Certificate was filed in the Office of the County Clerk of Alameda County on August 29th, 1929.

"3. Business cards of 'Belling Furniture Co.' showing 'J. Croter, Proprietor' and 'Max Belling, Manager.'

"4. Original lease of business premises taken in name of defendant, alone, as sole lessee.

"5. Workmen's Compensation Insurance policies listing plaintiff as an employee of said furniture business.

"That on December 5th, 1929, said creditors of plaintiff filed a Petition in Bankruptcy against plaintiff and on December 28th, 1929, plaintiff was adjudicated a bankrupt; that on January 10th, 1930, plaintiff filed his schedules in bankruptcy in which, as to the item, 'Stock in trade in———business of ——— at ——— of the value of ———', he answered, 'None'; that plaintiff did not at any place in said schedules nor in said bankruptcy proceedings reveal or admit any interest, either as partner or otherwise, in said furniture business.

"That throughout said bankruptcy proceeding, plaintiff failed to reveal and concealed his alleged interest in said furniture business from his creditors, the Referee in Bankruptcy, and the Trustee.

"That during the years from 1929 to 1940, inclusive, plaintiff filed his Individual Income Tax Returns with the Federal government on the basis of being an employee of the said furniture business; that said returns did not reveal any proprietary interest, as a partner or otherwise, in the profits of said furniture business.

"That on May 27th, 1937, plaintiff signed and executed a written instrument stating that the sole owner of said furniture business was the defendant; that at the trial of this action, plaintiff testified that his purpose in executing said instrument was to conceal from creditors of the Jade Club, of which he was the ostensible proprietor, his, plaintiff's partnership interest in said furniture business.

"At the time of the alleged creation of said partnership as set forth in said complaint and for many years prior thereto and until the termination of said partnership as alleged in said complaint, plaintiff reposed confidence in said defendant and relied upon him for advice in both personal and business affairs.

"For many years prior to the 1st day of January, 1929, plaintiff and his father were together conducting a furniture business in the City of Oakland, County of Alameda, State of California at Tenth and Clay Streets. In the early part of 1929 plaintiff became insolvent and the said business so conducted by him was insolvent. Plaintiff then consulted with said defendant with respect thereto. Said defendant on behalf of said plaintiff made to the creditors of said plaintiff an offer to settle with said creditors on the basis of twenty-five cents on the dollar. This offer was made by said defendant personally and through one Ernest Torregano, an attorney representing said plaintiff, and as a part of said offer, deposited with the San Francisco Board of Trade the sum of $10,000. The said offer was not accepted.

"Plaintiff thereupon again advised with defendant and advised with the said attorney and relied upon said attorney's advice, and after such advice and in reliance thereon and on the 12th day of August, 1929, conveyed his said business and all the assets thereof to G. W. Brainard, Secretary of the San Francisco Board of Trade. Said San Francisco Board of Trade offered the said business and its assets for sale and the said business and its assets were purchased by one Percy Bacharach, who acted as agent for said defendant and who in turn conveyed said assets to said defendant.

"While plaintiff and his witnesses testified to the fact that on and prior to the 22nd day of August, 1929, said plaintiff and said defendant entered into an oral partnership by which oral partnership it was agreed that said defendant would purchase the stock in trade of said business at a sale to be held by the Board of Trade and would put up all necessary money so to purchase said business, in which said agreement it was further agreed that said defendant would thereafter invest in said partnership all necessary moneys and that plaintiff should contribute thereto his knowledge, skill and experience, the Court makes no finding as to whether such a partnership did or did not exist; and with reference thereto the Court finds that, in order to protect the investment of said defendant in said business and at defendant's request and for the purpose of concealing from his creditors his interest in said co-partnership and said furniture business, said plaintiff caused, allowed and permitted "(a) the bill of sale from said Percy Bacharach, dated August 22, 1929, to be executed to defendant alone;

"(b) the filing on August 22, 1929, of a certificate of individual doing business under a fictitious name, in which said certificate defendant recited that he was 'the sole owner and proprietor of said furniture business' and in which it was stated that said business was being conducted under the name of 'Belling's Furniture Co.';

"(c) the preparation by plaintiff's said attorney of an employment agreement reciting that plaintiff was being employed by defendant to manage said furniture business at a salary of $75.00 per week, which said agreement, however, was never signed by the parties thereto;

"(In ink) items a, b and c above were done in accordance with advice of plaintiff's attorney. FMO

"(d) the issuance of business cards of 'Belling's Furniture Co.' showing 'J. Croter, Proprietor' and 'Max Belling, Manager';

"(e) the taking of the original lease to the premises in the name of defendant;

"(f) the procuring of workmen's compensation insurance policies listing plaintiff as an employee of said furniture business.

"From the commencement of said business on August 29, 1929, to the end of said year 1929, said business operated at a loss and said business operated at a loss during 1930 and for several years thereafter, with the result that defendant was obliged to and did invest more moneys for the conduct of said business.

"During the succeeding years until February 1940, said defendant on occasions, introduced said plaintiff and held said plaintiff out as his partner.

"On December 5, 1929, an involuntary proceeding in bankruptcy was filed against said plaintiff and on December 28, 1929, an order of adjudication of bankruptcy was made and the said matter was referred to a Referee. Said San Francisco Board of Trade turned over to said estate in bankruptcy all moneys received by it arising out of said sale as aforesaid and thereafter said moneys were distributed prorata to the creditors of said bankrupt who thereafter and on August 1, 1932, was granted a discharge in bankruptcy by an order duly given and made on said August 1, 1932.

"On the date of the filing of said petition in involuntary bankruptcy, to wit, December 5, 1929, and also on December 28, 1929, the data of the order of adjudication, and also on January 11, 1930, and throughout the pendency of said bankruptcy proceedings, the interest of said plaintiff in said partnership, if any existed as alleged by him, was of no value in that if at any time during said period said alleged partnership should have been liquidated and the alleged capital contributions made thereto by said defendant had been repaid to him, there would have been no remaining assets for distribution to plaintiff and in fact there would have been a deficit.

"The said business, known as 'Belling's Furniture Co.' as aforesaid moved to certain premises at 14th and Clay Streets, Oakland, California, and certain leases were executed to said plaintiff and said defendant, and signed by said plaintiff and said defendant, as partners, and in particular the following leases were executed covering the premises occupied by said business:

"(a) Lease executed by Central Bank to Max Belling alone in 1936;

"(b) Lease executed by Bank of America N.T.& S.A. to Max Belling and J. Croter individually and as co-partners doing business under the name of Belling's Furniture Company, dated February 4, 1937;

"(c) Lease executed by Central Bank of Oakland to Max Belling and Jake Croter individually and as co-partners, dated May 18, 1937;

"(d) Lease executed by Bank of America N.T.& S.A. to Max Belling and J. Croter individually and doing business as partners under the firm name of Belling's Furniture Company, dated January 8, 1938.

"While, as aforesaid, a certificate of doing business under the name of 'Belling's Furniture Co.' showing that defendant was the sole owner, was filed on the 29th day of August, 1929, no creditor of the bankrupt estate or of plaintiff, and no creditor of the alleged partnership was apparently prejudiced thereby.

"Plaintiff testified as follows: In 1936, said plaintiff and said defendant together with other persons not involved in this action, engaged in a business known as the Club Jade, situated in El Cerrito, California. In said business said plaintiff and said defendant together owned a one-half share thereof, said plaintiff and said defendant each owning a one-quarter interest therein. The building in which said business was situated was erected by said plaintiff and defendant in association with other persons. The lease to the premises was taken in the name of the plaintiff. The business was operated as a corporation under the name of Club Jade and except for qualifying shares of directors, all shares of stock were issued to defendant and by him transferred without compensation to plaintiff, who was to hold said shares of stock for the following persons: A one-half interest therein for the persons with whom said plaintiff and said defendant were associated, and the other half for the equal benefit of plaintiff and defendant. Said business was unsuccessful and was closed in 1937. On and prior to the 27th day of May, 1937, said defendant told said plaintiff that he feared that certain creditors of said Club Jade might attach or attempt to reach the assets of said Belling's Furniture Co., and requested plaintiff to sign a document showing that plaintiff had no interest in said Belling's Furniture Co., and thereupon defendant dictated and caused to be prepared a document and requested plaintiff to sign it, and plaintiff pursuant to said request of said defendant signed such document, which said document is in words and figures as follows, to wit:

"Letterhead of Belling Furniture Company. 'Thursday, May 27, 1937. In the matter of the lease with the Bank of America National Trust & Savings Association on the premises of 533–37–14th Street, Oakland, California, made out to Max Belling and Jake Croter, individually and as co-partners, doing business under the firm name and style of Belling Furniture Company, and also the lease with the Central Bank of Oakland on premises at 1314 Clay Street, Oakland, California, it is hereby agreed between Max Belling and J. Croter that this business is not a co-partnership; that Jake Croter is the sole owner of the said business, being that it is his own investment. Max Belling, Witnesses: Leonard Nachman, Jack D. Ruttan.'

"The court makes no finding as to the truth of plaintiff's explanation of the circumstances surrounding and the reasons for his signing said document because of the Court's finding herein that said document was signed by plaintiff for the purpose of and with the intent to defraud creditors.

"On said 27th day of May, 1937, there were no creditors of said Club Jade, except for small current obligations, the only other outstanding obligations being that for an electric sign to the Electric Products Company in the amount of $1135.60, the lease contract for which sign had been signed by said defendant personally and had been assumed by the Zemanskys, the other persons associated with said plaintiff and said defendant in said Club Jade.

"The Court finds from the evidence herein that no creditor of said Club Jade was apparently prejudiced by the execution of said document of May 27, 1937. Said document was not shown to any creditor and said document was at all times retained by said defendant.

"Immediately after the date of the alleged formation of said alleged partnership as aforesaid, said parties engaged in the business of buying and selling furniture in a retail store in the City of Oakland, County of Alameda, State of California, under the name of 'Belling's Furniture Co.' and continuously from August 22, 1929, engaged in such business until the 23rd day of February, 1940. Continuously from the commencement of said business said plaintiff devoted his time, attention and skill to the management thereof and said defendant made all necessary capital contributions thereto."

Whenever necessary the evidence will be referred to in considering the points presented.

The complaint alleges and the evidence shows that in February of 1940 respondent Croter denied that a partnership ever existed and excluded Belling from the partnership and premises. Belling then commenced this action wherein the value of the partnership is alleged to be $100,000, of which he claims to be entitled to one-half. As already stated, the court concluded that the evidence showed a case for the application of the doctrine of "unclean hands," and accordingly that Belling was not entitled to the aid of a court of equity. Appellant asks that the judgment be reversed with instructions to the trial court to determine whether a partnership existed, and, if so, that an accounting be had.

The question on appeal, as previously stated, involves the doctrine of "unclean hands," including a claimed confidential relation, inducement by respondent (but in fact acting on the independent advice of an attorney), absence of possible harm to others as a result of wrongdoing and the additional claim of "least at fault."

[1, 2] "* * * as the very foundation of an equity forum is good conscience, any really unconscientious conduct connected with the controversy to which he is a party is sufficient justification for the court to close its doors to him." De Garmo v. Goldman, 19 Cal.2d 755, 765, 123 P.2d 1, 6; Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296. The burden is on the one seeking relief to prove his clean hands, and ordinarily he may not rely on the unclean hands of the defendant (De Garmo v. Goldman, supra) except as hereinafter noted.

[3, 4] The crux of the problem presented is whether or not the findings justify an application of the exception to the unclean hands rule that though a party has been guilty of wrongdoing with respect to the matter in which relief is sought, he is not to be denied the aid of a court of equity if it be shown that he is the one "least at fault," and that the party against whom relief is sought was guilty of wrongdoing in respect to the same matters and is "most in fault." Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659; Birney v. Birney, 217 Cal. 353, 18 P.2d 672; Young v. Young Holdings Corp., Limited, 27 Cal.App.2d 129, 80 P.2d 723; Karallis v. Shenas, 41 Cal.App.2d 694, 107 P.2d 395; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478. The above rule is ordinarily invoked where the party seeking relief is not a free moral agent, and his participation in the wrongdoing is in fact the result of the undue influence, menace, or duress of the other party. Colby v. Title Ins. & Trust Co., 160 Cal. 632, 117 P. 913, 35 L.R.A.,N.S., 813, Ann.Cas.1913A, 515. The instances of wrongdoing in the present case bear directly upon the matter in which relief is sought—the establishment of the partnership—and consist in many instances in questionable efforts to conceal the alleged partnership. Appellant entered willingly, or at least without objection, into the various acts of wrongdoing. He was a free moral agent, and his consent to the concealment of the partnership was not obtained through duress, menace or undue influence.

[5] It is claimed that a confidential relationship existed between appellant and respondent. The court found that "plaintiff reposed confidence in said defendant and relied upon him for advice in both personal and business affairs." In Bacon v. Soule, 19 Cal.App. 428, 434, 126 P. 384, 385, the court said: "Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." Assuming that the above finding could be stretched into a definite finding of confidential relationship, upon the theory that the parties, as alleged in the complaint, were partners in a business venture, and that respondent owed a duty to act with the utmost good faith for the benefit of appellant, still the record discloses that in most matters referred to herein appellant sought the advice of an attorney—"a friend of mine"—, and followed such advice. Irrespective of a possible confidential relationship, appellant sought and followed independent advice. He testified that some of the acts of wrongdoing were performed because he acted upon the attorney's advice and because he (appellant) wished to protect respondent's investments.

[6-8] Appellant uses as an argument the fact that the record nowhere shows that any creditors were in fact defrauded through his participation in the execution or use of instruments indicating ownership of the business in respondent. Equity, in administering its remedies, regards not alone the accomplished fact, but also the intent and purpose of the act. Of course, the purpose of concealment may be best demonstrated by proof that it resulted in fraud, but the "unclean hands" principle is equally applicable to cases of intent to defraud as to those in which the intent ripened into accomplishment. Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227; Allstead v. Laumeister, supra. If appellant had not been successful in obtaining his discharge in bankruptcy, and though the partnership interest was of little or no value at the time, still, if the creditors' claims could have been kept alive, those claims might have been subsequently satisfied by the partnership interest (8 C.J.S., Bankruptcy, § 559, p. 1490) which appellant alleges in the present complaint to be of a value of $50,000. The findings are sufficient to sustain the conclusion of law that "plaintiff is not entitled to the aid or interposition of a court of equity because he does not come into court with clean hands by reason of his own conduct" and, being admittedly sup-

ported by sufficient evidence, do not warrant the application of the exception to the unclean hands rule. Accordingly, they afford ample ground for the court's refusal to consider whether a partnership existed. The refusal of the court to find further as to the reasons why plaintiff signed the document dated May 27, 1937, is explained in the finding that it was signed "for the purpose of and with the intent to defraud creditors."

Notwithstanding the admission of the sufficiency of the evidence to support the findings, appellant, by reason of the court's refusal to find on certain matters, has quoted his evidence upon those points as if a demurrer to the evidence had been sustained. We have not considered the record in this light. This is not a case of a nonsuit (Karallis v. Shenas, supra), but a decision upon the vital point in issue. As a matter of precaution we have examined the entire record and have reached the conclusion that the trial court would not have been justified in determining that defendant was "most at fault," or "of equal fault." There is no evidence that defendant laid a trap for plaintiff (Chamberlain v. Chamberlain, supra), or that he caused him to perform any act in violation of confidence (Birney v. Birney, supra). In Young v. Young Holdings Corp. Ltd., supra, it appears that there was a conspiracy to trick and defraud the plaintiff. In Lord v. Smith, 109 Md. 42, 71 A. 430, the facts are somewhat similar except that it was there determined that the alleged wrongdoing did not demand or justify the application of the maxim. The trial court herein has taken a contrary view. We can find no justification for interference with the judgment.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

21 Cal.2d 630

TREDE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16287.

Supreme Court of California.
Feb. 19, 1943.

Rehearing Denied March 18, 1943.

1. Building and loan associations 🔑1

Building and loan associations are creatures of statute, and authority to regulate their operations arises under the "police power" because of the public interest of their business. Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.13.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

2. Building and loan associations 🔑2

The Building and Loan Association Act constitutes a legislative declaration of policy that protection of investments in building and loan associations is a special subject of care by the state, and the act is designed to accomplish as a beneficial public service, the liquidation of insolvent associations in interest of creditors and claimants. Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.13.

3. Appeal and error 🔑1, 458(1)

There is no constitutional right to an appeal, appellate procedure being entirely statutory, and hence legislature may impose any condition or restriction upon granting of a stay of execution pending appeal.

4. Building and loan associations 🔑42(6)

As used in Building and Loan Association Act providing that unless commissioner shall be enjoined from further proceedings then commissioner shall proceed to liquidate affairs of the association, the word "then" does not indicate legislative intention that liquidation should be delayed until after a final determination upon appeal of suit brought by the association, in view of other provisions of the act fixing conditions concerning stay of proceedings. Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.13.

See Words and Phrases, Permanent Edition, for all other definitions of "Then".

5. Building and loan associations 🔑2

The Building and Loan Association Act, construed as authorizing commissioner to liquidate assets of association pending determination of appeal from judgment dismissing association's petition to enjoin further proceedings by commissioner, is not unconstitutional as an unreasonable exercise of the "police power". Gen.Laws 1937, Act 986, §§ 13.11, 13.12, 13.13.

In Bank.

Proceeding in prohibition by Babette M. Trede to restrain the Superior Court of the City and County of San Francisco from authorizing the sale of property of a building and loan association, wherein the Pacific States Savings and Loan Company and another intervened praying that the alternative writ should be made permanent.

Alternative writ of prohibition discharged, and peremptory writ denied.

B. E. Ahlport, of Los Angeles, and W. G. Harmon, Roy D. Reese, and Bartley C. Crum, all of San Francisco, for respondent.

John L. Mace and Hanna & Morton, all of Los Angeles, for interveners.

EDMONDS, Justice.

The assets of Pacific States Savings and Loan Company are under the control of the Building and Loan Commissioner. He took possession of them pursuant to the authority given by section 13.11 of the Building and Loan Association Act, Stats.1931, p. 483, as amended, Deering's Gen.Laws, Act 986. Thereafter, the company, following the procedure specified in section 13.12 of the act, petitioned the superior court to enjoin further proceedings and direct him to surrender its business and property. The decision was in favor of the commissioner and the company's appeal from the judgment is pending and undetermined.

Under the provisions of the Building and Loan Association Act, supra, an appeal from a judgment dismissing the application of an association for the return of its business and assets after the commissioner has taken possession of them "shall not operate as a stay thereof but the court rendering such judgment may, in its discretion, enjoin the commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, provided a bond shall be given as required by section 943 of the Code of Civil Procedure." Sec. 13.12. No order restricting the commissioner's action pending appeal has been made by the superior court, and he is proceeding to liquidate the Pacific States' assets. In accordance with that purpose, he presented to the respondent court a petition for an order authorizing him to sell certain improved real property owned by the company. To this petition Babette M. Trede, who is the owner and holder of a full paid investment certificate issued by Pacific States, filed objections which the court overruled. Later the petition was set for hearing. Miss Trede then brought the matter to this court, and an alternative writ issued directing the respondent to show cause why it should not be prohibited from hearing and determining the application. Subsequently the company and State Guaranty Corporation, the owner and holder of all of its outstanding capital stock, filed their petition in intervention praying that the alternative writ be made permanent.

Invoking the rule that prohibition is a proper remedy to arrest the proceedings of a court acting in excess of its jurisdiction, the petitioner and the interveners advance two main contentions. First, they say, the Building and Loan Association Act, supra, does not authorize the commissioner to liquidate the assets of a building and loan association pending the determination of the appeal from a judgment dismissing its application to enjoin further proceedings by him and to secure the return of its property. But if the act authorizes liquidation before final judgment, their argument continues, it is, in that respect, unconstitutional, being an unreasonable exercise of the police power.

The respondent asserts that neither of these contentions is well taken. It takes the position that the statute under which the commissioner is acting expressly confers jurisdiction upon the superior court to authorize the liquidation of an association pending the determination of an appeal, and that the legislation is a reasonable exercise of the police power. Since the appellant has already had a judicial review in the trial court, it contends, a statute prohibiting further restraint upon the process of liquidation is entirely reasonable and necessary for the protection of the association's creditors.

The petitioner and the interveners assert that the process of liquidation is the final step to be taken by the commissioner in administering the affairs of an association and may only be undertaken after a final determination that he properly exercised his statutory authority. Otherwise, they say, if the appellate court determines that his action in taking possession was unjustified and the ruling of the trial judge erroneous, by a sale of all of the association's assets prior to such final determination, the decision becomes a Pyrrhic victory.

The powers of the commissioner are enumerated in section 13.13 of the act. "* * * Upon taking such possession, the commissioner shall have authority to collect all moneys due to such association and to give full receipt therefor, and to do such other acts as are necessary or expedient to collect, conserve or protect its business, property and assets. Unless the commissioner shall be enjoined from further proceedings and directed to surrender such business, property and assets or unless such association shall with the consent of the commissioner resume business, then the commissioner shall proceed to liquidate the affairs of such association as hereinafter provided." Certain other powers are granted to him "regardless of whether or not he shall be liquidating the affairs of such association." Sec. 13.13.

[1, 2] Building and loan associations are creatures of statute, and the authority to regulate and supervise their operations arises under the police power because of the public interest of their business. It is important that investors in and creditors of such institutions not only have the benefit of strict supervision of their activities, but also that, in the event of financial instability, there be adequate authority for the state to step in and administer their affairs in the interests of all concerned. The Building and Loan Association Act, supra, constitutes a legislative declaration of policy to the effect that the protection of investments in building and loan associations is a special subject of care by the state (Richardson v. Superior Court, 138 Cal. App. 389, 394, 32 P.2d 405), and the statute is designed to accomplish, as an important and beneficial public service, the liquidation of insolvent associations in the interest of creditors and claimants. Wilson v. Superior Court, 2 Cal.2d 632, 637, 43 P.2d 286.

The powers of the commissioner are broadly stated in the regulatory statute. Although he may take summary possession of an association, it has the right to challenge his action by a judicial proceeding in which it may present evidence tending to show that it is qualified to continue in business. Pending the decision in such a proceeding, his authority is administrative for the purpose of conserving the assets of the institution in his charge. But upon a determination in his favor of the proceeding brought by the association to oust him from control, unless he consents that it may resume business, he shall proceed to liquidate its assets, and an appeal from the judgment "shall not operate as a stay thereof, but the court * * * may, in its discretion, enjoin the commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, provided a bond shall be given as required by section 943 of the Code of Civil Procedure." Sec. 13.12.

[3] There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control. A corollary of this rule is that the Legislature may impose any condition or restriction upon the granting of a stay of execution pending an appeal. United States v. Berg, 202 Cal. 10, 258 P. 942; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Foster v. Superior Court, 115 Cal. 279, 47 P. 58. In the Building and Loan Association Act, supra, the state has not authorized the commissioner to liquidate the assets of an association without an opportunity to review his determination concerning the institution's solvency or its failure to comply with particular statutory requirements. It has provided that the commissioner's action in taking possession of an association may be reviewed upon an application filed in the superior court to enjoin further proceedings, sec. 13.12. As an incident of such a suit, the right of the commissioner to liquidate the association's assets is delayed until there has been a determination of the issues concerning solvency or compliance with statutory requirements. But upon a decision adverse to the association, an appeal does not stay the authority of the commissioner to liquidate the assets, if he concludes that the institution is not in condition to continue doing business. Doubtless the Legislature considered that the right of the superior court to stay proceedings in particular cases, together with the restrictions upon the authority of the commissioner which are specified in section 13.16 of the Building and Loan Association Act, supra, sufficiently protects the rights of an association and allows payments to investors and creditors at a reasonably early date.

[4, 5] The petitioner relies upon section 13.13 of the Building and Loan Association Act, supra, as compelling a contrary conclusion. By the terms of that section, "Unless the commissioner shall be enjoined from further proceedings and directed to surrender such business, property and assets or unless such association shall with the consent of the commissioner resume business, then the commissioner shall proceed to liquidate the affairs of such association as hereinafter provided." The petitioner emphasizes the importance of the word "then" as indicating a legislative intention that the process of liquidation should be delayed until after a final determination upon appeal of the suit brought by the association.

Such a construction ignores the specific provisions of the preceding section fixing conditions concerning stay of proceedings. The two sections, read together, authorize the commissioner, if he does not surrender possession of the association's business and assets, to commence liquidation upon a decision of the trial court in his favor with no order staying his action. Such procedure accords with the rule applicable in civil actions generally, that an appeal from a decree denying an injunction or dissolving a preliminary injunction does not require the defendant to refrain from doing the act of which the plaintiff complains. Boggs v. North American Bond & Mortgage Co., 6 Cal.2d 523, 58 P.2d 918; Pasadena v. Superior Court, 157 Cal. 781, 109 P. 620, 21 Ann.Cas. 1355; Hicks v. Michael, 15 Cal. 107.

The alternative writ of prohibition is discharged and a peremptory writ is denied.

GIBSON, C. J., SHENK, CURTIS, CARTER, and TRAYNOR, JJ., and SPENCE, J. pro tem., concurred.

21 Cal.2d 614

HISE v. SUPERIOR COURT OF LOS ANGELES COUNTY.

S. F. 16815.

Supreme Court of California.

Feb. 19, 1943.

1. Building and loan associations ⚷42(3)

Building and loan commissioner in possession of property of company which had taken possession of assets of association, who recognized former commissioner as receiver to carry into effect judgment which had decreed lien on association's assets in favor of association's certificate holders, was "estopped" to deny validity of former commissioner's appointment as receiver, under statute prohibiting appointment as receiver of person interested. Code Civ.Proc. § 566.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Building and loan associations ⚷42(3)

An action by certificate holders of savings and loan association whose assets were taken over by savings and loan company, which action was brought more than 30 days prior to date building and loan commissioner took possession of company was not stayed by statute providing for staying of actions upon determination by commissioner to liquidate an association. Gen.Laws 1937, Act 986, § 13.16.

3. Judgment ⚷668(1), 681

Where Superior Court had jurisdiction of parties and subject matter of action by certificate holders of savings and loan association against savings and loan company which took over association's assets, a final judgment impressing lien on association's property was binding upon parties and their successors in interest.

4. Judgment ⚷470

Where findings of fact, conclusions of law and judgment determined equitable issues and included declaration of existence of trust and an order requiring accounting by trustee, upon collateral attack, particularly in absence of contrary showing, it will be presumed that such issues were properly presented by pleadings.

5. Building and loan associations ⚷42(16)

The Superior Court was not acting beyond its jurisdiction in determining that savings and loan association's assets in possession of company were subject to equitable lien in favor of association's certificate holders where court's findings of fact, conclusions of law and judgment determined equitable issues and included declaration of existence of trust.

6. Trial ⚷404(1)

In considering contention that because under court's decision trust terminated at date prior to rendition of judgment, court's equitable jurisdiction also had terminated, findings of fact must be read together.

7. Building and loan associations ⚷42(16)

Where court found that trust, created by agreement whereby savings and loan company took over savings and loan association's assets, terminated when association's assets were liquidated, but court also found that company as trustee failed to pay to association's certificate holders from proceeds of liquidation, trust could not terminate until trustee's obligation had been performed, and hence court had jurisdiction to enforce trust obligations.

8. Appeal and error ⚷840(1)

Where notice of appeal excepted from review portion of judgment which favored holders of certificates of savings and loan association whose assets were taken over by company and no appeal was taken from portion of judgment decreeing that trust lien existed upon association's assets transferred to company, judgment for holders placed beyond question court's determination that agreement for transfer of assets constituted a trust,

9. Building and loan associations ⚷42(3)

The statute prohibits levy of execution on property of building and loan association pending liquidation whether or not action in which judgment was rendered was commenced within or prior to 30 days before building and loan commissioner has taken possession of association's property. Gen.Laws 1937, Act 986, § 13.16.

10. Building and loan associations ⚷42(3)

Under act prohibiting levy of execution on property of building and loan association pending liquidation generally only effect of judgment in action not stayed by the act is the adjudication of debtor and creditor relation and of amount due. Gen.Laws 1937, Act 986, § 13.16.

11. Building and loan associations ⚷42(3)

Under act prohibiting levy of execution on property of building and loan association pending liquidation, no lien arises from entry of judgment subsequent to taking of possession by building and loan commissioner, notwithstanding action upon which judgment was based was commenced more than 30 days prior to taking of possession and hence was not stayed by the act. Gen.Laws 1937, Act 986, § 13.16.

12. Trusts ⚷187

When specific property is conveyed to trustee charged with or subject to payment of debts to third persons, although legal title to property vests in trustee, a lien thereon is created in favor of those persons which may be enforced in equity.

13. Building and loan associations ⚷42(19)

Where savings and loan association's assets were transferred to company subject to obligation in favor of association's certificate holders, and company as trustee failed to pay holders proceeds of sale of association's assets, property which company bought at such sale continued to be subject to equitable lien in favor of holders.

14. Liens ⚷7

An equitable lien, although not judicially recognized until judgment is rendered declaring its existence, relates to time it was created by conduct of parties.

15. Building and loan associations ⚷42(3)

A judgment impressing lien upon former assets of savings and loan association in favor of association's definite term certificate holders, which assets were in possession of company in liquidation was not void under act prohibiting levy of execution on property of building and loan association pending liquidation, where judgment did not create lien but merely declared rights of holders in trust property as against company, the trustee. Gen.Laws 1937, Act 986, § 13.16.

16. Building and loan associations ⚷42(3)

The Building and Loan Association Act shows legislative purpose to provide for an orderly liquidation of property of an association somewhat the same as that which has been prescribed for administration of property of bankrupts. Gen.Laws 1937, Act 986, §§ 13.13, 13.16.

17. Building and loan associations ⚷42(6)

Building and loan commissioner may liquidate property of association at such time as he may decide is for best interests of all including unsecured creditors, since Building and Loan Association Act constitutes declaration of policy that protection of investments in associations is a special object of care by the state. Gen. Laws 1937, Act 986, § 13.16.

18. Building and loan associations ⚷42(16)

The Superior Court which rendered judgment impressing lien in favor of definite term certificate holders of savings and loan association whose assets had been taken over by savings and loan company which was being liquidated by building and loan commissioner, could not direct foreclosure of lien by seizure and sale of association's property in possession of commissioner. Gen.Laws 1937, Act 986, § 13.16.

In Bank.

Prohibition proceeding by Harley Hise, as Building and Loan Commissioner, etc., to direct the Superior Court of Los Angeles County to show cause why the respondent should not be prohibited from enforcing its judgment.

Peremptory writ of prohibition issued in accordance with opinion.

B. E. Ahlport, of Los Angeles, W. G. Harmon, and Roy D. Reese, both of San Francisco, George S. Dennison, of Los Angeles, and James E. Burns, of San Francisco, for petitioner.

J. H. O'Connor, County Counsel, Douglas DeCoster, Deputy County Counsel, Wood, Crump & Rogers, Guy Richards Crump, Hugo H. Harris, and David E. Field, all of Los Angeles, for respondent.

EDMONDS, Justice.

In 1939, Ralph W. Evans, the then Building and Loan Commissioner, took possession of the business and assets of Pacific States Savings and Loan Company, and the Superior Court of the City and County of San Francisco has held that its financial condition justified his action. An appeal from that order is pending and undetermined. Meanwhile, Evans' successor has undertaken the liquidation of the company (see Trede v. Superior Court, 21 Cal.2d 630, 134 P.2d 745), and in doing so he is faced with an order of the Superior Court of Los Angeles County directing him to show cause why a receiver appointed by it should not seize and sell certain of the Pacific States' assets to satisfy a judgment. This conflict of authority is the basis of the present proceeding.

On May 23, 1931, Fidelity Savings and Loan Association and Pacific States Savings and Loan Company entered into an agreement, approved by the then Building and Loan Commissioner, pursuant to which the company took title to and possession of all of the assets, both real and personal, owned by the association on that day. A month later, the commissioner took possession of the assets, business and affairs of the association, which consisted chiefly of the agreement, and has since held them as a statutory liquidator. The company complying with the terms of the contract, delivered to the commissioner, as such liquidator, a master definite term certificate of a face value equal to 75 per cent of the total face value of the outstanding investment certificates of the association, and a master participating certificate of a face value equal to 25 per cent of the total face value of the outstanding investment certificates. The contract allowed the holders of an investment certificate in the association to surrender it for cancellation and to receive in exchange a definite term certificate and participating certificate representing a proportionate interest in the master certificates. As investors took advantage of this provision and surrendered certificates for exchange, the master certificates were reduced by the face value of the surrendered certificates.

Pacific States agreed to liquidate the Fidelity assets, apply the proceeds toward the payment of the definite term and participating certificates after deducting costs of liquidation and its fees as liquidator, and return the balance, if any, to the association. As indicated by their name, the definite term certificates are unconditional promises to pay their face value at a definite date. Payment of the participating certificates is conditioned upon the existence of a surplus from the proceeds of the liquidation after their application to the payment of the definite term certificates and certain other obligations.

On May 23, 1936, the expiration date of the original agreement, the process of liquidation was not yet completed and by a supplemental agreement the "final payment date" was extended for two years. At that time, as Pacific States had not fulfilled the terms of the contract, John Eggert and others, as representatives of the definite term certificate holders, the participating certificate holders, and the holders of Fidelity investment certificates who had not exchanged their certificates for those issued by Pacific States brought suit to establish and impress a trust upon the Fidelity assets in the possession of the company, to remove it as trustee, and for an accounting.

One month after the commencement of the Eggert action, Pacific States offered for sale at public auction the remaining assets of Fidelity in its hands, and purchased most of them. The following month, it credited Fidelity with an amount representing its valuation of the assets not disposed of at the auction sale and set them up on its books accordingly.

On March 4, 1939, Ralph W. Evans, as Building and Loan Commissioner, under the authority of section 13.11 of the Building and Loan Association Act, Stats.1931, p. 483, as amended, Deering's Gen. Laws, Act 986, took possession of the property, business, and assets of Pacific States. Shortly thereafter, acting in his official capacity, he filed a complaint in intervention in the Eggert action, asserting his interest both as liquidator of Fidelity and as the commissioner in possession of the assets and business of Pacific States. On April 7, 1939, the respondent court ordered the segregation by the commissioner, pending the determination of the action, of the property transferred by Fidelity under the 1931 agreement, together with all property substituted for any of it, and also directed him to care for, keep possession of, and manage those assets and the income from them separate and distinct from all other property of Pacific States.

The Eggert suit was successfully prosecuted to judgment upon the theory that, by the 1931 agreement and the supplemental agreement of 1936, Pacific States received the Fidelity assets in trust for the owners and holders of the definite term and participating certificates issued by the association. The trial court found that, under the agreement, Pacific States took title to and possession of the Fidelity assets as trustee for the benefit of the plaintiffs, the association, and the Building and Loan Commissioner as statutory liquidator of the association. More specifically, the court found that all holders of definite term certificates, including the master definite term certificate, are entitled to receive the unpaid balance of the face value of such certificates out of the trust assets transferred by Fidelity to Pacific States. And, upon an accounting, it found that proceeds are, or had been, available for payment to the participating certificate holders.

Other findings relate to the procedure by which the beneficiaries of the trust are to receive payment of the amounts due each of them. "In the exercise of judicial discretion," said the court, "a lien should be impressed upon the former Fidelity real estate assets in the State of California acquired by Pacific State by purchase at the auction sale" for the purpose of securing the payment of the amounts owed by it to the holders of the definite term and participating certificates. And since the money judgment to be entered in the action would be in favor of approximately seventeen thousand persons, collection "should be aided by the appointment of a receiver to carry [it] * * * into effect by foreclosing the lien herein mentioned by seizing and selling the property impressed thereby, when necessary, and as may be ordered by the court; to collect and receive the amount of the judgment herein ordered; to receive and impound monies segregated in the hands of the Building and Loan Commissioner of the State of California under * * * 'The Segregation Order' dated * * * April 7, 1939 and to disburse the same to the proper parties entitled thereto in the pro rata amounts as fixed by said judgment."

Judgment in accordance with the findings of fact and conclusions of law was entered on July 7, 1941, and included a provision: "That the Court hereby reserves jurisdiction of this cause for the purpose of designating the Receiver to be appointed herein and for the purpose of making such further order or orders herein as may be necessary to instruct and to enable said Receiver to fulfill his duties in carrying this judgment into effect." On July 16, 1941, the court made its order appointing Ralph W. Evans, who was then the Building and Loan Commissioner, receiver to carry the judgment into effect. On the same day, in order to allow Evans to retain for the Eggert receivership the attorneys who represented him as commissioner, the respondent court, by order, suspended its rule prohibiting the allowance, or the payment from custodial funds in the hands of a receiver, of any compensation for services performed for the receiver by an attorney for any party to the action in which the receiver is appointed.

Pacific States appealed from the whole of the judgment with the exception of that part of it in favor of the holders of the definite term certificates, and the provision that the holders of the definite term certificates "do have and are decreed to have a lien" upon the Fidelity assets purchased and taken over by Pacific States Savings and Loan Association at the auction sale, "superior to the title or interest of defendant, Pacific States Savings and Loan Company, thereto or therein, as security for the payment and satisfaction of" the judgment in their favor. Its appeal is now pending in the District Court of Appeal, and Harley W. Hise, the successor of Evans as Building and Loan Commissioner, was in possession of the business and assets of Pacific States at the time the present proceeding was commenced.

During the time Evans was the commissioner, he paid to himself as receiver for the definite term certificate holders, some $800,000 on account of the Eggert judgment. When Hise became commissioner, he petitioned the Superior Court, in and for the City and County of San Francisco, for directions in regard to the giving of notice to the Eggert judgment creditors and the acceptance of a claim or claims for the amount which the Los Angeles court awarded them. Pursuant to this petition, on March 31, 1942, the San Francisco court made an order authorizing the mailing of one copy of the notice to creditors and investors required by section 13.16 of the Building and Loan Association Act, supra, to Ralph W. Evans as receiver for the Fidelity certificate holders, in lieu of sending a separate notice to each one of them. By the same order it authorized Evans to present, and Hise, as Building and Loan Commissioner, to receive, proofs of all rights under the Eggert judgment in the form of two claims, one for the liability to definite term certificate holders and the other for the liability to participating certificate holders. Since Hise became commissioner, he has paid to Evans, as receiver, $500,000 from the funds of Pacific States.

Thereafter Evans filed with the respondent court his petition as receiver for an order directing the commissioner to show cause why he should not be ordered to render an accounting of the amounts held by him under the segregation order, and to pay the receiver from that account an amount sufficient to satisfy the portion of the money judgment from which no appeal was taken. Evans also asked the court to instruct him with respect to the seizure and sale of properties as ordered by the judgment in the event that it was not paid. In response to his petition, the court issued an order directing Hise, as commissioner, to show cause why the relief asked should not be granted. This court, upon the application of Hise, then issued an alternative writ directing the Los Angeles court to show cause why it should not be prohibited from enforcing its judgment. The respondent court has answered the Hise petition but only questions of law are presented for decision.

The petitioner contends that the judgment which the respondent is attempting to enforce violates the Building and Loan Association Act, supra, insofar as it directed the commissioner to segregate the former Fidelity assets and the income derived therefrom from assets of Pacific States, and impressed a lien for the payment of the judgment upon the former Fidelity property. The Eggert action, he says, is a suit at law and not in equity, and the court consequently was without power to declare a lien. Furthermore, he urges, the impressment of the lien to secure the judgment is void upon the face of the record because the court found that the trust terminated when Pacific States took over the remaining Fidelity assets in December, 1938. And the express finding of fact and conclusion of law that a lien "should be impressed" upon the former Fidelity assets clearly indicates, so he argues, that the lien was purportedly created by the decree in direct contravention of the prohibition of section 13.16 of the Building and Loan Association Act, supra, against the creation of a lien pending the process of liquidation by the commissioner. Another point relied upon is that jurisdiction to adjudicate and supervise the seizure of property held by Pacific States and the liquidation thereof rests solely with the Superior Court of the City and County of San Francisco, where it had its principal place of business. More particularly, Hise charges, the lien was impressed in accordance with the finding and conclusion that a trust was created by the agreement sued upon but that this determination is not yet final.

The only valid effect of the judgment in the Eggert action, asserts the petitioner, was to adjudicate the debtor and creditor relationship and the amount due. And the appointment of Ralph W. Evans as receiver, he claims, was a nullity because he was a party to the action and the written consent of all other parties to the action was not filed as required by section 566 of the Code of Civil Procedure.

In answer, the respondent court contends that, at the time of the commencement of the action, it had jurisdiction of both the parties and the subject matter. There is nothing in the act, it is said, which requires that actions against the commissioner be brought in the county of the principal place of business of the association of which he is in possession. The judgment, insofar as the definite term certificate holders and the lien in their favor are concerned, has become final. And on collateral attack, this court is bound by the judgment that the 1931 agreement constituted a transfer in trust, and the respondent had jurisdiction to declare and impress a lien upon the former trust property in aid of the enforcement of its decree. Having obtained jurisdiction, and sitting as a court of equity, it was the respondent's duty to administer complete relief, including the enforcement of its decree by the appointment of a receiver. Furthermore, asserts the respondent, the judgment did not create a lien within the prohibition of section 13.16 of the Building and Loan Association Act, supra, but was created by the acts which in equity constituted a violation of trust.

Replying to the petitioner's assertion that Evans' appointment as receiver is void, the respondent contends that he was appointed in his individual capacity, as distinguished from the representative capacity in which he intervened in the action. But even if it should be held that he was a person interested in the action within the provisions of section 566 of the Code of Civil Procedure, the respondent argues, his appointment may not be collaterally questioned because the violation of that provision renders the judgment voidable but not void. Moreover, each of the parties, including Hise, has since the appointment of Evans consented in writing to it. Both by failure to make timely objection and by affirmative acts recognizing the validity of the appointment, it contends that the petitioner has waived any right to object and is estopped from so doing.

[1] Considering first the procedural question, section 566 of the Code of Civil Procedure reads, in part, as follows: "No party, or attorney of a party, or person interested in an action * * * can be appointed receiver therein without the written consent of the parties, filed with the clerk." Upon notice to all interested parties in the Eggert action, the respondent court appointed Evans in his individual capacity as receiver to carry into effect the judgment. At the time of that appointment, no written consent of the parties was filed with the clerk. No appeal was taken from the order of appointment, and Hise, as commissioner, has recognized Evans as receiver, not only by his application to the San Francisco Superior Court for an order permitting him to mail the required notice to creditors to Evans in lieu of individual notices to each plaintiff in the Eggert action, but also by the payment to him of $500,000 to apply upon the judgment in favor of the definite term certificate holders. Under these circumstances, so far as the present proceeding is concerned, the petitioner is estopped to deny the validity of Evans' appointment as receiver for all purposes for which he could lawfully act under the judgment. See Weygandt v. Larson, 130 Cal.App. 304, 309, 310, 19 P.2d 852; First Nat. Bank v. Superior Court, 12 Cal.App. 335, 344–346, 107 P. 322.

The case of A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926, relied upon by the petitioner, does not require a different conclusion. Without deciding whether oral consent may satisfy the statutory requirement, it was held that the trial court had no jurisdiction to appoint as receiver a person interested in the action in the absence of consent in either form and in the face of objections to the order. In the Eggert action, however, no objection appears to have been made either at the time of the hearing on the appointment or for more than a year thereafter, and the petitioner has obtained from the San Francisco court, orders authorizing him to recognize Evans as receiver. And the advantage of having a receiver represent the judgment creditors in the liquidation proceedings has also been recognized by that court in the orders which it has made.

[2, 3] Turning to the merits of the controversy, section 13.16 of the Building and Loan Association Act, supra, provides: "The determination by the commissioner to liquidate any association, evidenced by filing written notice of such determination with the court, shall operate to stay or dissolve any or all actions or attachments instituted or levied within thirty days next preceding the taking of possession of such association by the commissioner, and pending the process of liquidation as herein provided no attachment or execution shall be levied or lien created upon any of the property of such association." The Eggert action, brought more than 30 days prior to the date the commissioner took possession of Pacific States, was not stayed by this statute. Evans v. Superior Court, 20 Cal.2d 186, 189, 190, 124 P.2d 820. And there can be no question but that, when the Eggert suit was commenced, the Los Angeles Superior Court had jurisdiction of the parties and the subject matter of the action. Therefore, a final judgment of the respondent court rendered within its jurisdiction is binding upon the parties and their successors in interest.

The petitioner's assertion that the court had no right to impress an equitable lien because Eggert brought an action at law and not a suit in equity is not sustained by the record in the present proceeding. The verified petition does not include a copy of the complaint, but as the ground for invoking the jurisdiction of this court, the Eggert suit is characterized as "an action to establish and impress a trust, substitute a trustee and for an accounting," and it is said that "the acts, orders and judgment in this application complained of arose in an equity suit." However, in a brief the petitioner states that the action "was not an action to establish or impress a trust, nor to substitute a trustee, nor for an accounting" but was "an action at law and not a suit in equity."

[4, 5] It is not necessary to base a ruling upon the effect of such conflicting statements as, unquestionably, the findings of fact, conclusions of law, and judgment of the respondent determine equitable issues and include the declaration of the existence of a trust and an order requiring an accounting by the trustee. Upon collateral attack, particularly in the absence of a showing to the contrary by the petitioner, it will be presumed that these issues were

properly presented by the pleadings. See City of Salinas v. Luke Kow Lee, 217 Cal. 252, 256, 18 P.2d 335; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 674, 74 P. 301; Rue v. Quinn, 137 Cal. 651, 654, 66 P. 216, 70 P. 732; Merrill v. Bachelder, 123 Cal. 674, 676, 56 P. 618; In re Eichhoff's Estate, 101 Cal. 600, 604, 36 P. 11. An action to establish and impress a trust is a suit in equity (Schooler v. Williamson, 192 Cal. 472, 479, 221 P. 195; Cauhape v. Security Sav. Bank, 127 Cal. 197, 201, 59 P. 589; Reay v. Reay, 97 Cal.App. 264, 270, 275 P. 533), as are also actions to substitute a trustee (DeGarmo v. Goldman, 19 Cal.2d 755, 760, 123 P.2d 1; Wickersham v. Crittenden, 93 Cal. 17, 32, 33, 28 P. 788; Overell v. Overell, 78 Cal.App. 251, 258, 248 P. 310), and for an accounting from a fiduciary (Prince v. Lamb, 128 Cal. 120, 125, 60 P. 689; Smith v. Smith, 88 Cal. 572, 577, 26 P. 356; Fischer v. Superior Court, 105 Cal.App. 466, 470, 287 P. 556; and see 4 Pomeroy's Equity Jurisprudence [5th ed., 1941], sec. 1421, p. 1077, 1078). Accordingly, the respondent court was not acting beyond its jurisdiction in determining that the Fidelity assets in the possession of Pacific States are subject to an equitable lien.

[6, 7] In considering the contention of the petitioner that since, under the court's decision, the trust terminated at a date prior to the rendition of judgment, its equitable jurisdiction also terminated as of that date, the findings of fact must be read together. The specific finding upon which the petitioner relies is that "Said trust created by the original agreement terminated on or about December 15, 1938; all assets being then liquidated." But the respondent court also found that the trust agreement included an obligation on the part of Pacific States, as trustee, to pay the definite term certificate holders from the proceeds of the liquidation of Fidelity assets, which the company did not perform. Considering the findings as a whole, it is clear that the liquidation of the remaining Fidelity assets on December 15, 1938, did not terminate the trustee's obligation to account for the proceeds of the liquidation and distribute them in accordance with the terms of the trust. There could be no termination of the trust until the trustee's obligations had been performed and, as a consequence, the respondent had jurisdiction to determine the extent of and enforce those obligations. See Prince v. Lamb, supra; Smith v. Smith, supra; Fischer v. Superior Court, supra; and see 4 Pomeroy's Equity Jurisprudence [5th ed., 1941], sec. 1421, p. 1077, 1078.

[8] But the petitioner points to the pending appeal from the respondent's judgment. He fails to consider, however, the terms of the notice of appeal, which specifically excepts from review that portion of the judgment in favor of the holders of the definite term certificates, and their interests are the only ones involved in the present proceeding. Moreover, no appeal was taken from that portion of the judgment decreeing that a lien exists upon the assets of Fidelity transferred to Pacific States in November and December, 1938. Since the judgment and lien are based upon a finding that the former assets of Fidelity were trust property, the fact that the judgment in favor of the definite term certificate holders is now final places beyond question that part of the court's determination declaring the agreement to constitute a trust. And in the event that the appellate court holds that the agreement between Pacific States and Fidelity evidences a sale and not a transfer in trust, it will affect only the interest of the participating certificate holders.

[9-11] The vital question raised by the petition is the effect of section 13.16 of the Building and Loan Association Act, supra, upon the judgment. That section prohibits the levy of any execution, pending the process of liquidation, whether or not the action in which the judgment was rendered was commenced within or prior to 30 days before the taking of possession by the commissioner. Evans v. Superior Court, supra. Generally speaking the only effect of the judgment in an action not stayed by the provisions of the act, is the adjudication of the debtor and creditor relation and of the amount due. Evans v. Superior Court, supra. No judgment lien arises from the rendition and entry of a judgment subsequent to the taking of possession by the commissioner, even though the action upon which the judgment was based was commenced more than 30 days prior to the taking of possession and therefore was not stayed by the provisions of section 13.16. Evans v. Superior Court, supra. But the lien which petitioner asserts has been "created" by the Eggert action in contravention of the prohibition contained in section 13.16 is, if effective, an equitable one impressed upon the former assets of Fidelity, now owned by or in the possession of Pacific States, to secure the balance due to Fidelity's definite term certificate holders under the trust agreement.

[12, 13] When specific property is conveyed to a trustee charged with or subject to the payment of debts to third persons, although the legal title to the property vests in the trustee, a lien thereon is created in favor of those persons which may be enforced in equity. See cases collected in 4 Pomeroy's Equity Jurisprudence [5th ed., 1941], sec. 1244, p. 719, sec. 1033, p. 65, n. 16; 116 A.L.R. 22, 23, 41; and see Washington Lumber & M. Co. v. McGuire, 213 Cal. 13, 20, 1 P.2d 437; McColgan v. Bank of California Ass'n, 208 Cal. 329, 337, 281 P. 381, 65 A.L.R. 1075; Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 201, 152 P. 542; Hall v. Cayot, 141 Cal. 13, 18, 19, 74 P. 299; White v. White, 11 Cal.App.2d 570, 574, 54 P.2d 482, 56 P.2d 202; Nau v. Santa Ana Sugar Co., 79 Cal.App. 685, 691, 250 P. 705; 4 Pomeroy's Equity Jurisprudence [5th ed., 1941], sec. 1235, p. 696; 16 Cal.Jur., Liens, sec. 10, p. 308, n. 5. In the present case, the Fidelity assets were transferred to Pacific States, subject to the obligation in favor of the definite term certificate holders, thereby creating an equitable lien upon the property in their favor. This obligation will not be fully discharged until payment has been made to them in accordance with the terms of the trust agreement. And when Pacific States, as trustee, failed to pay the beneficiaries of the trust the proceeds of the sale of Fidelity's assets to itself, the property which it bought continued to be subject to the equitable lien in favor of the certificate holders. The Eggert judgment, therefore, did not create the lien, but declared the rights of the beneficiaries in the trust property as against the trustee.

In deciding a case presenting facts very similar to those now being considered, the Court of Appeals of Missouri construed a statute closely analogous to the stay of process provision of section 13.16, and held that it was not intended to cause a vendor to lose an existing lien. The vendor's lien in that case, said the court, did not attach by reason of the judgment rendered, "but by reason of the sale of the real estate and the failure to pay the purchase price, and * * * [it] existed from the date of the sale and the failure to pay." The decree, the court continued, was only a finding that the lien existed, "and, since it did so exist, it was just as effective as if the purchaser had given a deed of trust upon the property to secure the unpaid purchase money." Tate v. Citizens Savings Bank, 223 Mo.App. 957, 967, 968, 21 S.W.2d 222, 227.

[14, 15] The language of the findings of fact and conclusions of law that a lien "should be impressed" does not compel a contrary conclusion. Although an equitable lien is not judicially recognized until a judgment is rendered declaring its existence, the lien relates to the time it was created by the conduct of the parties. Accordingly the lien declared in the Eggert judgment was not "created" by it within the meaning of section 13.16 of the Building and Loan Association Act. The judgment is therefore valid and effective insofar as it declares the debtor-creditor relationship and the amount of the debt, designates the former Fidelity assets held by Pacific States, and requires the proceeds from the liquidation of that property to be paid to the definite term certificate holders.

Whether the respondent court had the authority to direct the foreclosure of the equitable lien by seizure and sale of the property transferred by Fidelity and now in the possession of the petitioner, depends upon the scope of the applicable statutory provisions. Under the Building and Loan Association Act, supra, all property in the possession of an association at the time of its seizure by the commissioner shall be managed or liquidated by him in accordance with the purpose of the statute to protect the rights of all creditors and investors. Thus the act provides that "All claims, demands or causes of action of whatever nature, and regardless of whether or not a suit shall be pending to enforce the same at the time of the taking possession of the assets of the association by the commissioner, of creditors, and persons other than investors against the association or against any property owned or held by it in trust or otherwise, must be presented to the commissioner in writing, verified by the claimant, or someone in his behalf, within the period limited in the above mentioned notice for the presentation of claims; and the commissioner shall have no power to approve any claim not so presented, and any such claim, demand or cause of action not so presented shall be forever barred." Sec. 13.16. And although by section 13.13, the commissioner may pay secured claims in an amount equal to the value of the security therefor, even if the claim shall "have become barred from presentation by the expiration of the time" within which it could be presented, his authority in that regard is discretionary.

[16] These provisions show a legislative purpose to provide for an orderly liquidation of the property of an association somewhat the same as that which has been prescribed for the administration of the property of bankrupts. "The property [of a bankrupt]," said the court in Pugh v. Loisel, 5 cir., 219 F. 417, 421, 135 C. C. A. 221, "is taken into custody in the condition in which it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of the petition, of course, does not displace or disturb such liens; but neither the existence of such liens, nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that purpose, constitute obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it. The court is vested with ample power to protect the rights of lienholders otherwise than by permitting them to be enforced in some other court or courts. Whitney v. Wenman, 198 U.S. 539, 552, 25 S.Ct. 778, 49 L.Ed 1157; Bankruptcy Act, §§ 2, 57, 67, 69, sub. a, 70 [11 U.S.C.A. §§ 11, 93, 107, 109, 110]."

In accordance with this principle, the bankruptcy court, having acquired jurisdiction of the res, may restrain the further prosecution of a foreclosure suit already pending where it will interfere with the orderly administration of the assets of the bankruptcy estate. First Trust Co. v. Baylor, 8 Cir., 1 F.2d 24; In re Locust Bldg. Co., D.C.N.Y., 272 F. 988; In re Ball, D.C.Vt., 118 F. 672; and see 8 C. J. S., Bankruptcy, § 267, pp. 972, 973, note 65. If not restrained, the creditor may, of course, enforce his lien, but the bankruptcy court, in the interest of the creditors generally, has authority to regulate the method of enforcement for the purpose of realizing as much as possible from the assets. And property which has come into the possession of the court may be sold free of a lien upon it, preference in payment from the proceeds being substituted for the right to sell the security in payment of the amount due the creditor. In re North Star Ice & Coal Co., D. C., 252 F. 301, 303. The stay of process provided for in the Building and Loan Association Act authorizes the same method for ratable distribution of assets as is followed generally in the bankruptcy courts and avoids any preference in favor of those who might first secure judicial process for enforcement of their claims.

[17, 18] True, under the declaration of the judgment, the definite term certificate holders are entitled to reimbursement in full from the proceeds of the liquidation of the former Fidelity assets now in the possession of the commissioner, before the unsecured creditors are entitled to look to that property for satisfaction of their claims. But in the exercise of the authority granted him by the act, the commissioner may in his discretion liquidate the specific property at such time as he may decide is for the best interests of all parties, including the unsecured creditors, shareholders, and stockholders of Pacific States. Such a determination is justified by the fact that the act "constitutes a declaration of policy by the state to the effect that the protection of investments in building and loan associations is a special subject of care by the state, and that the measures prescribed in the statute are necessary measures in relation to the welfare of the public." Richardson v. Superior Court, 138 Cal.App. 389, 394, 32 P.2d 405, 407; and see Trede v. Superior Court, 21 Cal.2d 630, 134 P.2d 745. It must be expected that the commissioner will perform his duties and that the court which is supervising the liquidation will be quick to protect the rights of all concerned in the event there is any deviation from statutory requirements.

A peremptory writ of prohibition will issue restraining the respondent court, its officers, agents, and all other persons acting by or through its orders, from taking any further steps or proceedings to enforce the Eggert judgment but without restriction upon the right of Evans, as receiver, to receive and disburse any amounts paid by the Building and Loan Commissioner in full or partial satisfaction of it.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., and SPENCE, J., pro tem., concurred.

CURTIS, J., did not participate herein.

21 Cal.2d 688

LINNEY v. STATE BAR OF CALIFORNIA.
L. A. 18507.

Supreme Court of California.
March 1, 1943.
Rehearing Denied March 29, 1943.

Attorney and client 🔑53(2)

Evidence justified suspension of attorney for nine months on charge of giving false testimony and misleading the court.

In Bank.

Proceeding by Robert T. Linney against the State Bar of California to review a recommendation of suspension of petitioner, an attorney, for nine months.

Petitioner suspended for nine months.

Buel R. Wood, of Los Angeles, for petitioner.

Hallam Mathews and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks a review of disciplinary proceedings in which the Board of Governors of the State Bar has recommended that he be suspended for a period of nine months. This recommendation followed hearings before a local committee on an amended order which directed petitioner to show cause why he should not be disciplined on five charges. In its brief the State Bar relies on count three alone as the basis for its suspension recommendation. We therefore shall confine our discussion to the evidence and findings addressed to that count. It charged petitioner with giving false testimony and misleading the court in a hearing upon a petition filed by Howard S. Splane to have his mother, Minnie E. Splane, declared to be an incompetent person.

It appears that Minnie Splane, Jennie Price (her housekeeper) and Flora Schultz (her companion) in order to evade service of process, moved from place to place in California, Arizona and Nevada. As a result of concealment of their whereabouts, none of these persons was available as a witness during the trial of the incompetency matter, which ran from April 4 to June 4, 1940. Throughout the trial the absent Minnie Splane was represented of record by a firm of attorneys with whom petitioner was not associated. Petitioner, while not an attorney of record in that matter, had represented Mrs. Splane since 1939 and was present in the courtroom throughout the hearing. Petitioner testified in this disciplinary proceeding that "Mrs. Splane asked me if I would attend the sessions of the trial and offer suggestions and watch the proceedings throughout." He was also there under subpoena as a witness, and was called to testify on May 6, 1940. In answer to questions concerning Mrs. Price, the housekeeper, he testified as follows: "A. * * * I had been trying to get in touch with [Mrs. Price] for a couple of months or maybe longer. Q. You have not heard from her at all for a couple of months? A. No I have not. * * *"

In contradiction of this testimony, the evidence here shows that on or about March 10, 1940, petitioner had a conversation with Mrs. Price at a hotel near Bakersfield, California, where she had registered under an assumed name. Mrs. Price testified: "I think that [petitioner] said that day 'How would you like to go to Phoenix?'" Under date of April 25, 1940, petitioner wrote a letter addressed to Mrs. Price at Phoenix, Arizona, in which he acknowledged receipt of a letter from her on the 23rd and stated "The case has been progressing very slowly and they are hunting for * * * Schultz, Splane and you and as they have been unable to locate any of [you] they sure have been 'up against it.' I do not think they have produced any evidence that will help their side in the entire four weeks in the trial * * * as soon as somebody else and I can get away for a day we will come and see you." On April 26, 1940, petitioner wrote Mrs. Price at Phoenix, addressing her under an assumed name, and on April 29, 1940, Mrs. Price wrote to petitioner from Phoenix. Two witnesses testified in this proceeding that during the pendency of the incompetency matter, petitioner in conversations with them stated that he was in contact with Mrs. Price. One of these witnesses testified that petitioner told him he was to see Mrs. Price "over the week end," while another testified that he told her he had delivered a letter to Mrs. Price "in person."

In explanation of the conflict between the evidence in this record and his testimony in the incompetency matter, petitioner states that when testifying in that matter he thought the inquiry was there being made as to whether he had been in "physical contact" with Mrs. Price. There is, however, nothing in the record which would indicate that the petitioner was misled or had any reason to believe that "physical contact" was being referred to in the questions asked him. He admitted that he knew that Mrs. Splane and Mrs. Price were avoiding service of process by secreting themselves, and an examination of the record shows that the questions directed to petitioner were clearly designed to ascertain the whereabouts of Mrs. Price.

The evidence amply supports the finding that the testimony given by petitioner at the incompetency hearing "was knowingly given for the purpose of conveying the impression that he did not know where [Mrs. Price] could be reached, which testimony was false." The Board of Governors in making its recommendation no doubt considered the fact that petitioner is 73 years of age, has been a member of the bar for many years and that no prior disciplinary action had ever been taken against him.

It is ordered that petitioner be suspended from the practice of the law for a period of nine months, effective thirty days after the filing of this decision.

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21 Cal.2d 690

PEOPLE v. HUSTON.

Cr. 4439.

Supreme Court of California.

March 1, 1943.

1. Criminal law 🔑1159(1)

Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not require reversal.

2. Criminal law 🔑1159(1)

To warrant rejection of statements given by a witness who has been believed by the trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

3. Criminal law 🔑1159(3)

Conflicts in the evidence and testimony which is subject to justifiable suspicion do not justify reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of witnesses and the truth of the facts upon which a determination depends.

4. Infants 🔑20

Evidence sustained conviction of committing a lewd and lascivious act, as against contention that testimony of prosecution's witnesses was inherently improbable. Pen.Code, § 288.

5. Criminal law 🔑419(1)
Infants 🔑20

Fact that prosecutrix made a complaint in prosecution for committing a lewd act is admissible as "original evidence," but testimony concerning the details as then given, or the name of the person accused, is "hearsay". Pen.Code, § 288.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay" and "Original Evidence".

6. Infants 🔑20

In prosecution for committing lewd and lascivious act, question to prosecutrix concerning a conversation at the sheriff's office, whether she had told what accused had been doing to her, was objectionable as respects portion referring to accused. Pen.Code, § 288.

7. Criminal law 🔑1169(1)

In prosecution for committing lewd and lascivious act, affirmative reply to question to prosecutrix concerning a conversation at the sheriff's office, whether she had said what accused had been doing to her, was not prejudicial where trial court did not allow prosecutrix to testify concerning what she had told the officers. Pen.Code, § 288.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Lewis Arby Huston was convicted of committing a lewd and lascivious act, and he appeals.

Affirmed.

For prior opinion, see 127 P.2d 1021.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The appellant was convicted of violating section 288 of the Penal Code upon a trial which followed the reversal of a similar judgment of conviction for the same offense. People v. Huston, 45 Cal.App.2d 596, 114 P.2d 607. He has again appealed from the judgment and also from an order denying his motion for a new trial.

The complaining witness, an eleven year old girl, was one of a number of children who attended parties given by Huston. At these parties games were played which required the loser to kiss him as a forfeit. He had written notes to the complainant and received notes from her. He had also given her things to eat and, on several occasions had taken her to a moving picture theatre. At different times, according to her testimony, he kissed parts of her body. Testifying in his own behalf, the appellant admitted his actions in the games but denied that he had done any of the other things related by the child.

Upon the first trial, the court allowed the prosecution to offer evidence tending to prove acts of Huston with minors other than the prosecuting witness when she was not present. There was evidence concerning advances he made to a child and the testimony of another girl that, as a forfeit for a game which he played with she, she was required to kiss him. The admission of that evidence, said the District Court of Appeal in reversing the judgment, constituted prejudicial error.

When the case was again called for trial, Huston waived the right to a jury, and his counsel stipulated to submit the case upon the transcript of the previous trial and that of the preliminary hearing. This stipulation included the qualification that the trial judge eliminate from his consideration those portions of either transcript relating to the evidence which the District Court of Appeal held was inadmissible, and also the testimony of any child relating to acts or conduct of Huston when the complaining witness was not present. However, Huston reserved the right to call any additional witnesses, to testify in his own behalf or to cross-examine the complaining witness.

At a later date, the trial judge stated that he had read both of the transcripts and considered all of the evidence shown by them, with the exception of the testimony which the District Court of Appeal had criticized. The prosecuting witness was called and cross-examined concerning the acts upon which the prosecution is based, and the appellant explained the circumstances under which he met the little girl on various occasions. He again denied that he, at any time, kissed her body.

In stating the reasons why he adjudged Huston guilty, the trial judge pointed out that cases of this kind present many difficulties because they involve children of immature years and frequently of immature mentality. And because the testimony of the child does not require corroboration, the trier of fact has a very grave responsibility. But the evidence as to the relations of Huston and the complaining witness, he said, show an unnatural and clandestine association between them. And he pointed out that there is no evidence of any motive which would induce either the girl or her mother to falsify. On the contrary, the circumstances surrounding the case indicate that the appellant's reactions are not those of a normal mature man.

The first point presented by the appellant as justifying a reversal of the judgment is that the evidence is insufficient because the testimony of the witnesses for the prosecution is inherently improbable. And he urges that because a man prosecuted for committing an offense of the kind charged against him usually has no defense except his denial, contradictions and inconsistencies in the evidence are of particular importance in determining whether a crime was committed.

[1-3] Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Back v. Farnsworth, 25 Cal.App.2d 212, 219, 77 P.2d 295; Lufkin v. Patten-Blinn Lumber Co., 15 Cal.App.2d 259, 262, 59 P.2d 414; Agoure v. Spinks Realty Co., 5 Cal.App.2d 444, 451, 42 P.2d 660; Hughes v. Quackenbush, 1 Cal.App.2d 349, 354, 355, 37 P.2d 99; Powell v. Powell, 40 Cal.App. 155, 158, 159, 180 P. 346. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the

trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850.

[4] Unquestionably the trial judge followed this rule when considering the evidence against the appellant for he analyzed the testimony of the little girl in determining whether reliance could be placed upon it. Generally speaking, he said, the statements which she made at different times did not vary particularly as to what Huston did, or the manner in which it was done. There are discrepancies in her story, he continued, but they are not such as to vitiate it. And the fact that some of the acts are said to have been committed when she visited him in a room where there was "just the possibility of interruption" does not make it incredible that such a thing could happen. Upon a review of the entire record, there is no basis for a contrary conclusion by an appellate court.

As a second ground for reversal, the appellant claims that the admission of certain evidence constitutes prejudicial error. He points to the testimony of the complaining witness as shown by the record of the first trial. Concerning a conversation when her mother took her to the sheriff's office, she was asked whether she said something "by way of telling them what this defendant had been doing to you." Following an affirmative reply which was given before counsel's objection to the question was made and overruled, the district attorney inquired as to what she told them. An objection to this question was sustained and it was not answered.

[5-7] The fact that the prosecutrix made a complaint is always admissible as original evidence, but testimony concerning the details as then given, or the name of the person accused, is hearsay. People v. Adams, 14 Cal.2d 154, 159, 93 P.2d 146. The only objectionable portion of the answered question is the reference to the defendant. Although it would have been better had the district attorney identified the complaint as being related to the matter under inquiry without reference to a particular person, as the court refused to allow the witness to testify concerning what she told the officers, the ruling, even if erroneous, was not prejudicial. People v. Porter, 48 Cal.App. 237, 241, 242, 191 P 951.

The court also committed prejudicial error, says the appellant, in receiving testimony of another young girl concerning complaints made to her mother in regard to Huston's actions. This evidence, however, is part of that which the trial court judge, following the stipulation of the parties, excluded from consideration in rendering the judgment from which the present appeal is prosecuted.

Finally, says the appellant, the court convicted him upon evidence concerning a kissing game which was allegedly played by Huston when the complaining witness was present although there is no testimony showing that she was kissed at that time. He concedes upon the authority of People v. Hunt, 17 Cal.App.2d 284, 61 P.2d 1208, and People v. Anthony, 185 Cal. 152, 196 P. 47, that the evidence would be admissible if the complaining witness had been kissed during the game, but claims that the rule does not allow testimony concerning conduct solely with third persons.

The record does not support his assertions concerning the evidence. It shows that a boy by the name of Holt attended only one party at which kissing games were played, and the challenged testimony refers to that party. According to the boy, three girls, including the complaining witness, were present when the kissing games began. All of the girls lost, he said, and had to kiss Huston. And on cross-examination he stated specifically that the complaining witness kissed Huston during the game, but that, because she was losing quite a bit, he began "cheating" for her. He also testified that the complaining witness kissed the appellant a "Hollywood, a little bit longer." One of the girls testified, also on cross-examination, that the complaining witness kissed the appellant during the game. And the other girl related that, during the same game, the complaining witness kissed the appellant five or six times.

The judgment and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., SHENK, CURTIS, CARTER, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

21 Cal.2d 681

VALLERA v. VALLERA et al.

L. A. 18263.

Supreme Court of California.

March 1, 1943.

As Modified on Denial of Rehearing

March 29, 1943.

1. Marriage 🔑54

A woman who lives with a man in belief that a valid marriage exists is entitled, on termination of their relationship, to share in property acquired by them during existence of relationship, and the proportionate contribution of each party is immaterial, since property is divided as community property would be on dissolution of a valid marriage.

2. Marriage 🔑54

The essential basis of a "putative marriage", so as to entitle woman living with a man as his wife, on termination of their relationship, to share in property acquired by them during existence of relationship, is a belief in the existence of a valid marriage.

See Words and Phrases, Permanent Edition, for all other definitions of "Putative Marriage".

3. Marriage 🔑54

In action for division of property acquired by defendant while plaintiff cohabited meretriciously with defendant, evidence did not establish that plaintiff believed in good faith that she was defendant's lawful wife, and hence entitled on termination of their relationship to share in property acquired during existence of relationship.

4. Marriage 🔑54

Woman who lived with a man as his wife, with no genuine belief that she was legally married to him, did not acquire by reason of the cohabitation alone the rights of a "cotenant" in his earnings and accumulations during the period of their relationship.

See Words and Phrases, Permanent Edition, for all other definitions of "Cotenant".

5. Marriage 🔑54

If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property.

6. Marriage 🔑54

Even in absence of an express agreement by man and woman living together as husband and wife to pool their earnings and to share equally in their joint accumulations, the woman is entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition.

7. Marriage 🔑54

Where man and woman, who cohabited meretriciously, had no agreement to pool their earnings and share equally in their joint accumulations, and property accumulated consisted of man's earnings during the cohabitation, the woman was not entitled to an undivided one-half of the property.

8. Aliens 🔑16

Defendant was not precluded from challenging trial court's ruling in favor of plaintiff because defendant allegedly stood convicted in federal court of falsely representing himself to be an American citizen.

CURTIS and CARTER, JJ., and PETERS, J. pro tem., dissenting in part.

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In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Marian Vallera against Concezio Vallera for separate maintenance and for a division of community property, wherein Lido Cappello was named as corespondent. From the adverse portion of a judgment denying plaintiff maintenance, but awarding plaintiff an undivided one-half of property accumulated, defendant appeals.

Portion of judgment appealed from reversed.

For prior opinion, see 126 P.2d 638.

Zagon & Aaron and S. S. Zagon, all of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action for separate maintenance and for a division of community property, which she alleged was worth at least $60,000. She relied on an alleged common law marriage contracted in Michigan on December 16, 1938, and accused defendant of extreme cruelty, desertion, and adultery. Defendant denied the allegations of the complaint and alleged that his relations with plaintiff were illicit and that he was legally married to Lido Cappello, named as co-respondent in the complaint. The trial court found that plaintiff and defendant did not on December 16, 1938, or at any other time contract a common law marriage in Michigan or elsewhere; that they did not at any time enter into or attempt to enter into an agreement to take each other as husband and wife; that beginning in May, 1936, and for at least three years thereafter, plaintiff cohabited meretriciously with defendant; that between January, 1933, and December 15, 1938, defendant was married to Ethel Chippo Vallera; that plaintiff knew from the beginning of her relationship with defendant that he was married and under a legal disability to enter into a marriage contract with her; that while the marriage between defendant and Ethel Chippo Vallera was dissolved on December 15, 1938, neither plaintiff nor defendant learned of its dissolution until November, 1939; and that on July 6, 1940, defendant entered into a valid marriage with Lido Cappello. The court concluded that plaintiff and defendant had never been husband and wife; that plaintiff was not entitled to maintenance; and that there was no community property. It held, however, that all property acquired by the parties between December 16, 1938, and July 6, 1940, except such property as either might have acquired by gift, devise, bequest, or descent, was held by them as tenants in common, each owning an undivided one-half thereof, and defendant has appealed from this part of the judgment. He contends that since there was no marriage, no attempt to contract marriage, no belief in the existence of a valid marriage, no evidence of any agreement between the parties as to their property rights, and no evidence concerning the accumulation of property or contributions by the parties thereto, plaintiff could not acquire the rights of a cotenant in property acquired by him during the period of illicit cohabitation.

[1] It is well settled that a woman who lives with a man as his wife in the belief that a valid marriage exists, is entitled upon termination of their relationship to share in the property acquired by them during its existence. Feig v. Bank of Italy etc. Ass'n, 218 Cal. 54, 21 P.2d 421; Figoni v. Figoni, 211 Cal. 354, 295 P. 339; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844; see Knoll v. Knoll, 104 Wash. 110, 176 P. 22, 11 A.L.R. 1394. The proportionate contribution of each party to the property is immaterial in this state (Coats v. Coats, supra; Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143), for the property is divided as community property would be upon the dissolution of a valid marriage. Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; Feig v. Bank of America, etc., Ass'n, 5 Cal.2d 266, 54 P.2d 3; Schneider v. Schneider, supra; Coats v. Coats, supra; Macchi v. La Rocca, supra.

[2] The essential basis of a putative marriage, however, is a belief in the existence of a valid marriage. Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307; see Evans, Property Interests Arising from Quasi-Marital Relations, 9 Corn. L.Q. 246; 20 Cal.L.Rev. 453. In addition, in the majority of cases, the defacto wife attempted to meet the requisites of a valid marriage, and the marriage proved invalid only because of some essential fact of which she was unaware, such as the earlier undissolved marriage of one of the parties (Schneider v. Schneider, supra; Knoll v. Knoll, 104 Wash. 110, 176 P. 22, 11 A.L.R. 1391), a consanguineous relation between the parties (Figoni v. Figoni, supra; Krauter v. Krauter, 79 Okl. 30, 190 P. 1088), or the failure to meet the requirement of solemnization. Santos v. Santos, 32 Cal.App.2d 62, 89 P.2d 164; Macchi v. La Rocca, supra; see Fung Dai Kim Ah Leong v. Lau Ah Leong, 9 Cir., 27 F.2d 582.

[3, 4] Although it is clear from the trial court's findings that the parties in the present case did not comply with the requisites of a legal marriage, plaintiff contends that the presumption that a person is innocent of crime or wrong (Code Civ. Proc. § 1963, subd. 1), and the fact that the parties lived together as man and wife at a time when both were free to enter into a valid marriage with one another, establishes that plaintiff believed in good faith that she was the lawful wife of defendant. The findings of the trial court, however, amply supported by the evidence, do not substantiate the existence of good faith. See Flanagan v. Capital Nat. Bank, supra. The removal of the barrier to a valid marriage between the parties by the dissolution of defendant's marriage to Ethel Chippo Vallera does not substantiate plaintiff's good faith, for the court found that neither plaintiff nor defendant was aware of that dissolution. The controversy is thus reduced to the question whether a woman liv-

ing with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship. It has already been answered in the negative. Flanagan v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307. Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case.

[5-7] Plaintiff's lack of good faith in alleging the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940, 36 L.R.A.,N.S., 838; see Feig v. Bank of America etc. Ass'n, supra; Bracken v. Bracken, 52 S.D. 252, 256, 217 N.W. 192; Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43, 132 Am.St.Rep. 879. Even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition. Hayworth v. Williams, supra; Delamour v. Roger, 7 La. Ann. 152. There is no evidence that the parties in the present case made any agreement concerning their property or property rights. The meager evidence with respect to the accumulation of the alleged community property can support only the inference that the property consisted of defendant's earnings during the period in question, and there is no contention to the contrary. There is thus no support in the record for the trial court's finding that the parties each owned an undivided one-half of the property acquired by either of them between December 16, 1938, and July 5, 1940.

[8] There is no merit in plaintiff's contention that defendant is not in a position to challenge the trial court's ruling because he stands convicted in the District Court of the United States of falsely representing himself to be an American citizen.

The part of the judgment appealed from is reversed.

GIBSON, C. J., and SHENK, and EDMONDS, JJ., concurred.

CURTIS, Justice (dissenting in part).

I dissent. I agree with the conclusion of the majority opinion in holding that the judgment of the trial court cannot be sustained upon the ground that (1) there was a valid marriage, (2) an attempt to contract a valid marriage, (3) a bona fide belief in the existence of a valid marriage, or (4) an express agreement of the parties as to their property rights. I disagree with the conclusion of the majority opinion that in order to sustain the judgment of the trial court there must be proof of a definite monetary contribution by the plaintiff in the form of separate property, or a contribution of her earnings as a waitress or from other employment outside the home. In the absence of any proof of any cash or property contribution by the plaintiff, the holding of the trial court that she owned a one-half interest in the property accumulated must have been based upon the conclusion that the value of her services as a housekeeper, cook, and homemaker was of sufficient value to warrant an equal division of the property. The majority opinion substitutes its own appraisal of the value of her services in the home as being of no more value than the cost of maintenance of herself and her two children. The holding of the trial court seems to me more reasonable.

The existence of the illicit relationship even knowingly entered into, is no bar per se to an equitable division of the property. This is demonstrated by the cases cited in the majority opinion which hold that if there is an express agreement to pool property, or if the woman's earnings contribute to its purchase, the existence of the illicit relationship, even knowingly entered into, does not bar an equitable division of the property. This state has determined as part of its fundamental public policy that a wife has a one-half interest in marital property. The same rule, by analogy, is applied where the parties enter into an illicit relationship but think, in good faith, they are married. The next step was taken in those cases which hold that express agreements to share equally in joint accumulations will be enforced, and the court will protect the interest of both where both contribute toward the purchase of the property even though they both knew the relation was illicit. Likewise, if an express agreement will be enforced, there is no legal or just reason why an implied agreement to share the property cannot be enforced. Unless it can be argued that a woman's services as cook, housekeeper, and homemaker are valueless, it would seem logical that if, when she contributes money to the purchase of property, her interest will be protected, then when she contributes her services in the home, her interest in property accumulated should be protected. Just because the man, who in the instant case was equally guilty, earned the money to buy the property, should not bar the woman from any rights at all in the property, although her services made the acquisition possible. Such a rule gives all the advantages to be gained from such a relationship to the man with no burdens.

The majority opinion concedes that in determining the value of a woman's services in maintaining a home the courts have held, in instances involving the absence of a valid marriage but the existence of a bona fide belief in the existence of a marriage, that upon the termination of the relation, the property will be divided as community property would be upon the dissolution of a valid marriage and that the proportionate contribution of each party to the purchase of the property is immaterial. Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143. Unless the underlying purpose be to punish the woman for participating in the illicit relationship—which idea of punishment obviously has no just place in a controversy between two parties equally guilty—why should not the same rule be applied to the instant case?

It should perhaps be noted that the trial court limited the recovery by the plaintiff to a half-interest in the property acquired during the period the parties cohabited subsequent to the divorce of the first wife and prior to defendant's marriage to his second wife, hence no equities of third parties intervene, and the only question involved is that of the equities between the parties. To permit the defendant to retain the entire fruits of their joint efforts is contrary to the dictates of simple justice.

CARTER, J., and PETERS, J. pro tem., concurred.

Rehearing denied; CURTIS and CARTER, JJ., dissenting.

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21 Cal.2d 695

SHEARER et ux. v. COOPER.

L. A. 18125.

Supreme Court of California.

March 2, 1943.

1. Fraud ⇐20

Where purchaser discovered vendor's mistake in representing that property included certain trees by vendor's voluntary admission and his purchase of additional land to make good the representation, purchaser was not precluded from thereafter relying upon vendor's representations.

2. Fraud ⇐58(4)

The replacement of wooden culverts by a concrete bridge and cleaning of canyon wash of willows and brush by purchaser of ranch property did not establish lack of purchaser's reliance on vendor's representation of absence of flood conditions on ranch property, where purchaser's object was merely to prevent necessity of recovering and replacing culverts after a heavy rain, and to keep normal current of canyon wash in its proper place.

3. Fraud ⇐58(1, 4)

The fact that purchaser of ranch property represented as being free from flood conditions conveyed a contractor across river flowing through the land by means of a tractor under flood conditions was not evidence of purchaser's assent to the conditions or previous knowledge thereof.

4. Fraud ⇐35

The purchaser of ranch property represented as being free from flood conditions was not required to vacate property or abandon his partially constructed improvements when true conditions became known.

5. Fraud ⇐23

Numerous visits to property prior to purchase do not absolutely preclude purchaser from relying on representations made by vendor.

6. Fraud ⇐23

Numerous visits by purchaser of ranch property to property prior to purchase did not absolutely preclude reliance on vendor's representations as to extent of areas and as to their susceptibility to cultivation, where it was not shown that purchaser was so versed in knowledge of land or soil as to be able to observe true facts as to such matters.

7. Fraud 🔑58(4)

Fact that accountants of purchaser of ranch property placed value of an irrigation system at a figure much less than that represented by vendor, in setting up books for ranch operations, did not signify that purchaser had knowledge of its actual cost before purchase, so as to preclude purchaser from relying on vendor's representation in such matter.

8. Fraud 🔑58(4)

Evidence supported finding that purchaser of ranch property had no knowledge until after purchase that all of alfalfa fields visible on inspection of premises were not included and that a reduction in asked price was not based on elimination from sale of a part of the field, and hence purchaser was not precluded from relying upon vendor's representations as to area of the fields.

9. Fraud 🔑13(2)

A vendor's positive assertion as to boundaries of acreage sold in a manner not warranted by any information he possessed, if false, constituted "actual fraud" within statute, even though vendor believed statements to be true. Civ.Code, § 1572, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Fraud".

10. Appeal and error 🔑994(3), 1012(1)

Questions of weight of evidence and credibility of witnesses are for trial court.

11. Appeal and error 🔑1011(1)

Where there was both documentary evidence and evidence of conduct of parties to support trial court's findings, fact that there was also documentary evidence from which a contrary inference might have been drawn would not militate against substantial nature of conflict by which Supreme Court was bound in resolving intendments and inferences in favor of trial court's action.

12. Fraud 🔑23

In determining whether an examination of premises by purchaser will shield vendor from an action based on vendor's alleged misrepresentation, each case must be judged for itself.

13. Fraud 🔑23

Proof that purchaser of ranch property made some examination of property before purchasing it would not shield vendor from an action for alleged misrepresentation, especially where truth of vendor's representations could be checked accurately only by experts.

14. Fraud 🔑22(2), 23

Any information as to amount of acreage revealed to purchaser of ranch property by use of a planimeter was not conclusive on question of his reliance on vendor's representations as to acreage, or as to his duty to pursue the inquiry further, where vendor thereafter positively reassured purchaser as to his representations with respect to acreage.

15. Fraud 🔑58(4)

Evidence authorized finding that purchaser of ranch property relied upon vendor's false representations as to acreage available for cultivation, cost of irrigation system installation, and as to property being free from flood conditions, so as to authorize purchaser to recover for damages sustained.

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In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Douglas G. Shearer and his wife against Charles E. Cooper for fraud in the sale of land. From a judgment for plaintiff, the defendant appeals.

Affirmed.

For prior opinion, see 128 P.2d 426.

Jerry Giesler, of Los Angeles, and Gray, Cary, Ames & Driscoll, J. G. Driscoll, Jr., and John M. Cranston, all of San Diego, for appellant.

Gang & Kopp, Martin Gang, and Robert E. Kopp, all of Los Angeles, for respondents.

SHENK, Justice.

The plaintiff, Douglas G. Shearer, with his wife, commenced an action against the defendant, Charles E. Cooper, to recover damages alleged to have been sustained by reason of false representations in the sale to the plaintiff of real property situated in San Diego County. The plaintiff had judgment for $19,650, interest and costs. The defendant appealed.

On the appeal it is not contended that the evidence is insufficient to support the trial court's findings that certain false representations were in fact made by the defendant to the plaintiff, and that if relied upon they were material inducements to the making of the contract. The only ground of the appeal is that the evidence is insufficient to support the finding of reliance on the false representations.

In 1932 the defendant, a breeder of race horses, purchased from the Huntington Land and Improvement Company 4,860 acres in the San Luis Rey Valley, San Diego County, which he called the Rancho San Luis Rey. He did not need the entire acreage as a breeding establishment, and in 1934 listed 1,250 acres for sale. In 1933 the plaintiff, who was chief recording engineer for a motion picture studio in Culver City, had become interested in acquiring a ranch as a commercial venture and upon which to establish his home. David Backus, a real estate broker, showed him several places. He made his first visit to the Rancho San Luis Rey in May 1934. Negotiations between the plaintiff and the defendant commenced and continued for a period of twenty-two months. The parties came to an agreement and on March 10, 1936, consummated the purchase and sale for $61,500 of 550 acres situated generally along the easterly and southerly portions of the 1,250-acre tract. Four hundred and thirty acres on the easterly side were selected by the plaintiff because they included two large areas devoted to the raising of alfalfa, to which water was accessible through an irrigation system. The remaining 120 acres along the southerly side adjoining the 430 acres on the west were purchased because of some old adobe buildings at the westerly end thereof. The San Luis Rey River flowed diagonally through the 1,250-acre tract northwesterly of the 550 acres. The Keys Canyon Wash extends from the higher region on the east to the San Luis Rey River and is between the two alfalfa areas, which we shall designate as the north and south alfalfa fields.

Throughout the negotiations the defendant represented that there were 160 acres then in alfalfa, certain additional acreages available for alfalfa, for other cultivation, and for pasture, with certain areas in brush and trees. He submitted to the plaintiff a map, showing the various acreages in different colors, including 160 acres in alfalfa, 150 acres otherwise cultivable, and 145 acres of pasture and waste land all within the 550 acre tract. The defendant represented the cost of the irrigation system installation to have been $27,000. Other representations on his part were: That the San Luis Rey River was not heavy flowing, could not flood and had not flooded since the erection of the Henshaw Dam; that the stream in the Keys Canyon Wash was never more than a small creek, was not dangerous, could not possibly overflow or do any damage to the land, that he had "cured" any such possible tendency; that the property was readily accessible by automobile at all seasons from the north across the San Luis Rey River except for a few days in years of excessive rainfall when the wooden culverts were displaced but were easily dragged back into position by a team of horses or mules; that the property was accessible at all times across the Keys Canyon Wash.

The trial court found that the foregoing representations had been made, and that they were false in the following particulars: There were but 123 acres of alfalfa land, 15 acres of potential alfalfa land, and only 102 acres of land otherwise cultivable. The colored map incorrectly designated the areas, and incorrectly set forth the width, boundaries and course of the San Luis Rey River. The map used was a copy of one printed by the Huntington Land and Improvement Company. Before the exhibition of the colored map to the plaintiff, there had been removed therefrom the words "San Luis Rey River," the presence of which would have shown the river to be several hundred feet in width, instead of the narrow stream bordered by potential alfalfa acreage as depicted on the colored map. This map had otherwise been altered by the removal therefrom of the words "Steep Mountain" from the area east of the north alfalfa field, the larger portion of which had been colored on the map to designate it as cultivable land. The defendant had offered to the plaintiff the entire visible area planted to alfalfa, whereas the description of the property in the deed cut off about five acres of the south field.

The court also found and it is not questioned that the Keys Canyon Wash during any normal season of heavy rainfall was not a small creek but wide and fast flowing, and during such a season was a river which overflowed its banks; that the defendant knew the dangers from flood and that to his knowledge the waters from Keys

Canyon had overflowed its banks and seriously damaged the south alfalfa field; that the San Luis Rey River also was and was known by the defendant to be a flood river which continued to be so after the construction of the Henshaw Dam; that the roads from the main highway over the San Luis Rey River and over the Keys Canyon Wash were impassable by any means of vehicular travel for long periods of time; and that the cost of the irrigation system was not $27,000, but less than $15,000.

The defendant contends that inasmuch as the plaintiff made numerous trips to the property he could see with his own eyes and must be deemed precluded by what he saw. The plaintiff procured an aerial photograph of the area. He marked squares on a separate piece of tissue paper, and sent it with the photograph to the defendant with the request that he place it correctly on the photograph so that the plaintiff could see where the boundaries were. It does not appear that the defendant acceded to this request. Apparently neither the defendant nor the plaintiff knew the boundaries. The plaintiff made an attempt without success to locate a monument by which to establish them. After the purchase and in 1937 a survey was made at the plaintiff's instance, and the discrepancies were then disclosed. In the interim, and before the purchase, the plaintiff marked off squares on the aerial photograph which indicated that, if he had properly placed the eastern boundary, the western boundary line would cut off about five acres from the south alfalfa field.

The defendant showed to the plaintiff and explained the working principles of a planimeter, an instrument with which the plaintiff was not acquainted. Given the measurement of an area on a plane surface, a planimeter is used to measure multiples of the given area. Before the final agreement the plaintiff asked the defendant for the measurement of the race track on the defendant's property which showed on the upper edge of the aerial photograph. The plaintiff then used the instrument to measure the approximate acreage of the alfalfa fields, and "became suspicious" that the fields contained only about 128 acres. He communicated his suspicions to the defendant who sent back the message that there was something wrong, that the plaintiff's calculations were "cock-eyed," and that the alfalfa fields actually comprised 160 acres.

Upon the occasion of an earlier view of the property, the defendant had represented that some pine trees toward the southeast were within the boundaries of the offered property. Subsequently he discovered that he did not own that particular land. He thereupon acquired an additional 40-acre tract in order to include that area in the sale. He so informed the plaintiff.

After the purchase of the property the plaintiff proposed to the defendant that they replace the wooden culverts over the San Luis Rey River with a concrete bridge. This was done, the plaintiff furnishing the material and the defendant the labor. Before the first winter the plaintiff had some willows and brush cleaned out of the bed of the Keys Canyon Wash. The plaintiff commenced the clearing of the cultivable land east of the north alfalfa field and sent for 3,000 orange trees for the purpose of planting them in that area. It was not until after the trees arrived that it became apparent that only about a third of the area was in fact cultivable. In order to plant all of the trees it was necessary to utilize about 35 acres of the north alfalfa field. The plaintiff also commenced the construction of improvements at the site of the old adobe houses. During the construction the road over the San Luis Rey River became so impassable that the plaintiff was required to assist the contractor across by means of a tractor. During the winter heavy floods destroyed the concrete bridge and a considerable portion of the south alfalfa field. Members of the plaintiff's family were stranded at the home site, which was so inaccessible for a long period of time that it became necessary to drop food and other articles to them from an airplane.

[1] The defendant contends that the evidence conclusively shows that the plaintiff relied on his own investigations and not on the false representations. The defendant asks: "May a prospective purchaser of real property who has actual affirmative knowledge that the seller has been mistaken in at least one material representation, thereafter rely upon any representations made to him by the seller or his agents? Is not the buyer thereby placed upon notice that all the other representations made to him may likewise be erroneous, so that he is no longer justified in relying upon any such representations?" Here the defendant is referring

to the representation that the property included the pine trees to the southeast and the plaintiff's discovery of the mistake by the defendant's voluntary admission and his purchase of additional land to make good the representation. Far from creating any suspicion in the mind of the plaintiff, it is more reasonable to suppose that the occurrence served to increase the plaintiff's confidence in a seller who thus proceeded to make good his representation. This same confidence and the subsequent reassurances by the defendant could also reasonably be found to have allayed any suspicion that the alfalfa fields contained less than 160 acres.

[2-4] The defendant asserts that the substitution of a concrete bridge for the wooden culverts, and the cleaning of the canyon wash of willows and brush, could lead to but one conclusion, namely, that the plaintiff did not rely upon the representations of the absence of flood conditions. But the trial court could justifiably conclude from the evidence that the plaintiff did so rely. The facts sufficiently indicated that the plaintiff's efforts were known to him to have been futile to stem, or prevent damage from, heavy floods, and that his object was merely to prevent the necessity of recovering and replacing the wooden culverts after a heavy rain, and to keep the normal current of the canyon wash in its proper place. Likewise the conveyance of the contractor across the river by means of a tractor under flood conditions cannot be deemed to be evidence of assent to the conditions or previous knowledge thereof. The plaintiff was not required to vacate the property or abandon his partially constructed improvements when the true conditions became known.

[5, 6] Numerous visits to the property prior to purchase do not absolutely preclude reliance on representations made by the seller. We may assume that on those visits the topography of the land was plainly visible to the plaintiff; but it is not shown that he was so versed in the knowledge of land or soils as to be able to observe whether the areas were of the extent represented or whether they were susceptible to the cultivation represented.

[7] After the purchase the plaintiff's accountants set up books for the ranch operations and placed the value of the irrigation system at $5,000. The placing of that figure on the value of the irrigation system does not necessarily signify that knowledge of its actual cost or value was possessed by the plaintiff before the purchase. The inference is reasonable that that value was fixed because of the discovery after the purchase that the actual cost and the subsequent allowable depreciation were considerably less than that represented by the defendant.

[8] After the purchase both the plaintiff and the defendant treated the alfalfa crops from the entire area of both fields as the property of the plaintiff, and they were harvested as such until the defendant commenced the construction of a fence or laid out a line to mark a portion of the western boundary through the south alfalfa field. In response to an objection communicated to the defendant by David Backus on behalf of the plaintiff that "if this line is run he [plaintiff] does not get part of one of the alfalfa fields that you sold him," the defendant stated: "Dave, I don't know where the lines are. There is the contract, and the legal description; they had plenty of time to check it against the legal description. There is nothing I can do about it." The evidence was sufficient to justify the conclusion that the plaintiff did not know until after the purchase that all of the alfalfa fields were not included; and that a supposed reduction of about $5,000 in the asked price was not based on the elimination from the sale of a part of the alfalfa field.

[9] It is fair to assume that the defendant did not know the exact location of the boundaries of the acreage which he sold to the plaintiff; but under the law it is a matter about which he should have informed himself before making the representations. The trial court concluded that the defendant's positive assertions in a manner not warranted by the information he possessed, of that which was not true even though he believed it to be true, constituted actual fraud within the meaning of subdivision 2 of section 1572 of the Civil Code.

[10, 11] The questions of the weight of the evidence and the credibility of the witnesses were for the trial court to determine. We cannot say that the conflict in this case is one of "mere words," as designated in Herbert v. Lankershim, 9 Cal.2d 409, at page 471, 71 P.2d 220, a case relied on by the defendant. Unlike the facts in that case, here there was in addition both documentary evidence and evidence of the con-

duct of the parties to support the finding and conclusion that the plaintiff was warranted in relying upon and actually did rely upon the defendant's false representations. The fact that there was also documentary evidence from which a contrary inference might have been drawn does not militate against the substantial nature of the conflict by which this court is bound in resolving intendments and inferences in favor of the action of the trial court.

[12-14] Other authorities relied upon by the defendant do not warrant a different conclusion. He places special reliance on the case of Carpenter v. Hamilton, 18 Cal. App.2d 69, 62 P.2d 1397, in support of his contention that the plaintiff, having discovered the falsity of one representation, was put on guard as to all other representations and could not legally rely upon any statement made by the defendant. The defendant again is referring to his voluntarily admitted mistake as to the location of the pine trees. The defendant cannot be heard to say that his voluntary admission of a mistake prior to the purchase must be deemed to have put the plaintiff on guard as to the truth of other representations. The purpose of the rule invoked by the defendant is to close the door to false claims of reliance by the purchaser. But its application here in accordance with the defendant's contention would afford with impunity the opportunity for fraud on the part of the seller. In Carpenter v. Hamilton, the judgment for the plaintiffs was reversed because the plaintiffs chose to inspect the property before purchase and by such inspection ascertained the true factual situation, or, without any conflict in the evidence, the true condition was so apparent as to foreclose their claim of reliance. See, also, to similar effect Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 P. 240; Elko Mfg. Co. v. Brinkmeyer, 216 Cal. 658, 15 P.2d 751; Gratz v. Schuler, 25 Cal.App. 117, 142 P. 899; Hackleman v. Lyman, 50 Cal.App. 323, 195 P. 263. That is not the situation disclosed by the record before us. Furthermore, it is not the law of this state that some examination made by the buyer will shield the seller from an action for damages. As was said in Dow v. Swain, 125 Cal. 674, 58 P. 271, 273, "Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts [and to that should be added, or if he represents them as known to him], and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations," there is no reason why relief should not be granted, "although an imperfect examination was made. It may have been imperfect because of the representations." See, also, Neff v. Engler, 205 Cal. 484, 271 P. 744. As indicated in those cases the truth of the representations of the defendant in the present case could be checked accurately only by the employment of experts. In Quarg v. Scher, 136 Cal. 406, 69 P. 96, it was said that the purchaser had a right to rely on the representations as to acreage; that the acreage of land cannot be seen by the eye at a glance, but can only be ascertained with accuracy by scientific measurement. See, also, Morey v. Bovee, 218 Cal. 780, 25 P.2d 2; Eichelberger v. Mills Land & W. Co., 9 Cal.App. 628, 100 P. 117. An instrument for measuring the area of a plane by passing a tracer around the boundary line is not the scientific instrument by which the area of land is accurately measured. Scientific measurement of land is commonly made on the ground by surveying instruments. Moreover, any information revealed to the plaintiff by his use of a planimeter was not conclusive on the questions of reliance or duty to pursue the inquiry further, in view of the defendant's positive reassurances. Feckenscher v. Gamble, 12 Cal.2d 482, 495, 85 P.2d 885; Shermaster v. California Home Bldg. Loan Co., 40 Cal.App. 661, 181 P. 409.

[15] It is our conclusion that there is substantial evidence in the record to support the finding that the plaintiff could and did rely upon the representations of the defendant found to have been false. No contention is made that the plaintiff did not sustain the amount of damages specified in the judgment.

The judgment is affirmed.

GIBSON, C. J., CURTIS, EDMONDS, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

21 Cal.2d 668

MARLENEE v. BROWN et al.

L. A. 17765.

Supreme Court of California.

March 1, 1943.

Rehearing Denied March 29, 1943.

1. Appeal and error 🔑380(4)

On appeal from judgment refusing to set aside order confirming executrix' sale of decedent's realty, order was required to be read as including circumstance that no sale was in fact made, notwithstanding that return of sale and order were regular considering only the face of the record, where grantee's part in the transaction was admitted in the answer and his testimony was admitted without objection by defendants.

2. Vendor and purchaser 🔑239(1)

A bona fide purchaser is not chargeable with the fraud of his predecessors and takes title purged of any anterior fraud affecting it and free from any equities existing between the original parties.

3. Vendor and purchaser 🔑232(1)

Possession of land imports to an intending purchaser only such knowledge as would be gained by inquiry from the one having such possession.

4. Executors and administrators 🔑380(1)

An order confirming executrix' sale of decedent's realty would not be set aside for fraud on executrix inducing sale where title had passed through two parties to purchasers, there was no claim that purchasers had notice of executrix' claimed rights, and where, although tenants were in possession and executrix managed the property as she had done before, she told purchasers that she was collecting rents for their vendor, and executrix understood that purchasers were buying the property from their vendor, since purchasers were "bona fide purchasers".

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser".

5. Vendor and purchaser 🔑239(9)

A void deed cannot be the foundation of a good title, and a bona fide purchaser for value acquires no rights under it.

6. Judgment 🔑497(1)

In a collateral attack upon a judgment or order of the probate court, recitals in the record may not be contradicted by evidence of facts different from those appearing upon the face of the record.

7. Judgment 🔑499

Although a judgment or order is valid on its face, if a party in favor of whom a judgment or order runs admits facts showing its invalidity or without objection on his part evidence is admitted which clearly shows such facts, trial court must declare the judgment or order void.

8. Executors and administrators 🔑349(2)

An executrix was not entitled to attack collaterally an order confirming her sale of decedent's realty, which order was regular and valid on its face, to show that the order was void because there was in fact no sale to her grantee who was purchasers' predecessor in interest notwithstanding that purchasers admitted that there was no sale to her grantee and evidence tending to show that her grantee had not made a bid to the property was received without objection, where purchasers were bona fide purchasers.

9. Vendor and purchaser 🔑239(9)

The title of a bona fide purchaser may not be successfully questioned even though he admits by pleading or fails to object to admission of facts tending to show that the judgment or order under which title is based is invalid, and discovery of a defect not apparent in the record does not deprive the purchaser of rights earlier acquired in reliance upon validity of the judgment roll.

10. Executors and administrators 🔑397

An executrix' deed of decedent's realty, reciting that it was made pursuant to confirmation order and in consideration of specified purchase price which was stated as $5,670 complied with confirmation order confirming sale for $10,000 less amount of liens and incumbrances against the realty, notwithstanding that the parties stipulated that the amount of unpaid and due taxes and assessments was $3,773, where there were liens other than for taxes and assessments or liens for taxes and assessments not due which were included in amount stated in the order but not in the stipulation.

11. Vendor and purchaser 🔑239(9)

The lack of delivery of a conveyance may be asserted against a bona fide purchaser who relied upon grantee's possession of the deed.

12. Deeds 🔑56(2)

Whether a deed has been delivered is a question of intention, and, if a grantor intends that his deed shall be legally operative, there is a "delivery" regardless of how the intention is manifested.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

13. Deeds 🔑62

Although a deed in the hands of a grantee may be ineffective because unaccompanied by the intention of grantor that it should be legally effective, it may subsequently be made operative by grantor's recognition of title as being in the grantee; such recognition constituting "delivery" of the deed.

14. Executors and administrators 🔑380(3)

Evidence disclosing that executrix had intended that her grantee of decedent's realty should obtain a merchantable title thereto, and that grantee delivered his deed to grantor of defendant purchasers at time he signed and acknowledged it with intention that it should convey title, established "delivery" of deed authorizing refusal to set aside order confirming the sale.

15. Executors and administrators 🔑380(3)

In action to set aside order confirming executrix' sale of decedent's realty, evidence rebutted presumption that executrix' affidavit relating to sale to grantee who conveyed the realty to her attorney, and executrix' notice directing tenants upon the realty to pay future rent to defendants, who were bona fide purchasers from attorney, were obtained by attorney's undue influence over executrix. Civ.Code, § 2235.

16. Executors and administrators 🔑380(4)

In action to set aside order confirming executrix' sale of decedent's realty, finding that defendants were bona fide purchasers from executrix' attorney to whom executrix' grantee had conveyed the realty compelled judgment in favor of defendants and rendered determination of issue of fraud as between executrix and her attorney immaterial.

17. Appeal and error 🔑1050(1)

In action to set aside order confirming executrix' sale of decedent's realty, where trial court admitted a purported assignment of executrix' distributive share in the estate but did not permit executrix to testify as to when, how, and for what purpose she signed the assignment, the rulings were not prejudicial to executrix where no finding was made concerning the assignment and trial court did not conclude that defendants had title because of it.

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Phoebe A. Marlenee, sometimes known as Phoebe A. Colvin, as executrix of the last will and testament of Charles Lee Marlenee, against James E. Brown and others to set aside an order confirming executrix' sale of realty belonging to decedent's estate, to have her deed and conveyances by which title has become vested in defendant declared void, and to quiet title of the estate in the property. From a judgment for defendants, plaintiff appeals.

Affirmed.

For prior opinion, see 128 P.2d 137.

Vere Radir Norton, W. H. Gregory, Finlayson, Bennett & Morrow, and Frank G. Finlayson, all of Los Angeles, for appellant.

Milo V. Olson, Howard Painter, M. J. Rankin, R. Leslie Sparks, Thomas Reynolds, and John O. Palstine, all of Los Angeles, for respondents.

EDMONDS, Justice.

The appellant, as executrix of the estate of her deceased husband, conveyed real property which the respondents later purchased from a successor in interest of the grantee. By this action she is seeking to set aside the order of the probate court affirming the sale, to have her deed and other conveyances by which title has been vested in the respondents declared void, and to quiet the title of the estate in the property.

Shortly after the death of Charles Lee Marlenee in 1931, letters testamentary were issued to the appellant. The estate is still in course of administration. In 1935, there was presented to the probate court a return of sale of the property in controversy to William Gaston. This return, signed and verified by the appellant, included a request that the sale be confirmed.

Upon a hearing after due notice, the court made an order confirming the reported sale and directing that a conveyance be made accordingly. On July 1, 1935, the appellant, as executrix, signed and acknowledged such a deed, but it was not recorded until June 2, 1936, when there was also placed of record one purporting to be signed and acknowledged by Gaston conveying the same property to Taylor O. Taylor, the appellant's attorney. The respondents acquired title from Taylor in 1937. He died the following year.

According to the appellant's complaint, the land described in the return of sale is improved with buildings containing nine rental units. Taylor falsely represented to her that Gaston had purchased this property. Taylor then caused a return of a purported and pretended sale of it, together with a petition for confirmation, to be filed in the probate court. At the hearing on the return he "introduced testimony in support thereof, although he then well knew, and it is a fact, that no sale had in fact been made." Other allegations are that the appellant, at Taylor's request, and in compliance with the court's order of confirmation, signed and acknowledged a deed. This deed she placed in the custody of Roger S. Page, who had succeeded Taylor as attorney of record for her as executrix, with instructions to deliver it to Gaston for $10,000, less the amount of encumbrances of record. Neither she nor the estate has received any consideration for the deed and it was never delivered to Gaston. The deed to Gaston which appears of record purporting to have been signed and acknowledged by her was not signed, acknowledged or delivered by her as executrix, or otherwise or at all, nor was it ever delivered by or with her authority, and she had no knowledge of its existence until the latter part of 1938.

In a second cause of action the appellant alleges that if the deed of record to Gaston "does bear her signature and acknowledgment as such Executrix, then such signature and acknowledgment were, and each was, obtained without her knowledge or consent and by means of a fraudulent trick and device of * * * Taylor" and as a part of a scheme to defraud her and deceive the probate court. Also, any deed to Gaston was executed in violation of the court's order authorizing a conveyance to the executrix on receipt of a stated consideration and she did not "cause said or any deed * * * to be delivered to * * * Gaston or to anyone for him."

By their answer, the respondents assert, among other defenses that, so far as they are concerned, the appellant is estopped to claim that the sale to Gaston was a purported or pretended one. They say that the appellant, and not Taylor, made the return of sale, and they have relied upon the order of confirmation, which is valid and regular on its face. Furthermore, the deed to Gaston which was recorded on June 2, 1936, was executed and acknowledged by the appellant and is the only deed to him which she signed. The same defense is pleaded by way of answer to the second cause of action. Twelve separate defenses follow.

Upon trial, the appellant testified that she signed the return of sale, that she was in court at the time it came on for hearing, and that Taylor testified in support of its allegations. She was positive that she signed no deed to Gaston except an unrecorded one, acknowledged before Perry F. Backus as notary public, which was produced by Page. He testified that it had been in his possession since July 9, 1935, the date it was acknowledged. But Mrs. Marlenee also said that she understood Taylor had sold the property to the respondents "on the deed that I signed to Mr. Gaston." And she admitted that although she managed the property during the administration of the estate, collecting the income directly from the tenants or through an agent, she received no rent after March 1, 1937.

In the course of her testimony, Mrs. Marlenee identified her signature on an affidavit dated July 7, 1937, which includes a recital of the services rendered by Taylor, as her attorney, during the administration of her husband's estate. According to this affidavit, on March 1, 1935, the probate court ordered her to sell all of the property belonging to the estate, and the property in controversy was sold to William Gaston for $5,670 net, subject to liens and encumbrances of record. "But Gaston couldn't raise the $5,670 and we couldn't get another offer from anyone. In order to avoid the expense of a second probate sale, enable us to hold the property for a better market, and enable me, in the meantime, to receive the rents thereof, I arranged with T. O. Taylor to take the title in his own name, through Gaston, hold it as long as he could, sell it for the best price obtainable, apply the net proceeds on my indebtedness to him, and meanwhile take care of all my litigation."

The same explanation of the transfer of title to Gaston and Taylor appears in another affidavit, dated August 16, 1937, which the appellant admitted that she signed and verified. And she also identified her signature to a writing dated March 30, 1937, addressed to the tenants of the property in controversy, directing them to pay all future rents to the respondent James E. Brown.

The appellant, in her testimony, insisted that certain parts of the affidavit dated July 7, 1937, "were not on there" when she signed it, and that she did not swear to the truth of any part of it. As to the second affidavit, she said that none of the writing above her signature was on the paper when she signed it; she wrote her name, at Taylor's direction, on the blank page. She also declared that she was visiting in San Diego on August 16, 1937, the date of verification. But her statement in that regard was contradicted by Mary E. Warren, a notary public, who testified that the document was signed by the appellant in her presence as stated in the jurat.

William Gaston testified that he did not offer to buy the property described in the appellant's deed to him, and never had a deed to it in his possession. Asked if he signed and acknowledged a deed conveying the property to Taylor, he replied, "not knowingly." But he admitted that he signed "some document" in the office of Freda R. Paulson, a notary public, and that "it may have been" a deed. Miss Paulson, in support of her certificate of acknowledgment on the deed from Gaston to Taylor, said that she signed it when the two men came to her office and Gaston acknowledged his execution of it.

There is voluminous evidence concerning the transactions between the appellant and Taylor during the time he acted as her attorney. Apparently the property comprising the estate of Dr. Marlenee was much involved and its administration was carried on under many difficulties. But expressly omitting any determination upon the allegations respecting the alleged misrepresentations of Taylor to the appellant, the court found that she verified and caused to be filed a return of sale of the real property described in her complaint and petitioned for an order confirming its sale to Gaston. The appellant appeared and testified at the hearing upon that return, and later executed and acknowledged a deed in compliance with the order of confirmation. That deed, the findings continue, was recorded with the knowledge and consent of the appellant; she was familiar with all of the facts and circumstances surrounding the signing, acknowledging and recording of the deed, and by reason thereof, she is estopped in this action from contending that it was not signed or executed by her or that it is void. The court also found that the appellant "at all times" knew about the conveyance to Taylor O. Taylor.

According to other findings, on March 30, 1937, the respondents met the appellant for the purpose of adjusting the rentals of the property. At that time they, Mrs. Marlenee and Taylor notified the tenants that the Browns had become the owners and were entitled to collect the rent and she made no claim to the property. On the contrary, she voluntarily delivered possession of the property to them.

Upon these and many other findings in favor of the respondents, the court concluded that the appellant is not entitled to any relief. Her appeal is from the judgment based upon them.

[1] In attacking this judgment, the appellant admits that the return of sale and the order confirming it are regular and valid, considering only the face of the record. But it is asserted that because there was, in fact, no sale to Gaston, the order purporting to confirm it is void. And although, ordinarily, in a collateral attack upon such a record the fact that there was no sale to Gaston may not be shown by other evidence, because of the admissions in the answer concerning Gaston's part in the transaction and the introduction into evidence of his testimony without objection by the respondents, the order of the probate court must be read as including all of the circumstances now proved. Other contentions are that no title passed to Gaston because the appellant's deed to him was never delivered. And the appellant also urges that there was no delivery of Gaston's deed to Taylor. All of her actions, she concludes, were induced by the fraud of Taylor, which was not discovered by her until shortly before the commencement of this action.

The respondents assert that they are bona fide purchasers for value and they rely upon the doctrine of estoppel. They concede that there was no sale to Gaston and they take no position upon the asserted fraud of Taylor. But they insist that because of the appellant's representations to the probate court and her conduct at the time Taylor sold the property to them, she is estopped to deny the validity of the probate sale and her deed to Gaston. Their position is that, having bought the property from Taylor, the record owner, for value and without notice of the appellant's claims, she has no rights in it.

The appellant's attack upon the judgment is based upon two main premises: (1) The respondents are not bona fide purchasers of the property and therefore took it subject to her right to set aside the conveyance for the fraud of Taylor, and (2) if the court correctly found that the respondents acquired the property for value and are not chargeable with notice of her rights, no title passed to them for any and all of the following reasons: (a) Since there was no sale to Gaston and consequently no subject matter for judicial determination, the probate court was without jurisdiction to make the order confirming the sale and her deed based upon it was a nullity; (b) if the order is valid, the deed to Gaston does not comply with its terms and is therefore void; and (c) assuming that the deed complies with the provisions of the probate order, no title passed because the deed was never delivered to Gaston, nor was there any delivery to Taylor of the deed made by Gaston.

[2] Considering the status of the respondents, as buyers, a bona fide purchaser is not chargeable with the fraud of his predecessors and takes a title purged of any anterior fraud affecting it and free from any equities existing between the original parties. Williams v. Borgwardt, 119 Cal. 80, 51 P. 15; Morrow v. Graves, 77 Cal. 218, 19 P. 489; Fish v. Benson, 71 Cal. 428, 12 P. 454; Chapman v. Ostergard, 73 Cal.App. 539, 238 P. 1081; see 25 Cal.Jur., Vendor and Purchaser, sec. 268, pp. 820, 821, n. 3, 5, 6, 7. But the appellant contends that the purchasers may not have the protection of this rule because she was in possession of the property, by her tenants, at the time they bought it, and they took title subject to her rights.

[3, 4] There is no contradiction of Mrs. Marlenee's testimony that after the date of the deed to Gaston signed by her and until March 27, 1937, she managed the property as she had done before. She called on some of the tenants from time to time and collected rent. Mrs. Marlenee said that this rent was collected for the estate. But these facts do not compel a finding that the respondents are not bona fide purchasers. There is no claim that they had notice of any rights claimed by the appellant, and the possession of land imports to an intending purchaser only such knowledge as would be gained by inquiry from the one having such possession. Porter v. Johnson, 172 Cal. 456, 156 P. 102 Had the respondents made inquiry of the tenants concerning the ownership of the property, undoubtedly they would have been referred to the appellant. But before the respondents completed their transaction with Taylor, they met the appellant. At that time, Mrs. Marlenee said: "I came down to check the rents with you." The record also shows that she told Mr. Brown she "was collecting the rent for Mr. Taylor."

The appellant claims that her statement may reasonably be construed to mean that she was collecting the rent for Taylor who was her agent. But her other acts and conversation unquestionably show that she fully understood the respondents were then buying the property from Taylor. According to testimony in the record, after the conversation concerning rentals, Mrs. Marlenee went to the property with the respondent James Brown and introduced him to several of the tenants, saying that he "was going to be the new purchaser" of it. She also offered to sell him some of the furniture. At no time did she make any objections to the purchase by the respondents or assert that she had any interest in the property. And although Mrs. Marlenee denied these conversations, the finding of the trial court that the respondents are bona fide purchasers for value is supported by substantial evidence. As such purchasers, they took a title which, if voidable as between Taylor and the appellant, may not now be attacked for his asserted fraud.

[5] A determination of the rights of the respective parties therefore depends primarily upon the title to the property at the time Taylor made his deed to the respondents. The appellant urges that as there was in fact no probate sale to Gaston, hence no subject matter upon which the order of confirmation could operate, the order is void. And a deed based upon an invalid order of confirmation, she contends, is also void. In this connection, she calls to her aid the well established rule that a void deed cannot be the foundation of a good title and a bona fide purchaser for value acquires no rights under it.

Trout v. Taylor, 220 Cal. 652, 32 P.2d 968; Bernhard v. Wall, 184 Cal. 612, 194 P. 1040.

[6] It is elementary that in a collateral attack upon a judgment or an order of a probate court the recitals in the record may not be contradicted by evidence of facts different from those appearing upon its face. Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 41, 53 P.2d 127; Kaufmann v. California Mining, etc., Syn., 16 Cal.2d 90, 91, 104 P.2d 1038; In re Estate of Keet, 15 Cal.2d 328, 333, 100 P.2d 1045; and see cases collected in 15 Cal. Jur., Judgments, sec. 145, p. 59. The case of Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617, which is relied upon by the appellant, recognizes this rule, for the court pointed out that the order there under attack contained no general statement concerning compliance with the requirements as to notice of a probate sale, but, on the contrary, "shows affirmatively that the statute rule was violated."

But Mrs. Marlenee calls attention to certain admissions in the pleadings as to there being no sale to Gaston. The complaint alleges that Gaston "never at any time made any bid for said property or for any part thereof; he never at any time offered to purchase said property. . . . At no time did said Gaston have any intention of purchasing said property or any part thereof and never at any time did he purchase it or any part of it. At no time was there a sale of said property or any part thereof to said Gaston." These allegations are not denied, although in their answer the respondents declare that there was "an actual sale" to Gaston. But as the truth of the facts stated in the complaint is not controverted by this conclusion of the answer, according to the pleadings there was no sale to Gaston. Schoonover v. Birnbaum, 148 Cal. 548, 551, 83 P. 999; Easom v. General Mortgage Co., 101 Cal. App. 186, 190, 281 P. 514; Gillons v. Turner Oil Co., 51 Cal.App. 139, 141, 196 P. 276.

[7] The appellant also points to evidence received without objection, tending to show that Gaston did not make any bid for the property. Under such circumstances, says the appellant, upon the authority of Hill v. City Cab, etc., Co., 79 Cal. 188, 191, 21 P. 728; People v. Harrison, 107 Cal. 541, 546, 40 P. 956; Akley v. Bassett, 189 Cal. 625, 639, 209 P. 576, the order of confirmation must be read as affirmatively showing that fact. The doctrine of these cases, as recently stated in Thompson v. Cook, 20 Cal.2d 564, 569, 127 P.2d 909, 912, is that "although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void."

[8, 9] However, the appellant may not have the benefit of the exception to the rule confining a collateral attack to matters appearing on the face of the record for the respondents are bona fide purchasers. The title of such a purchaser may not be successfully questioned even though he admits by pleading or fails to object to the admission in evidence of facts tending to show that the judgment or order upon which it is based is invalid. Garrison v. Blanchard, 127 Cal.App. 616, 621–623, 16 P.2d 273; Doyle v. Hampton, 159 Cal. 729, 733, 734, 116 P. 39; Reeve v. Kennedy, 43 Cal. 643, 650–653; and see Follette v. Pacific L. & P. Corp., 189 Cal. 193, 205, 214, 208 P. 295, 23 A.L.R. 965; Newport v. Hatton, 207 Cal. 515, 519, 520, 279 P. 134; Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Wood v. Roach, 125 Cal.App. 631, 640, 14 P.2d 170. The discovery of a defect not apparent in the record should not deprive the purchaser of rights he had earlier acquired in reliance upon the validity of the judgment roll, even though his subsequently acquired information prevents his denial, by way of answer or proof, of the existence of the defect.

[10] The appellant's contention that her deed to Gaston does not comply with the order of confirmation is not supported by the record. The court confirmed a sale of the property for $10,000, less the amount of liens and encumbrances against it. The recorded deed to Gaston recites that it is made pursuant to the order "and in consideration of the purchase price therein specified," which is stated as $5,670 although the parties stipulated that "the total amount of unpaid and due taxes and assessments" was $3,773. But there is no contradiction between the amount of the consideration stated in the order and that specified in the deed. Apparently there were liens other than for taxes and assessments, or liens for taxes and assessments not due and payable, which were included

in the amount stated in the order but not in the stipulation. For Mrs. Marlenee, speaking in her affidavit of the sale to Gaston, explained the consideration as being "$10,000. gross, or $5,670. net, subject to liens and encumbrances amounting to more than $4,330."

Another point urged by the appellant is that there was no delivery of either of the recorded deeds upon which the respondents rely for their chain of title. Without delivery, she insists, these deeds are ineffective for any purpose.

[11-13] The lack of this vitalizing force, as it has been termed, of a conveyance may be asserted even against a bona fide purchaser who relied upon the grantee's possession of the instrument. Gould v. Wise, 97 Cal. 532, 32 P. 576, 33 P. 323; and see Trout v. Taylor, supra, 220 Cal. page 656, 32 P.2d 968. But whether an instrument has been delivered is a question of intention. If a grantor intends that his deed shall be legally operative there is a delivery regardless of how the intention is manifested. Goodman v. Goodman, 212 Cal. 730, 300 P. 449; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; Follmer v. Rohrer, 158 Cal. 755, 112 P. 544; and see 4 Tiffany, Real Property, 3rd Ed. 1939, sec. 1034, pp. 199, 200. It has also been held that, although a deed in the hands of a grantee may be ineffective because unaccompanied by the intention of the grantor that it should be legally effective, it may subsequently be made operative by the grantor's recognition of the title as being in the grantee. See cases collected in 4 Tiffany, Real Property, 3rd Ed. 1939, sec. 1036, p. 207, n. 4. Although such recognition is usually termed a "ratification" of delivery, a more accurate statement would be that the recognition of title in the grantee is, in itself, a delivery by the grantor, that is, an expression of intention by him that the instrument, which has already passed into the grantee's hands, should effect the transfer of title. See 4 Tiffany, Real Property, 3rd Ed. 1939, sec. 1036, p. 207.

There is no evidence showing who had possession of the deed of July 1, 1935, to Gaston between that date, when, according to the testimony of Miss Paulson, Mrs. Marlenee signed it in her presence, and June 2, 1936, when it was recorded. As a witness for the appellant, Gaston declared that he never had possession of it nor did he know of its existence. Concerning the other recorded instrument, Gaston did not directly deny that he signed a deed to Taylor. He admitted that he signed "some document" while in the office of Miss Paulson. He also said the document "may have been a deed," and that while he was there, one or more documents were handed back and forth between him and Mr. Taylor and Miss Paulson.

[14] From this and the other evidence the trial court might have found that Gaston delivered his deed to Taylor at the time he signed and acknowledged it with the intention that it should convey title. And Mrs. Marlenee's admission that she "arranged with T. O. Taylor to take the title in his own name, through Gaston, hold it as long as he could," and then sell it, certainly imports a full intention that Gaston should obtain a merchantable title. Under these circumstances there was a legal delivery of her deed.

[15] In denial of any such plan, the appellant insists that the affidavits and also the notice to tenants of March 30th received in evidence are inadmissible against her because they were obtained by Taylor for his benefit while acting as attorney for her. The confidential relationship of attorney and client, Mrs. Marlenee asserts, raises a presumption of lack of consideration and undue influence which was not rebutted. Sec. 2235, Civ.Code. However, assuming that the statements of fact concerning the sale to Gaston are an "advantage" obtained by Taylor, as attorney, which may be questioned in an action between the client and a successor in title of the attorney, there is ample evidence in the record to support the implied finding of the trial court that they were not obtained by any undue influence. The same may be said of the notice to tenants. Certainly from the evidence before it, the trial court was entirely justified in concluding that the appellant was thoroughly conversant with every move made by Taylor in connection with the property and that she fully agreed upon the method used in conveying title to the respondents.

[16] The appellant complains of the trial court's failure to determine the issue of the asserted fraud perpetrated upon her by Taylor. But it did find that if there was such fraud, the respondents had no knowledge of it and are not affected thereby. Another finding is that they are bona fide purchasers, which compels a judgment

in favor of the respondents, hence any determination of the issue of fraud as between the appellant and Taylor was immaterial and unnecessary. Russell v. Riley & Peterson, 82 Cal.App. 728, 256 P. 557.

[17] It is also asserted that the trial judge erroneously admitted into evidence, over objection, a purported assignment of Mrs. Marlenee's distributive share in the estate of her deceased husband, and that she was not allowed to testify as to when, how, and for what purpose, she placed her signature upon it. As no finding was made concerning this instrument, and the court did not conclude that the respondents have any title because of it, the rulings have not prejudiced the appellant.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, CARTER, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

21 Cal.2d 718

AUSTIN et al. v. HALLMARK OIL CO. et al.

L. A. 17989.

Supreme Court of California.

March 11, 1943.

Rehearing Denied April 8, 1943.

1. Mines and minerals 🔑101, 106

In action for share of proceeds from operation of oil wells, evidence *held* sufficient to support trial court's finding that plaintiff and one who assigned oil lease obtained by him to defendant corporation entered into oral grubstake agreement, pursuant to which plaintiff endeavored to raise funds for drilling operations, corporation was formed, and lessee assigned half of amount due him under contract with corporation to plaintiff.

2. Mines and minerals 🔑101, 106

Under oral grubstake agreement for acquisition of oil lease by one of parties for equal benefit of both, other party became equitable owner of undivided half interest in lease obtained, but when lessee assigned lease to corporation with other party's consent, retaining interest in half of net income therefrom, other party's equitable ownership was limited to share in interest so retained.

3. Licenses 🔑18½

A written assignment of half of amount due assignor under contract for equal division of net income from oil lease between him and corporation, to which he assigned lease, was not a "security" within statute prohibiting issuance of corporate security without permit from commissioner of corporations. Gen.Laws 1937, Act 3814.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

4. Licenses 🔑18½

A written assignment to mere investor, given right for a consideration to share in profits or proceeds of enterprise to be conducted by others, is a "security" within statute prohibiting issuance of corporate security without permits from commissioner of corporations, but such an assignment of fractional interest in production of oil to one who is to share in conduct of enterprise is not a "security" within such act. Gen.Laws 1937, Act 3814.

5. Licenses 🔑39

Majority stockholders of corporation, to which oil lease was assigned under contract providing for equal division of net income from lease between assignor and corporation, cannot raise question of noncompliance with Corporate Securities Act in assignor's subsequent assignment of half of amount due him under contract to another without permit from commissioner of corporations. Gen.Laws 1937, Act 3814.

6. Mines and minerals 🔑106

A corporation's majority stockholders cannot urge invalidity of assignment of half of amount due assignor from corporation under contract for equal division of net income from oil lease between them while relying on validity thereof to claim benefit of another's purchase of portions of assignor's and assignee's interests in lease.

7. Licenses 🔑39

A corporation, as assignee of oil lease, cannot question validity of its assignor's subsequent assignment to another of half of amount due assignor under contract with corporation for equal division of net income from lease between them on ground that such assignment was made without permit from commissioner of corporations in violation of Corporate Securities Act, as purchaser of security is not in "pari delicto" with issuer, even if he knows that no permit has been issued. Gen.Laws 1937, Act 3814.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Delicto".

8. Corporations 🔑30(1)

A promoter of corporation owes "fiduciary duty" to disclose to stockholders thereof his interest in transactions with or on behalf of corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Duty".

9. Mines and minerals 🔑104

Where one assigning to corporation promoter half of amount due assignor under contract with corporation for division of net income from oil lease sought and discovered leased property and with assignee, came to understanding with owners thereof before assignee took active steps to organize corporation, and principal stockholder contributed to venture, assignee's interest in lease did not represent "secret profit", obtained in violation of "fiduciary duty" to stockholders, though written lease was not secured until after such steps and contribution.

See Words and Phrases, Permanent Edition, for all other definitions of "Secret Profit".

10. Mines and minerals 🔑104

Corporation stockholders, dealing with certain person as their agent in management of drilling operations on oil lease, assigned to it by another, for several months after discovering such person's alleged fraud in failing to disclose his interest in lease as assignee of corporation's assignor, and persuading him to assign part of his interest to another and induce assignor to do likewise, so that all might benefit from funds advanced by such other, "waived" fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

11. Corporations 🔑428(4, 5, 7)

While knowledge of subscribers to corporation's stock cannot be "imputed" to corporation, it is presumed to know what is known to its managing officers and directors.

See Words and Phrases, Permanent Edition, for all other definitions of "Imputed Knowledge".

12. Mines and minerals 🔑105(2)

Knowledge of corporation's majority stockholders, one of whom suggested and brought about formation of corporation, directed naming of dummy directors thereof, and managed corporation's affairs, that certain person had interest in oil lease, assigned to corporation by another, was knowledge of corporation.

13. Mines and minerals 🔑74

A written assignment of half of income, profits, etc., due assignor under contract with corporation for equal division of net income from oil lease assigned to corporation by him, was broad enough to include "interest in real property".

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Real Property".

14. Assignments 🔑73

The interest created by assignment depends on parties' intention.

15. Assignments 🔑73

While intention of parties to written assignment as to interest created thereby is determined primarily from terms of instrument, language thereof must be construed in light of facts and circumstances of particular case.

16. Mines and minerals 🔑74

A provision in contract of assignor and corporate assignee of oil lease for equal division of income from leasehold between them gave assignor an interest, amounting to "interest in real property" or "profit à prendre", in oil and gas produced, so that assignor's subsequent assignment of half of amount due him under contract to another gave such other an interest in real property.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit à Prendre".

17. Mines and minerals 🔑74

Where one assigning oil lease to corporation under contract providing for equal division of income from lease between parties and assignor's performance of conditions of lease relinquished management and control of operations on leasehold to another at solicitation of corporation's majority stockholders before expiration of time, for such performance, and such other person was not remiss in his duties, assignor's interest in income was not partially forfeited because of his failure to perform such conditions, and his successor's right to share of proceeds from operation of oil wells as assignee of half of amount due assignor under contract was not affected.

18. Mines and minerals ⇨74

A corporation, to which oil lease was assigned under contract providing for equal division of income from lease between corporation and assignor, "waived" any default by assignor in performing conditions of lease by inducing him to enter into agreement for relinquishment of his management of operations to another and assignment of portion of his interest to employee on leasehold in order to obtain additional funds to continue project for all parties' benefit. Code Civ.Proc. § 1962, subd. 3.

19. Mines and minerals ⇨74

The execution of instrument, quitclaiming to corporation all of grantor's interest or rights under contract for equal division between parties of income from oil lease theretofore assigned by grantor to corporation, did not terminate or limit rights of one who had assumed performance of grantor's obligations under contract by agreement of all parties concerned as assignee of half of amount due grantor under contract.

20. Action ⇨63

The existence of laches barring action is determined by trial court in light of facts and circumstances of particular case.

21. Equity ⇨88

A defendant, whose conduct contributes to delay in bringing action, may be "estopped" from urging defense of laches.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

22. Action ⇨63

Mere lapse of time before bringing action, without prejudice to defendant, does not constitute "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

23. Action ⇨63

Mere expenditure of money or effort by a defendant is insufficient to show prejudice to him by plaintiff's delay in bringing action, as required to establish "laches".

24. Action ⇨63

The death of a material witness is but one circumstance considered by trial court in determining whether prejudice to defendant resulted from lapse of time before bringing action, so as to establish "laches".

25. Mines and minerals ⇨83

In action for share of proceeds from operation of oil wells, where there was evidence that plaintiff made efforts to reach conciliatory agreement with defendants and that success of enterprise was assured before plaintiff's ouster therefrom nearly two years before filing of original complaint, trial court did not abuse discretion in refusing to sustain defendant's plea of "laches".

26. Corporations ⇨78

One agreeing to subscribe for $2,500 worth of corporation's stock and paying corporation $1,300 on account thereof was entitled to recover stock paid for, though he testified that he never intended to contribute any more money to parties' venture than he had to, as parties' manifest, not secret, intent is basis of their contract.

27. Corporations ⇨78

One paying corporation part of amount subscribed by him for stock therein was entitled to stock paid for, though portion of sum paid was held in trust by him for another's benefit, as trust agreement respecting stock was of concern only to trustor and trustee.

28. Corporations ⇨90(1)

In action to obtain stock in corporation, where evidence disclosed that plaintiff paid to corporation for stock a sum held in trust by him for another's benefit and additional sum representing his personal funds, court did not err in awarding him number of shares of stock paid for.

29. Corporations ⇨90(1)

In action to obtain stock in corporation, court erred in holding that plaintiff, by reason of his agreement to subscribe for certain amount of corporation's stock, for some of which he did not offer to pay until success of venture undertaken by corporation was assured, was entitled to issuance of stock not paid for on payment of amount due therefor.

In Bank.

Appeal from Superior Court, Kern County; Herbert S. Gans, Judge Assigned.

Action by John W. Austin and others against the Hallmark Oil Company and others to recover a share of the proceeds from the operation of certain oil wells and obtain stock in defendant corporation. Judgment for plaintiffs, and defendants appeal.

Modified, and affirmed as modified.

For prior opinion, see Cal.App., 125 P.2d 935.

Luce, Forward, Lee & Kunzel, of San Diego, Borton, Petrini, Conron & Borton, of Bakersfield, and Schell & Delamer and L. W. Frankley, all of Los Angeles, for appellants.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiffs brought this action to recover a share of the proceeds from the operation of certain oil wells and to obtain stock in the operating corporation. The facts set forth in the findings of the trial court are as follows: On or about July 1, 1934, John Austin and John Porter entered into an agreement for the acquisition of a lease on some thirty acres of oil-bearing land in Kern County owned by Julius Fried and the Merritt Annex Oil Company. They agreed that if Porter could obtain the lease in his own name for the equal benefit of himself and Austin, the latter would attempt to secure funds for drilling operations and the investors would be given a fifty per cent interest in the lease. Porter was to supervise drilling operations and Austin was to manage finances. Thereafter defendant Reuben Harrison agreed that if a corporation were formed he would purchase stock therein. At his insistence, his personal attorney, defendant Charles Forward, was employed as attorney for the parties, and in that capacity advised the formation of a Nevada corporation and the assignment thereto of the lease. The parties agreed that the lease should be taken in the name of Porter, who would assign it to the corporation, that Porter would devote his time to drilling operations, and that funds raised by stock subscriptions would be turned over to Austin for disbursement on the project. On September 24, 1934, Porter entered into a written lease with Julius Fried and the Merritt Annex Oil Company. The lease, in addition to reserving a landowner's royalty, required the lessee to drill a specified number of wells within a stated period and contained provisions for forfeiture commonly found in oil leases. On the same day, Austin and Harrison advanced the sum of $500 to enable Porter to proceed. Drilling operations were begun the following day, and thereafter all the covenants and obligations of the lessee under the lease were fully kept and performed. On September 25th, Austin went to Bakersfield where for seven months he managed the disbursement of moneys on the project and, to the knowledge of defendants Harrison and Charles Forward, devoted virtually all his time to the venture. On October 3, 1934, Charles Forward arranged for the incorporation of the Hallmark Oil Company, Inc., under the laws of Nevada. At his direction three Nevada residents, who had no interest in the corporation, its stock, or its property, were named directors and officers of the corporation. The city of Bakersfield was designated the principal office and place of business of the corporation in California and Austin was appointed resident state agent. Subsequently, defendants Charles Forward, James Forward, Frank Carroll, and others subscribed to the corporation's stock, which had a par value of $10 per share. On October 30, 1934, the Hallmark Oil Company, Inc. and Porter entered into a written agreement under which Porter was to assign the lease to the corporation, the corporation was to pay the bills incurred by Porter in connection with the drilling operations, and the net income from the lease was to be divided equally between Porter and the corporation after the money advanced by the latter was repaid with interest. The agreement recited a representation by Porter that drilling operations could be carried out at an initial cost to the corporation of $16,000. It expressly provided that the corporation should not be called upon to furnish a greater amount, but that any outlays in excess of that sum should be obtained from the proceeds of oil and gas produced. In the event of Porter's failure to perform the obligations imposed by the lease and agreement, the corporation could terminate his rights under the agreement, provided he was allotted a one-half interest in the proceeds received as well as in future proceeds from wells already brought into production. A similar forfeiture on the part of the corporation was provided for in the event of its default. By supplemental agreement of January 9, 1935, the amount that the corporation was obligated to expend was increased to $18,000. On November 2, 1934, in accord with the obligation imposed by the grubstake agreement of July 1st, Porter assigned to Austin one-half of all income, profits, moneys and credits to become due or payable to him under the terms of his contract with the Hallmark Oil Company, Inc. The assignment was recorded on January 31, 1935. On November 5, 1934, Austin agreed with the Hallmark Oil Company, Inc. to subscribe for $2,500 par value of its capital stock. On December 6, 1934, Porter assigned the lease to the corporation. It was evident by January 18, 1935, that the defendants were in financial difficulty and were dissatisfied with Porter's management. While more than $18,000 had been spent in development, the first well was yet to be brought into production, there were a large number of outstanding bills that could not be met, and the corporation was no longer able to finance drilling operations. Defendants Harrison, Carroll, Charles Forward, and the Hallmark Oil Company, Inc. persuaded McGuire, an employee on the leasehold, to purchase from Austin and Porter, whom they likewise prevailed upon to sell, portions of their respective interests in the lease. In the course of that transaction, defendants persuaded Austin to secure on their behalf an agreement from Porter giving Austin the entire management of drilling operations. Austin secured such an agreement on January 23, 1935, and thereafter, until his removal in April, undertook the entire management of drilling operations. On January 28, 1935, Austin and Porter assigned five and fifteen per cent respectively of their interests to McGuire in consideration of $4,000 advanced by the latter for the payment of outstanding bills and the expenses of continued drilling operations. The $4,000 was spent by Austin in developing the project. On March 21, 1935, Charles Forward secretly directed the officers and directors of the corporation to resign and to appoint in their places defendants James Forward, Charles Forward, and Carroll. He likewise caused the board of directors to move the corporation's principal office from Bakersfield to San Diego, the county of his residence, to remove Austin as resident state agent, and to direct the bank in which the corporation had an account to dishonor any further checks drawn by Austin. On the same day, the corporation issued 130 shares of stock to plaintiff John Austin, 10 shares to plaintiff Helen Austin, and 10 shares to plaintiff Luethel Austin. With the exception of 20 shares issued to John Austin, the stock was regularly issued in consideration of the sum of $1,300 previously advanced by plaintiffs and spent with defendants' knowledge for the corporation's benefit. The stock was delivered to James Forward as plaintiffs' agent. He in turn delivered the stock to Charles Forward, who refused to surrender it on demand to plaintiffs. On March 28, 1935, after the completion of the first well, Porter quitclaimed to the Hallmark Oil Company, Inc. all his rights and interest in the contract of October 30th and in the lease. On April 9, 1935, Austin was removed from the venture. Additional wells were subsequently brought into production. On November 4, 1935, defendants Charles Forward, James Forward, and Harrison caused a California corporation, the Hallmark Oil Company, to be organized and to take over the assets of the Nevada corporation, which was then dissolved. The corporation thereafter purchased McGuire's interest under the assignments of January 28th and gave him an option to have his investment returned in cash or stock. Harrison purchased the option and exercised it, dividing the stock obtained with Charles Forward.

The trial court concluded that plaintiff John Austin was the equitable owner of a twenty per cent interest in the leasehold and in the net profits realized or to be realized therefrom; that he was entitled to have issued to him 110 shares of stock of the Hallmark Oil Company dated as of the first issuance of stock by the corporation, together with dividends declared thereon; that he was obligated to pay the corporation $1,200 by virtue of the agreement of November 5, 1934, to be deducted from the amount of the judgment; that he was entitled to an additional 120 shares of stock as of the date of entry of judgment; and that plaintiffs Helen and Luethel Austin were each entitled to have issued to them 10 shares of stock dated as of the first issuance of stock by the corporation, together with dividends declared thereon. The court further concluded that defendants were estopped from denying that plaintiffs are the owners of such property. Judgment was entered in accord with these conclusions and this appeal followed.

[1, 2] Defendants maintain that the findings and judgment in favor of respondent John Austin are not supported by the evidence. They contend that Austin agreed to join with them and acquire the lease as joint adventurers, that Austin's claim and the judgment awarding him a share of the profits of the enterprise were based solely upon the written assignment of November 2, 1934, and that the assignment is unenforceable because it was made without a permit from the Commissioner of Corporations and represented an attempt by Austin to obtain a secret profit out of the enterprise in violation of his fiduciary duty. The trial court found, however, and its finding is supported by Austin's direct testimony, that there was no agreement between the parties to acquire the lease as joint adventurers. It found that Porter and Austin entered into the alleged oral grubstake agreement of July 1st and that the subsequent transactions of the parties, namely, Austin's endeavor to raise funds for drilling operations, the formation of the corporation, and the assignment of November 2nd, were designed to effectuate the plan for the development of the property envisaged by the original agreement. The challenged finding relating to the oral grubstake agreement is amply supported by the record. Austin testified that before his negotiations with defendants, Porter suggested that "if I would grubstake him for some of the expense money he would go out and try to look up some leases * * * with the understanding that any leases that he found we would divide fifty-fifty," that he advanced $100 to Porter for that purpose, and that Porter discovered the property involved in this action pursuant to that agreement. Evidence introduced by defendants tending to show that the $100 advanced by Austin was furnished under a grubstake agreement covering oil lands in another locality and that Porter had a lease on the property in question as early as June 22, 1934, does not demonstrate that Austin's testimony in this respect was inherently improbable. Austin's testimony revealed that the agreement covering land in the other locality had been abandoned, that Porter retained the money advanced by Austin, and that the agreement in question was substituted for the earlier agreement on or about August 27, 1934. There was also evidence indicating that little if any of the development work required by the purported June lease had been performed, warranting the inference that the earlier lease had been abandoned or forfeited before August 27th. There was no showing that Porter had any interest in the property on or after that date, or that Austin had knowledge of the earlier lease. On the contrary, the evidence disclosed that Austin interviewed the owners of the property, who informed him that there was no lease outstanding, and that they would be willing to enter into a lease with him and Porter. By virtue of the oral grubstake agreement, Austin became the equitable owner of an undivided fifty per cent interest in any lease obtained by Porter pursuant to that agreement. See Berry v. Woodburn, 107 Cal. 504, 40 P. 802; Moritz v. Lavelle, 77 Cal. 10, 18 P. 803, 11 Am.St. Rep. 229. When, however, Porter subsequently assigned the lease to the Hallmark Oil Company, Inc., with Austin's consent, retaining an interest in fifty per cent of the net income of the leasehold, Austin's equitable interest or ownership was thereby limited to a share in the interest thus retained by Porter. It therefore appears that Austin's claim and the judgment do not rest solely upon the written assignment of November 2nd, and that the assignment was made in recognition of rights already possessed by Austin.

[3-7] Even if it is assumed that Austin must rely exclusively upon the assignment of November 2d, the defense based upon the Corporate Securities Act is not available to defendants. The act (Stats.1917, p. 673, as amended, Deering's Gen.Laws, 1937, Act 3814) provides that a security issued without a permit from the Commissioner of Corporations is void. Agreements assigning percentages of the production of oil and gas or moneys received therefrom have been held to be securities under the act. (Domestic and Foreign Pet. Co., Ltd., v. Long, 4 Cal.2d 547, 51 P. 2d 73; People v. Craven, 219 Cal. 522, 27 P.2d 906; Julian v. Schwartz, 16 Cal.App. 2d 310, 60 P.2d 887; see 26 Cal.L.Rev. 359; 10 So.Cal.L.Rev. 483), but the assignment herein does not fall within that category. If the transaction is one in which the assignee is merely an investor who for a consideration is given the right to share in the profits or proceeds of an enterprise to be conducted by others, the instrument representing such interest is a security. Where, however, as in the present case, the assignee is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional

interest in the production of oil is not a security within the act. See Domestic and Foreign Pet. Co., Ltd., v. Long, supra; People v. Steele, 2 Cal.App.2d 370, 36 P. 2d 40; 10 So.Cal.L.Rev. 483. It is apparent also that defendants are in the position of third parties having no interest with respect to the alleged issuer or buyer and cannot therefore raise the question of compliance with the act (Wortley v. Wood-Callahan Oil Co., Ltd., 17 Cal.2d 762, 112 P.2d 226; Julian v. Schwartz, supra; Wachner v. Richardson, 14 Cal.App. 2d 422, 58 P.2d 714; German Publishing Co. v. Scheidt, 77 Cal.App. 238, 246 P. 88; 6A Cal.Jur. 530); nor can they urge the invalidity of the assignment while relying upon its validity to claim the benefit of the McGuire purchase (see cases cited in 10 Cal.Jur. 645). The Hallmark Oil Company cannot question the validity of the assignment as Porter's assignee, for the purchaser of a security is not in pari delicto with the issuer even though he may have knowledge of the fact that no permit has been issued. Randall v. California L. B. Syndicate, 217 Cal. 594, 20 P.2d 331; Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271; Walker v. Harbor Realty & Dev. Corp., 214 Cal. 46, 3 P.2d 557.

[8-9] Defendants' contention that Austin's interest represents a secret profit obtained in violation of his fiduciary obligations is untenable. Austin was a promoter of the Hallmark Oil Company, and as such had a fiduciary duty to disclose to defendants his interest in his transactions with or on behalf of the corporation. Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Munson v. Fishburn, 183 Cal. 206, 190 P. 808; California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 149 P. 595; Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 P. 496; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L.R.A,N.S., 1106; 22 Cal.L.Rev. 326. It does not appear that he notified defendants, with the exception of Harrison and possibly Carroll, of his agreement with Porter or that he made a timely disclosure of the assignment from Porter. Whether Austin obtained a secret profit, however, turns upon whether he had a fiduciary duty to defendants at the time he acquired the alleged secret interest. Dunbar v. Redfield, 7 Cal.2d 515, 61 P.2d 744; Victor Oil Co. v. Drum, supra; see Ehrich, The Law of Promoters, 182, 187. The trial court's finding that he did not is sustained by the evidence. Although the written lease was not secured until after Austin took active steps to bring about the formation of the corporation and until after Harrison contributed to the venture, Porter had previously sought and discovered the property and with Austin had come to an understanding with the owners thereof. See Dunbar v. Redfield, supra. The incorporation of the Hallmark company, the subscriptions by Charles Forward, James Forward, and Carroll, the written agreement between Porter and the corporation, and the assignment from Porter to Austin followed the securing of the written lease.

[10-12] Although defendants do not challenge the validity of the transaction whereby the corporation acquired an interest in the lease, they contend that the nondisclosure of Austin's interest was a fraud that prevented Austin from coming into a court of equity with clean hands. The evidence supports the trial court's finding, however, that defendants had knowledge of Austin's alleged secret interest in the early part of January, 1935, and that any fraud resulting from a nondisclosure of that interest had been waived. After the discovery of the alleged fraud, defendants dealt with Austin as their agent for several months, utilized his personal services, treated him as having a separate interest, induced him to persuade Porter to yield the management of the enterprise and to undertake such management himself, persuaded him to assign a part of his interest to McGuire, and requested him to persuade Porter to do likewise in order that they might all benefit from the funds advanced by McGuire. See Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54; Tucker v. Beneke, 180 Cal. 588, 182 P. 299. The finding that "the corporation had knowledge of the assignment at least as early as the early part of January, 1935," that "defendant Charles Forward . . . had knowledge of the assignment and agreement at least as early as the early part of January, 1935," and that "defendant Harrison knew of the agreement prior to any of the negotiations with any of the other defendants and had knowledge of the assignment at least as early as the early part of January, 1935," is amply supported by Austin's testimony. Austin testified that he informed Harrison of the grubstake agreement in the latter part of August, 1934, and of the assignment of November 2nd sometime in November or December. He further testified that at a meeting at the El Tejon Hotel in Bakersfield on January 19, 1935, he told Charles Forward, Harrison, and Carroll of his and Porter's interests. Defendants argue that the knowledge of Charles Forward, Harrison, and Carroll was not the knowledge of the corporation. While the knowledge of subscribers cannot be imputed to the corporation (Victor Oil Co. v. Drum, supra; Lomita Land & Water Co. v. Robinson, supra), a corporation is presumed to know what is known to its managing officers and directors. Sanders v. Magill, 9 Cal.2d 145, 70 P.2d 159; see cases cited in 6A Cal.Jur. 1166. Charles Forward, Harrison, and Carroll were not only majority stockholders but de facto directors and officers of the corporation. Charles Forward suggested and brought about the formation of the Hallmark company. Dummy directors were named at his direction and the trial court found that he "generally and ordinarily directed and managed the affairs" of the corporation. Subsequently, Charles Forward and Carroll also became nominal officers and directors. Charles Forward alone so controlled and directed the corporation that, as the court said in Victor Oil Co. v. Drum, 184 Cal. 226, 236, 193 P. 243, 247, "the knowledge of the directors would have been but the knowledge of defendants, and a disclosure to the directors but a disclosure to defendants."

On the issues presented by the allegation of other frauds allegedly perpetrated by Austin that are urged as a bar to this action the trial court's findings were in favor of plaintiffs and are adequately supported by the evidence.

[13-16] Defendants contend further that the trial court erred in awarding Austin an interest in the leasehold on the ground that Austin had acquired merely a contract right to share in the proceeds from the sale of oil and gas produced. They argue that Austin accepted the written assignment of November 2nd in full satisfaction of his claims under the grubstake agreement of July 1st, and that since there was no reference to the transfer of any right or interest in the leasehold in the assignment, or in the pleadings, alleging the assignment, no interest in real property was conveyed. The instrument of assignment, however, purported not merely to create a personal obligation on the part of the assignor, but to sell, assign, transfer, and set over "one-half of all income, profits, moneys and credits, now or hereafter to become due or due and/or payable" to Porter under the terms of the agreement of October 30th between Porter and the Hallmark Oil Company, Inc. This language was broad enough to include an interest in real property. Since whatever interest Porter possessed was retained by virtue of the agreement of October 30th, reference to that agreement in the subsequently executed assignment was designed to identify the property transferred and not to create a mere chose in action. The interest created by an assignment depends upon the intention of the parties (La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546; National R. Co. v. Metropolitan T. Co., 17 Cal.2d 827, 112 P.2d 598; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871), and while that intention is determined primarily from the terms of the instrument, the language of the assignment must be construed in the light of the facts and circumstances of the particular case. Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 64 P.2d 1081; Adamson v. Paonessa, 180 Cal. 157, 179 P. 880. In view of this rule it is clear that the instrument in the present case was intended to transfer fifty per cent of the interest retained by Porter under the agreement of October 30th, regardless of the nature of that interest. By virtue of the grubstake agreement, Austin was equitably entitled to such a share, and since the intention to confer rights different from those previously held is not manifested by the terms of the assignment, it must be assumed that Porter intended it to fulfill the obligations of his trust. Thus the trial court found that Porter made the assignment of November 2nd "pursuant to" the agreement of July 1st. The trial court's judgment could have rested solely upon the grubstake agreement and the conclusion that the subsequent assignment merely evidenced rights created thereunder. The nature of Austin's interest must therefore be determined by the nature of Porter's interest under his agreement with the Hallmark Oil Company, Inc. There can be little doubt that this agreement, in providing that "all income from the leasehold shall be equally divided" between Porter

and the corporation, gave Porter an interest in oil and gas produced under the lease, amounting to an interest in real property. La Laguna Ranch Co. v. Dodge, supra; Dos Pueblos Ranch & Imp. Co. v. Ellis, 44 Cal.App.2d 299, 112 P.2d 302; Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050; see 26 Cal.L.Rev. 480. Porter's interest under the lease was a profit à prendre (see La Laguna Ranch Co. v. Dodge, supra; Callahan v. Martin, supra), and by the terms of the production agreement wherein he agreed to assign the lease to the corporation he did not merely retain an interest in the production of oil and gas but remained in effect the operating lessee. The agreement recites Porter's ownership of the lease, the wish of the parties that he drill certain wells in accord with the provisions of the lease, and Porter's covenant to comply with the obligations of the lease. It clearly contemplated that he alone would conduct drilling operations. The corporation's function was to furnish capital for that purpose, to hold legal title to the leasehold for the protection of the investors, and to assist Porter so far as possible. Except in the event of Porter's default, it was not to receive more than its share of the oil and gas produced. At most, Porter assigned to the corporation an interest in his profit à prendre, to make the assignee a tenant in common of his leasehold estate. In La Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132, 114 P.2d 351, 135 A.L.R. 546, this court characterized the lessee's operating rights as the sine quo non of a profit à prendre. The conclusion is thus inevitable that under the agreement of October 30th, Porter retained an interest in real property, a profit à prendre, and that the assignment of November 2nd created in Austin an interest in real property.

[17, 18] Defendants next contend that Porter's interest, whatever its nature, was partially forfeited under the agreement of October 30th because of his default thereunder, that Porter was therefore entitled to share only in the proceeds from the first well, and that Austin, as Porter's assignee, can claim no greater rights than Porter's. The trial court found that Porter did not refuse to perform his contract and that he was never in default thereunder, but defendants maintain that the finding is not supported by the evidence. It is their contention that the undisputed evidence shows that Porter agreed under the contract of October 30th to perform the conditions of the lease, including the commencement of a second well within sixty days after the completion of the first, but that he failed to do so and instead abandoned the contract and left the leasehold in March, 1935. This contention overlooks the significance of the contract secured by Austin from Porter on January 23, 1935, whereby the latter relinquished to the former the management and control of operations on the leasehold. The contract was secured at the solicitation of defendants. It provides: "John Austin shall have the entire management and control of * * * operations on said lease and all of them, and of the purchase of all machinery, equipment and supplies, and the said John Porter shall give his time and personal services in said operations and in carrying out the terms and conditions of the original lease * * * and the agreement between Hallmark Oil Company, Incorporated and said Porter, under the control and direction of said John Austin." Porter was to receive $150 per month for his services. It is clear that following this agreement and at the time of the alleged default and abandonment, Porter was merely an employee without power to conduct drilling operations. The corporation thereafter looked to Austin for the performance of the conditions of the lease, and there is no suggestion that he was in any manner remiss in his duties. By April 9, 1935, when he was removed, well number one was producing profitably and Austin had arranged for the drilling of a second well. There is likewise no suggestion that the lease was ever in default. Defendants contend, however, that Porter was also in default at the time the management agreement was entered into because he had used all the moneys agreed to be advanced by the corporation and no funds from the production of oil were available to continue operations. Porter had represented under the contract of October 30th that drilling operations could be carried out at an "initial" cost to the corporation of a sum not to exceed $16,000 (later raised to $18,000) and had agreed to perform the conditions of the lease provided these funds and the proceeds derived from the sale of oil and gas produced on the leasehold were made available by the corporation. There was no cessation of drilling activities at the time of the alleged default. Plaintiffs argue that the management agreement of January 23rd was motivated by what

defendants deemed an abuse of credit rather than by Porter's failure to obtain credit. It is unnecessary, however, to determine whether Porter's alleged inability to proceed because funds were not available constituted a breach of the agreement of October 30th. The Hallmark Oil Company, Inc., waived any previous default or forfeiture when it induced Porter to enter into the management agreement with Austin and assign a portion of his interest to McGuire so that additional funds would become available to continue the project for the benefit of all the parties. By negotiating with the defaulting party the corporation recognized the validity of the contract and indicated that it did not claim a forfeiture. See Knarston v. Manhattan L. Ins. Co., 124 Cal. 74, 80, 56 P. 773; cases cited in 12 Cal.Jur. 641. Austin testified that at a meeting at the El Tejon Hotel in Bakersfield on January 19, 1935, he suggested and defendants assented to the arrangement giving him the management of the lease "with the understanding that I would try to finance the continuous operation of it under his (Porter's) contract in some form." In a letter to Charles Forward on January 23, 1935, informing him of the execution of the agreement of that date, Austin stated: "A part of the inducement to get him (Porter) to sign this agreement with me was to preserve his interests in the wells." In a reply dated January 24, 1935, Charles Forward stated that it was unfortunate that after Porter had "flatly breached" his contract Austin had to obtain funds or credit to continue operations on the property as a condition precedent to his becoming manager, in order to protect Porter's fifty per cent interest. The letter also contains the following: "* * * those interested in the Porter 50 per cent interest lose nothing irrespective of how much the drilling operations cost. Their interests are not prejudiced or cut down by increasing the capital expenditure, but such interest remains constant,—that is, 50 per cent irrespective of whether the drilling operations cost $18,000 or $100,000." In inducing Porter to yield a part of his interest to McGuire, the corporation recognized Porter's interest. It likewise persuaded Austin to secure the management agreement, undertake its obligations, and assign a share of his interest to McGuire in the belief that Porter's rights had not been forfeited. Defendant's conduct induced the belief that the alleged default and forfeiture had been waived. See Dool v. First National Bank of Calexico, 209 Cal. 717, 290 P. 15; Allen v. Hance, 161 Cal. 189, 118 P. 527; Cal.Code Civ.Proc., sec. 1962, subd. 3; 10 Cal.Jur. 611.

[19] Defendants contend finally that Austin's rights were terminated or limited by the execution of the written instrument of March 28, 1935, in which Porter quitclaimed to the Hallmark Oil Company, Inc. all his interest or rights under the agreement of October 30th. The trial court found that this agreement was not entered into in good faith and was not supported by consideration. There is no need to consider defendants' contention that the finding of lack of good faith is unsupported by the evidence, for even assuming its execution in good faith, the instrument did not prejudice Austin's rights. Porter could not effectively abandon a contract when the performance of his obligations thereunder had previously been assumed by Austin with the agreement of all concerned. At the time of the purported quitclaim the Hallmark company was aware of the assignment of November 2nd, and Austin's rights are therefore clearly entitled to protection. Schiffman v. Richfield Oil Co., supra. La Laguna Ranch Co. v. Dodge, supra, insofar as it is cited in support of defendants' contention, does not apply to the present case. It was there held that a lessee's voluntary surrender of a leasehold by a quitclaim deed terminated the interests of holders of overriding royalties created out of estate of the lessee. In the present case, the leasehold remained intact at all times and was unaffected by the quitclaim executed on March 28th.

[20-25] The original complaint in this action was filed on February 2, 1937, nearly two years after John Austin was ousted from the enterprise. Between April 9, 1935, and February 2, 1937, the Hallmark Oil Company spent large sums of money in completing the project, and John Porter, who could have elucidated the transactions on which Austin based his claim to an interest in the leasehold, died. The trial court rejected defendants' contention that under these circumstances plaintiffs were guilty of laches as a matter of law. The existence of laches is determined by the trial court in the light of the facts and circumstances of the particular case. Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229; Toomey v. Toomey, 13 Cal.2d 317, 89 P.2d 634; Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767; Newport v. Hatton,

195 Cal. 132, 231 P. 987; Brown v. State Personnel Board, 43 Cal.App.2d 70, 110 P. 2d 497; see 10 Cal.Jur. 520.

In the present case there was an explanation for the alleged delay. Under the agreement of October 30th, Austin was not entitled to share in the proceeds from the leasehold until the property was fully developed, and at the date of his removal only the first well had been brought into production. There was evidence indicating that Austin made efforts to reach a conciliatory agreement with defendants, which were met with evasion and delay. A defendant may be estopped from urging the defense of laches where his conduct contributed to the delay. Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 111 P.2d 948; Powell v. Oak Ridge Orchards Co., 84 Cal.App. 714, 258 P. 636; see 10 Cal.Jur. 535. Moreover, the mere lapse of time without prejudice to defendants does not constitute laches. Cohn v. Cohn, 7 Cal.2d 1, 69 P.2d 969; Wolpert v. Gripton, supra; McMahon v. Grimes, 206 Cal. 526, 275 P. 440; Newport v. Hatton, supra. While the complaint was not filed until after the Hallmark Oil Company had spent large sums of money to complete the enterprise, its success was assured before Austin's ouster. The expenditures in the present case were not induced by the alleged delay in bringing this action, and the mere expenditure of money or effort on the part of a defendant is insufficient to show prejudice. Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; see 10 Cal.Jur. 531. The death of a material witness is but one circumstance that the trial court considers in determining whether prejudice resulted from the lapse of time. Goodfellow v. Barritt, 130 Cal. App. 548, 20 P.2d 740; see 10 Cal.Jur. 532. It does not appear that the trial court abused its discretion in refusing to sustain defendant's plea of laches. See Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2; Brown v. State Personnel Board, supra.

[26-29] The principal finding underlying the judgment awarding plaintiffs stock in the Hallmark Oil Company is that on or about November 5, 1934, John Austin agreed with the Hallmark Oil Company, Inc. to subscribe for $2,500 worth of its capital stock and paid the corporation $1,300 on account thereof. Defendants themselves repeatedly testified that Austin agreed to purchase stock. Nevertheless, they urge that since Austin testified that he never intended to contribute any money to the venture, that is, "any more than I had to or unless I was forced to put some money into the venture," he is not entitled to stock in the corporation. The manifest and not the secret intent of the parties, however, is the basis of the contract between them. Defendants challenge the finding that Austin paid $1,300 to the corporation under his agreement and maintain that he contributed nothing. The record, however, discloses that Austin paid $1,000 to the corporation and that stock was issued in consideration therefor. Although these funds were apparently held in trust by him for the benefit of one Samuel McFadden any trust agreement with respect to such stock is of concern only to the trustor and trustee. An audit of Austin's accounts disclosed that an additional sum of $300, representing his personal funds, was invested in the enterprise. The trial court therefore did not err in awarding plaintiffs 130 shares of stock in the defendant corporation. The court went on to hold, however, that by reason of his agreement to subscribe for $2,500 par value of stock, Austin is entitled to have issued to him 120 additional shares and is obligated to pay the corporation $1,200, to be deducted from the amount of the judgment. That holding was erroneous. It is not appropriate to grant specific performance of a subscription contract when the complainant, instead of paying for the stock subscribed to at the time the corporation is in great need of funds, does not offer to pay until the success of the venture undertaken by the corporation is assured.

The judgment therefore is modified by striking therefrom the provision that the defendant Hallmark Oil Company make, issue, and deliver to and in the name of John Austin a certificate of its capital stock for 120 shares to be dated as of the date of the entry of judgment herein, and as so modified it is affirmed, each side to bear its own costs on appeal.

GIBSON, C. J., SHENK, CURTIS, and CARTER, JJ., and SPENCE, Justice pro tem., concurred.

21 Cal.2d 654

HICKS et al. v. REIS et al.

L. A. No. 18523.

Supreme Court of California.
Feb. 26, 1943.

As Modified on Denial of Rehearing
March 25, 1943.

1. Automobiles 🔑192(1)

Under statute imposing liability on automobile owner up to stated sum for negligence of person using or operating automobile with owner's express or implied consent, automobile owner, permitting another to use automobile, is liable for negligence of third person, driving it with such permittee's consent, at least where permittee accompanies driver. Vehicle Code, § 402, St. 1937, p. 2353.

2. Automobiles 🔑242(6)

Evidence that automobile was being driven by its owner's employee when involved in accident warrants inference by trier of facts that such employee was operating automobile with owner's permission. Vehicle Code, § 402, St. 1937, p. 2353.

3. Automobiles 🔑242(6)

In action for injuries sustained in collision between plaintiffs' automobile and defendant's automobile driven by his employee's brother, evidence *held* sufficient to justify inference by trial judge, as trier of facts, that employee was using automobile with defendant's permission. Vehicle Code, § 402, St. 1937, p. 2353.

4. Witnesses 🔑311, 315, 316, 363(1)

In passing on witness' credibility, trier of facts may consider witness' interest in result of case, as well as manner in which he testifies, character of his testimony, his motives, and contradictory evidence. Code Civ.Proc. § 1847.

5. Evidence 🔑594

The trier of facts may reject witness' testimony in toto, though uncontradicted, if trier does not act arbitrarily.

6. Automobiles 🔑242(6)

The trier of facts, provided he does not act arbitrarily, is free to disbelieve evidence that owner of automobile, negligently driven by another at third person's request, did not give such third person permission to use automobile, and to find, solely on basis of inference, that such permission was given. Vehicle Code, § 402, St. 1937, p. 2353.

7. Automobiles 🔑242(6)

The trier of facts may not infer that owner of automobile, negligently driven by another at third person's request, permitted such person to use automobile, when such inference is rebutted by clear, positive and uncontradicted evidence not subject to doubt in reasonable men's minds. Vehicle Code, § 402, St. 1937, p. 2353.

8. Appeal and error 🔑931(1)

Any reasonable doubt as to whether inference that owner of automobile, negligently driven by another at third person's request, permitted such person to use automobile, has been rebutted as matter of law, should be resolved in favor of submitting question to trier of facts. Vehicle Code, § 402, St. 1937, p. 2353.

9. Appeal and error 🔑1008(1)

In action for injuries sustained in collision between plaintiffs' automobile and defendant's automobile driven by his employee's brother at employee's request, whether inference that defendant permitted employee to use automobile was rebutted by other evidence *held* for trial court as trier of facts. Vehicle Code, § 402, St. 1937, p. 2353.

10. Automobiles 🔑247

In action for injuries sustained in collision between automobiles, where one paragraph of answer stated single affirmative defense that plaintiffs were contributorily negligent, trial court's finding that all allegations in such paragraph were not true was not equivalent to finding that some of them were true.

11. Automobiles 🔑243(12)

In action for injuries sustained in collision between plaintiffs' automobile and defendant's automobile, driven by his employee's brother at employee's request, employee's testimony that he told another employee of defendant that witness was going to take automobile was admissible, not to show that defendant permitted employee to use automobile, but to show facts surrounding taking thereof and support plaintiffs' contention that defendant had no rule prohibiting taking of automobile by defendant's employees. Vehicle Code, § 402, St.1937, p. 2353.

TRAYNOR and EDMONDS, JJ., dissenting, and CARTER, J., dissenting in part.

In Bank.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Dorrance P. Hicks and wife against John Reis, Fred W. Gray, and another for injuries sustained by plaintiffs in an automobile collision. Judgment for plaintiffs, and defendant Gray appeals.

Affirmed.

For prior opinion, see Cal.App., 128 P.2d 69.

Jennings & Belcher, Frank P. Belcher, and Louis E. Kearney, all of Los Angeles, for appellant.

James C. Hollingsworth, Henderson & Churchill, and E. Perry Churchill, all of Ventura, for respondents.

PETERS, Justice pro tem.

Plaintiffs, husband and wife, recovered judgment against defendants Stanley Reis and John Reis in the sum of $6,487, and against defendant Fred W. Gray in the sum of $5,000, as damages for injuries sustained by them in a collision of their automobile with a car owned by Gray and driven by Stanley Reis at the request of John Reis, an employee of Gray. Gray was held liable under section 402 of the Vehicle Code, St.1937, p. 2353, imposing liability on owners up to $5,000 for the negligence of any person using or operating an automobile with the consent, express or implied, of the owner. The case was tried before the court without a jury. Gray alone appeals.

The trial court found that the Oldsmobile driven by Stanley was owned by Gray; that John was, on June 14, 1940 (the date of the accident), employed by Gray; that at the time of the accident John and Stanley "did carelessly, recklessly, and negligently drive and operate said Oldsmobile" so as to cause it to collide with respondents' car; that as a proximate result of such negligence the respondents suffered the damages found by the court; that at the time of the accident "John Reis was using and operating said Oldsmobile automobile with the permission of defendant Fred W. Gray"; that Stanley Reis was driving the car "at the request of and under the immediate direction and control of defendant John Reis." One of the main contentions urged by appellant is that, as a matter of law, the finding that he granted permission to John Reis to use the car is unsupported by the evidence. On this issue the evidence most favorable to respondents is as follows:

Appellant was a dealer in second-hand cars, Frank P. Hume was his salesmanager, and John Reis was employed as a salesman. On the night of June 13, 1940, John, being then alone on the sales lot and admittedly then in charge of the lot, left his own automobile there, and took an Oldsmobile belonging to appellant from the lot to his home. The next day was his birthday and he did not report for work. During the day he drove the Oldsmobile some thirty-seven miles. On that night John and his brother Stanley, and two women, took a ride in the car, Stanley, at John's suggestion and request, driving. They drove from Los Angeles to Oxnard, a distance of over sixty miles, and on the return trip the accident with respondents occurred. The question to be determined is whether the trial court's finding that at that time and place John was using the car with the consent of appellant is supported by the evidence. On this issue respondents were compelled to rely on the testimony of John and of appellant, defendants called under section 2055 of the Code of Civil Procedure, and upon the testimony of Hume, salesmanager of appellant. John testified that he had been working for appellant about three weeks before the accident; that he had worked for appellant on a prior occasion; that at no time during his previous or during his last employment had he ever been instructed by Hume or appellant, or anyone else, not to take cars from the lot without first securing the consent of appellant or of Hume; that he had never been informed of any such rule; that during his last employment, on several occasions, he had taken cars off the lot to demonstrate them to prospects; that he had occasionally taken a company car from the lot and driven to lunch; that if Hume was there he told Hume where he was going, not to secure his permission, but so that he would know where he was; that if Hume or appellant were not there he took the cars without telling anyone; that Hume knew he took the cars for these purposes; that when he had left appellant's employ on the previous occasion he had not been fired by Gray for taking a car overnight without permission; that no such thing occurred; that he left his employ with appellant to secure more money and that appellant told him of another job and introduced him to his new employer; that sometime prior to June 13, 1940, he became interested in purchasing the Oldsmobile for himself; that he discussed the purchase with appellant, and particularly discussed with him the details of the proposed purchase; that he also discussed the proposed purchase with Chapman and Daly, two other employees of appellant; that he ran the motor on the lot but wanted to assure himself the car was in good condition; that he took the Oldsmobile for that purpose; that on June 14th he drove the car some thirty-seven miles and was satisfied with its performance; that on the night of June 14th when they rode to Oxnard he "would have liked to have had" his brother Stanley's opinion of the car before he purchased it; that he asked Stanley to drive.

Much of this evidence was contradicted by appellant and his salesmanager, Hume. Appellant testified that when Reis was formerly employed by him he took a car from the lot and kept it overnight and was discharged for so doing; that when he reemployed John, about three weeks before the accident, he told him that it was a rule of the company that no car should be taken from the lot without his consent, or the consent of Hume; that he never had any conversation with John about the purchase of the Oldsmobile; that he never knew of John taking a car to lunch and never knew of John taking a car off the lot for any purpose without first securing permission. He admitted, however, that on the night of June 13, 1940, John was in charge of the lot and was authorized to write contracts of sale. Although he testified that no salesman ever took a car off the lot for demonstration or other purposes without consent, he also testified that salesmen were empowered to demonstrate cars "around the block" and that he instructed Reis that "if anyone wanted a demonstration to go with him."

Frank P. Hume, salesmanager of appellant, corroborated appellant in most respects. He contradicted John Reis by testifying that he had instructed John that cars were to be taken off the lot for demonstration purposes only and that either he or appellant must be notified if a car was taken. He testified that he had no knowledge of any case when a salesman had ever taken a car without first securing permission.

[1] On this evidence, can it be said that the finding that John was using the car with the permission of appellant, is totally unsupported by the evidence as a matter of law? The fact that Stanley was actually driving the car is immaterial. The evidence clearly demonstrates that John was using and operating the car through the instrumentality of Stanley. Both John and Stanley so testified. The law is well settled that under section 402 of the Vehicle Code the owner is liable to the extent there limited if his permittee consents to another driving, at least where the permittee accompanies the driver. Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521; Hughes v. Quackenbush, 1 Cal.App.2d 349, 37 P.2d 99; Armstrong v. Sengo, 17 Cal.App.2d 300, 61 P.2d 1188. The real question, therefore, is whether there is any evidence, or inference from the evidence, to support the finding that John was using the car with the permission of appellant at the time of the accident.

[2-6] The law is settled that "If the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner." Blank v. Coffin, 20 Cal.2d 457, 460, 126 P.2d 868, 870; see, also, Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550; McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417; Pozzobon v. O'Donnell, 1 Cal.App.2d 151, 36 P.2d 236; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Wagnitz v. Scharetg, 89 Cal.App. 511, 265 P. 318; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. Under this rule the trial judge, as the trier of the facts, was justified in inferring permission existed. Appellant contends that the inference was rebutted as a matter of law. Such contention is not sound. The trier of the facts is the exclusive judge of the credibility of the witnesses. § 1847, Code Civ.Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that "This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence." In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal.Jur. 180, § 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. Blank v. Coffin, supra; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc.,

Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; see cases collected in 27 Cal.Jur. 182, § 156; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334; 8 A.L.R. 796. As a general rule, therefore, the trier of the facts is free to disbelieve the evidence as to the non-existence of the fact of permission, and to find that it does exist solely on the basis of the inference. Blank v. Coffin, supra; Bushnell v. Yoshika Tashiro, supra; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 89 P.2d 718. In discussing the rule that the trier of the facts may find the fact of permission to exist based on the inference even where the evidence contrary thereto is uncontradicted, the court, in Market Street Ry. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41, 43, stated: "It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted."

[7, 8] To these well settled rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities. When the rebutting testimony is of such a nature that the minds of reasonable men cannot differ on the subject, then the trier of the facts cannot, and should not be permitted to, indulge in the inference. If there is any reasonable doubt as to whether the inference, as a matter of law, has been rebutted, that doubt should be resolved in favor of submitting the question to the trier of the facts. This limited exception was expressed as follows in Blank v. Coffin, supra, 20 Cal.2d at page 461, 126 P.2d at page 870: "If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law;" citing Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198. In the same case, after pointing out that the jury is the sole judge of the credibility of the witnesses and may disbelieve an uncontradicted witness if there is any rational ground for doing so, the court stated, page 461 of 20 Cal.2d, page 870 of 126 P.2d: "In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference."

[9] The instant case clearly discloses a factual situation where the question as to whether the inference was rebutted was for the trier of the facts. The rebutting testimony was not uncontradicted. Practically every material fact testified to by appellant and his employee Hume on the issue of permission, was directly contradicted by John Reis, another defendant. Thus John contradicted their testimony that a rule existed prohibiting employees from taking cars from the lot; that they had informed John of this rule; that John had been fired on a previous occasion for taking a car without permission; that John had never taken a car from the lot without permission; that John had discussed the purchase of the car with them. The trial judge, as the trier of the facts, saw these witnesses. He knew appellant and Hume were financially interested in defeating liability. He chose to believe John and to disbelieve appellant and Hume. That was his province. Under such circumstances he was justified in disbelieving all the evidence proffered by appellant on the issue of permission. He was also justified in basing his finding of permission solely on the inference. Moreover, the inference was supported not only by the evidence that the Oldsmobile belonged to appellant and John was his employee, but also by the evidence of John. From his testimony it is reasonable to infer that employees had the permission of appellant to take cars from the lot whenever it was reasonably necessary to perform their duties; that John took the Oldsmobile in order to satisfy himself before purchasing it; that appellant knew he was a prospective purchaser, and that appellant impliedly consented to the taking.

[10] Appellant urges other points for a reversal. He contends that the court's finding on contributory negligence on the part of respondents is in the form of a negative pregnant, and, in effect, finds that respondents were guilty of contributory negligence. In his answer appellant pleaded on information and belief as "a separate and affirmative answer and defense" that respondents were guilty of contributory negligence. The trial court found "That all of the allegations contained in paragraph I of the separate and affirmative answer and defense of defendant, Fred W. Gray, contained in the answer of defendant, Fred W. Gray, on file herein are not true." By thus finding that "all" such allegations were not true appellant urges that the court necessarily found that some of them were true, citing such cases as Austin v. Harry E. Jones, Inc., 30 Cal.App. 2d 362, 86 P.2d 379; and Wiles v. Hammer, 66 Cal.App. 538, 226 P. 651. It is true that when an allegation in a pleading contains a series of affirmative allegations, a finding that "all" of them are not true implies that some of them are true. But that is not the situation here. In this case the affirmative defense presented a single issue, that is, whether respondents were guilty of contributory negligence. No other ultimate fact was presented by the defense. The finding that all of the allegations of the defense were untrue necessarily amounts to a negativing of the defense. This is fundamentally different from the situation presented in the Austin case. There the court found that "all the affirmative allegations" [30 Cal.App.2d 362, 86 P. 2d 381] in a designated paragraph of an answer were not true, and then in the same finding found that a specific allegation of that paragraph was not true. Obviously, in finding that all the "affirmative" allegations were untrue, the court fell into the same error as where a court finds that "all material" allegations are true or untrue. The uncertainty thus created voids the finding. Moreover, by finding one specified allegation of the paragraph was untrue, the court cast doubt on what it meant by "all affirmative allegations." That is not the situation here. In the instant case there is no doubt but that the trial court intended to and did find that respondents were not guilty of contributory negligence. Similar findings have frequently been upheld. Heinrich v. Heinrich, 2 Cal.App. 479, 84 P. 326; Stevens v. Stevens, 215 Cal. 702, 12 P.2d 432; Hackler v. Tubach, 129 Cal.App. 680, 19 P.2d 295.

[11] Appellant also contends that the trial court erroneously, over his objections, permitted John Reis to testify as to a conversation had with Daly, another employee of appellant, in which conversation Reis testified he told Daly he was going to take the Oldsmobile. Appellant urges that there was no showing that Daly had authority to permit the car to be taken. Although there was no evidence of authority on the part of Daly to authorize the taking, and, therefore, the evidence was not admissible to show permission, it was admissible to show the facts surrounding the taking, and to show the conduct of John Reis in taking the automobile. The important issue was whether employees were authorized to take cars without permission. The fact that John told Daly he was taking the car was relevant evidence to support his contention that there was no rule prohibiting the taking of cars. John's conduct in taking the car was relevant on this issue.

The judgment appealed from is affirmed.

GIBSON, C. J., and SHENK and CURTIS, JJ., concurred.

CARTER, Justice (concurring and dissenting).

I concur in the judgment of affirmance as I am of the opinion that the evidence is sufficient to justify the inference that John Reis was using and operating the automobile involved in the accident with the permission and consent of defendant Gray at the time of the accident.

I do not, however, agree with that portion of the majority opinion which places reliance upon the rule announced in the majority opinion in the case of Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868, with reference to when an inference may be rebutted as a matter of law, and I adhere to the views which I expressed in my concurring opinion in the case of Blank v. Coffin, supra, which, when applied to the facts of this case justify the conclusion reached by the trial court.

To my mind there is no basis in reason, logic or common sense for the statement in the majority opinion that "when the rebutting testimony is of such a nature that the minds of reasonable men cannot differ on the subject, then the trier of the facts cannot, and should not be permitted to, indulge in the inference." The import of this statement is that if the trial judge or the jury draws an inference from certain proven facts notwithstanding rebutting evidence which an appellate court considers sufficient to rebut the inference, then, the trial judge and the members of the jury do not have reasonable minds; in other words, the inevitable effect of such a rule is that in every case in which an appellate court thinks that an inference has been overcome by rebutting evidence and reverses a finding of a trial judge or a judgment based upon the verdict of a jury, both the trial judge and the jury are placed in the category of persons not possessing reasonable minds. Such a theory is not the product of sound reasoning and disregards the basic concept of the finality of determination of issues of fact by the trial forum. A trial judge and a jury hear the witnesses testify, observe their demeanor on the witness stand, scrutinize the exhibits, and in many cases make ocular observation of the subject matter of the action. They are in a much better position to determine the weight and effect of an inference than any appellate court justice could possibly be. If, as the majority opinion concedes, the trier of fact is the exclusive judge as to the weight and effect of evidence, then it must necessarily follow that when evidence is presented from which the trier of fact is justified in drawing an inference, if he sees fit to give such inference greater weight than any evidence offered in rebuttal, it should not lie in the province of an appellate court to say that because he accorded to the inference greater weight than the evidence opposed to it, he did not possess a reasonable mind. The trial judge and the jury are presumed to have reasonable minds, the majority opinion to the contrary notwithstanding. If we indulge in the presumption that appellate and Supreme Court justices have reasonable minds, we have a situation in every case where it is contended that an inference was rebutted, in which there may be reasonable minds on both sides of the issue. To then apply the rule announced in the majority opinion would in every case result in an affirmance of the judgment based upon inferences drawn from proven facts if a logical course of reasoning is pursued. In a trial by jury where all twelve jurors agree upon the verdict and the trial judge denies a motion for a new trial we have a situation where there are thirteen minds concurring in the same conclusion. Should they all determine that an inference should prevail over rebutting evidence to the contrary, and three justices on an appellate court should arrive at a contrary conclusion, we would have the anomalous situation of three justices who did not hear the witnesses testify, observe their demeanor on the stand or have any personal contact with the subject matter of the action declaring that none of the thirteen persons constituting the trial forum possessed reasonable minds. The absurdity of this type of metaphysical legalism should be so apparent that no reasonable mind should venture to promulgate it much less announce it as a principle of jurisprudence.

TRAYNOR, Justice (dissenting).

I dissent. The operative fact incumbent upon plaintiffs to establish in this case was the owner's consent to the use of the automobile. This fact must be established, not with certainty or beyond a reasonable doubt, but as probably true. Only if the trier of facts could reasonably conclude from the evidence that it was more probable that the employee was operating the automobile with the owner's consent than without it can the finding to that effect be sustained. Such a conclusion may be reached by way of an inference, in accord with the rule recently affirmed in the majority opinion in Blank v. Coffin, 20 Cal.2d 457, 460, 461, 126 P.2d 868, 870: "An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. Cal.Code Civ.Proc. §§ 1958, 1960, 1832; see cases cited in 10 Cal.Jur. 736–738, § 59. It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738, 739, § 60." This language makes it clear that an inference from the facts proved must be a reasonable one. The essence of an inference is its reasonableness, as this court recognized when it denied a hearing in Maupin v. Solomon, 41 Cal.App. 323, 326, 183 P. 198, 199, declaring: "When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts." See, also, Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Grand Lodge of A.O.U.W. v. Miller, 8 Cal.App. 25, 96 P. 22.

The majority opinion, invoking certain statements in Blank v. Coffin, supra, holds that the single fact that John Reis was appellant's employee warrants the inference that he was operating the automobile with appellant's consent at the time of the accident, and reduces the issue to whether the inference was dispelled by the evidence. The first question, however, is whether an inference of consent can reasonably be drawn from all the evidence favorable to plaintiffs; if it cannot, the question whether it is dispelled never arises. It is my opinion that such an inference cannot reasonably be drawn from the single fact that the person operating the automobile at the time of the accident was an employee of the owner. The statements in Blank v. Coffin that it can are too broad and must be read in the light of the many facts in that case beyond the single one that the automobile was operated by an employee of the owner: "The testimony of Coffin and Stuperich revealed the following facts that would justify the jury in concluding that Coffin was driving the automobile with the tacit permission of the defendant: Coffin was given exclusive possession of the automobile; he kept it in his own garage without charge to the company; the manual of instructions that he received forbade the use of the car on vacations, but did not forbid its use for personal matters; the company could determine that Coffin was habitually using the car for his personal business by checking his mileage reports against his gasoline reports; Coffin was not discharged after discovery of his use of the car on a week-end trip and was allowed to resume possession of it after a short lay-off." It was the sum of all these facts that led the court to hold that the inference of the owner's consent was a reasonable one. When, however, the fact stands alone that the car was operated by an employee of the owner, there is no more reason to infer the owner's consent from the employer-employee relationship than there would be to infer it from any one of countless social or business relationships that could exist between the operator of a car and its owner. It does not follow that because an employer owns a car he consents to its use by an employee, or that a car taken by an employee from his place of employment is taken with the owner's consent any more than if it were taken from the street.

No such inference can be drawn in the present case from the evidence most favorable to respondents. John Reis was in charge of the lot the night he took the car. He had his own car with him and had not requested permission to take a company car from the lot. He took the car without the knowledge of appellant or Hume, the manager of the lot. He kept it overnight, but did not report for work the next day, which was his birthday. On a previous occasion he had taken a car out overnight and returned it the following morning after covering a distance of 14 miles. He had occasionally taken cars from the lot for demonstration to customers and for transportation to lunch a few blocks away. He was interested in purchasing the automobile and had talked with appellant about it, but was financially unable to make such a purchase. He had five years' experience in selling used cars and was familiar with motors. He had run the motor while it was standing on the lot and on the night of June 13th drove it six or seven miles to his home. He was not satisfied with it then but by the time he had driven it the next day for about 37 miles he was satisfied with its performance. That night he and his brother Stanley and two women took a ride in the car. The purpose of this trip was "mainly social." John Reis wanted his brother's opinion of the car and asked him to drive. John Reis thought they would go on to Santa Barbara but they turned back at Oxnard, about 60 miles out of Los Angeles, because of the chilly weather. John Reis sat in the rumble seat part of the time with one of the women and the rest of the time alone.

A trier of facts might reasonably infer from this evidence that John Reis had appellant's permission to use cars on the lot for demonstration and for small personal errands, and to try out the car himself in the usual manner as a prospective customer. It is quite another matter to infer that he had the owner's consent to retain the car for thirty-six hours or more and take his brother and two women on a 120 mile pleasure trip. There is no evidence from which it can reasonably be inferred that appellant gave his consent to so extensive an appropriation of the automobile. The rule is well settled that the owner is not liable for injuries caused by the user of his car in the course of a use exceeding that for which consent was given. Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051; Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581; Souza v. Corti,[1] —— Cal.App.2d ——, 129 P.2d 729.

EDMONDS, J., concurred.

Rehearing denied: EDMONDS and TRAYNOR, JJ., dissenting.

SCHAUER, J., not participating.

MATHER v. MATHER et al.

L. A. 17608.

Supreme Court of California.

March 1, 1943.

Rehearing Granted March 29, 1943.

1. Husband and wife 🔑279(2)

In action to rescind property settlement agreement between plaintiff and his former wife, judgment for defendants was not void because of provision for payment to defendant wife of sum in hands of codefendant administrators of estate, against which plaintiff held approved claim, half interest in which was transferred to wife by such agreement, but judgment should be corrected so as to require administrator to pay wife only half of balance due on claim.

2. Trial 🔑400(1)

Where trial judge files findings constituting rendition of judgment, court retains power until entry of judgment to amend or change conclusions of law and enter different judgment, and such change may be made by another judge.

3. Appeal and error 🔑452

The trial court cannot be divested of jurisdiction of case by unauthorized appeal from judgment announced by court before entry of such judgment, and affirmance of announced judgment on such appeal does not prevent subsequent entry of different judgment, since no jurisdiction is acquired by premature appeal.

4. Judgment 🔑326

Where case was ready for rendition of final judgment at conclusion of trial on two of three counts of complaint pending appeal from purported judgment against plaintiff on third count, and trial court's failure to include all issues in its adjudication as of such time was merely inadvertence or mistake, court had inherent power to enter final judgment "nunc pro tunc" for defendants in order to do justice between parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Nunc Pro Tunc".

5. Judgment 🔑273(6, 8)

A court's inherent power to enter judgment "nunc pro tunc", where record furnishes basis for such retrospective entry, may be exercised at any time on court's own motion or that of a party, with or without notice of motion.

6. Abatement and revival 🔑4

The taking of proceedings in action wherein defendants filed cross-complaints and answers joining issue on question involved in their prior pending action against cross-defendants did not deprive court of power to enter final judgment in such pending action.

7. Contracts 🔑138(1, 3)

Generally, a party to illegal contract may not obtain courts' aid, either to enforce it directly or to recover consideration parted with pursuant thereto, but law leaves parties where it finds them.

8. Husband and wife 🔑279(2)

The fact that Hawaiian law prohibits married woman from contracting with her husband gives husband no cause of action in California for rescission of property settlement agreement made with wife in Hawaii, in absence of showing that husband was not equally at fault in entering into such illegal agreement.

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[1] Hearing in Supreme Court granted.

9. Appeal and error ⚷82(1)

An order granting entry of judgment nunc pro tunc was intermediate ruling of court, and hence not "appealable".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

10. Appeal and error ⚷82(3)

An appeal will not lie from order denying motion to vacate nunc pro tunc judgment on grounds existing before entry thereof and available on appeal therefrom.

In Bank.

Appeals from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by A. W. Mather against Anna Inez Mather, Edna Greenfield, as administratrix of the estate of Louis R. Greenfield, deceased, and others for rescission of a property settlement agreement between plaintiff and defendant Mather. From a final judgment, denying plaintiff any relief and directing payment of money by defendant administratrix to defendant Mather, and from orders granting a motion for entry of such judgment nunc pro tunc, denying a motion to set it aside, and granting entry thereof, plaintiff and defendants administratrix and others appeal.

Judgment modified and affirmed as modified, and appeals from orders dismissed.

For prior opinion, see Cal.App., 126 P.2d 960.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for plaintiff and appellant.

Gavin McNab, Schmulowitz, Aikins & Wyman, of San Francisco, for defendants and appellants.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

CURTIS, Justice.

Plaintiff and certain defendants appeal from a final judgment, from an order granting a motion for entry thereof nunc pro tunc, and from an order denying a motion to set aside such judgment and the order granting entry thereof.

The facts necessary to a correct understanding of the respective positions of the parties involved may be chronologically recorded as follows:

On August 3, 1934, the plaintiff commenced this action for rescission of a certain property settlement agreement between himself and his former wife, the defendant Anna Inez Mather.

The complaint contained three counts for the relief sought: the first two were based upon fraud and misrepresentation, and the third rested upon the alleged invalidity of the agreement because of its having been made in the Territory of Hawaii at a time when, according to plaintiff's pleading, the laws of that jurisdiction did not permit a married woman to contract with her husband. The other defendants here appealing were joined in the action as administrators of the estate of Louis R. Greenfield, deceased, against which it was alleged plaintiff held an approved claim with an unpaid balance of $38,699, together with accrued interest. Part of the property transferred by the aforesaid agreement to the defendant Anna Inez Mather was a one-half interest in this claim. These defendant administrators filed an answer to the complaint herein to the effect that they held on account of the claim in question, and for whom it might concern, the sum of $12,549.60; and that various assignments and notices of assignment had been served upon them affecting the said fund, the defendant Anna Inez Mather, also known as Dorothy Devore Mather, being among the claimants thereto. The defendant administrators then averred in their answer that they were holding the said sum subject to the order and direction of the court, and they asked that they might be dismissed with their costs and released from all further liability toward the parties to the action and toward all claimants to the fund. This answer was in the nature of an interpleader.

Successive demurrers were effectively interposed to the third count of the complaint, and finally on December 24, 1934, after it had been thrice restated, a demurrer was sustained without leave to amend further. On January 4, 1935, and before trial of the other counts, a purported judgment was entered to the effect that the plaintiff take nothing by his third amended third cause of action. On February 7, 1935, plaintiff filed a notice of appeal from this purported judgment.

On February 18, 1935, the cause proceeded to trial upon the issues joined by the first and second counts of the complaint. At the conclusion of the trial the court found against the plaintiff and in favor of the defendant Anna Inez Mather. Among other facts, the court found that the plaintiff assigned and transferred to the defendant Anna Inez Mather a one-half interest in his title to the approved claim against the above-mentioned Greenfield estate. The trial court also found generally that the plaintiff and said defendant were intermarried on December 18, 1925, separated on June 10, 1933, and divided their property on June 16, 1933; that an interlocutory judgment of divorce of said marriage was entered on August 18, 1933; that at the time of the marriage of plaintiff and said defendant each was possessed of separate property, and during their marriage each contributed to their community property; that at the time of their separation the property of plaintiff and defendant was intermingled and consisted of their separate, community and joint property; that at the time plaintiff and defendant divided their property, June 16, 1933, such intermingled property was distributed between them by mutual consent, without fraud, undue influence or mistake on the part of either party, and such distribution was then and there wholly executed and completed. The trial court thereupon concluded that plaintiff should take nothing by reason of his complaint, that the answering defendants should have their costs, and that a temporary injunction theretofore allowed in the action should be and was dissolved. This injunction had served to restrain the estate in question and the administrators thereof from paying any further moneys to the defendant Anna Inez Mather under the assignment made by plaintiff of the one-half interest in his claim against the said estate. The findings of fact and conclusions of law were filed March 12, 1935. Judgment was then entered on March 14, 1935. However, this last document omits any reference to the previous disposition of the third count upon demurrer and on its face purports to be merely a judgment entered upon the findings and conclusions of the court at the close of the trial of the first and second counts of the complaint. Notice of appeal from this purported judgment was filed by the plaintiff on March 15, 1935.

The record discloses that the appeal from the "judgment" on the first and second counts of the complaint was dismissed by this court on September 10, 1935, "for failure to file a transcript within the required time"; and that the "purported" appeal from the "judgment" on the third count was dismissed by this court on March 17, 1936. Mather v. Mather, 5 Cal. 2d 617, 55 P.2d 1174. On December 7, 1939, defendants Anna Inez Mather and Lessie G. Williams (an interested party under the terms of the aforementioned property settlement agreement) made a motion for entry of a final judgment nunc pro tunc as of March 14, 1935, which motion was granted; and such a judgment was so entered on December 12, 1939. It is from this judgment that the appeal herein is taken, as well as from the order granting the motion to enter such judgment and from the order denying the motion to set said judgment aside.

Appellants contend that the motion for entry of the judgment nunc pro tunc was made upon insufficient notice; that the judgment was improper because the judge who ordered it entered was not even on the bench at the time the case was tried, and that he made new findings and changed the findings and conclusions previously rendered by the trial judge; that a nunc pro tunc entry of judgment may not be used to correct an erroneous judgment or to affect rights acquired in the interim; that neither the court nor the clerk may enter a judgment which does not conform to the order for judgment made by the trial court; that, moreover, the appeal taken from the "judgment" upon the demurrer sustained as to the third count stayed all further proceedings in the trial court, and proceedings thereafter taken in the trial court during the pendency of the appeal are void. Appellants also contend that the trial court erred in sustaining the demurrer to the amended third count of the complaint.

The status of the two judgments, upon the third and upon the first and second counts, has already been considered by this court. Mather v. Mather, supra; Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100, 103. Both decisions held in substance that the entry of such successive separate judgments constituted but piecemeal disposition of a single and unseverable cause; that the judgments in question were partial, not final, and hence nonappealable. The case of Greenfield v. Mather, supra, was an action in interpleader commenced by the estate of Greenfield to try the issue as to the respective rights of A. W. Mather, appellant herein, and his former wife, sued therein as Dorothy Devore Mather, respondent on this appeal, to the aforementioned sum of $12,549.60. In that proceeding said husband and wife joined issue by cross-complaints and answers. Under their respective pleadings the validity of the property settlement agreement as executed in Hawaii, the point involved in the present action, became the determinative factor. Specifically illustrative of this court's viewpoint that no final judgment was ever entered in the present action, though, according to the record, the trial court had made disposition of the issues, including the matter raised upon demurrer, by responsive rulings and findings, is the discussion of the situation as presented in the interpleader proceeding. In reversing therein by decision of August 21, 1939, the judgment entered in favor of the wife's claim to the fund involved upon the theory that the matter in issue was res judicata by virtue of the entry of the judgment of March 14, 1935, in the present action, this court stated at page 233 of its opinion: "Obviously that judgment (March 14, 1935) was in no better position than the judgment of January 4th. It disposed of the first two counts of the complaint, whereas the latter judgment disposed of the third count thereof. The reasoning which this court employed in determining the character of the one judgment (Mather v. Mather, supra), is equally applicable to fix the character of the other.

"The fact that the judgment of March 14th was the second judgment to be entered did not cloak it with finality because it did not purport to embrace a final disposition of the entire cause. By express terms it was confined to only counts 1 and 2, and erroneously failed to include a recital with respect to the disposition of count 3. It did not affect count 3. The appeal from the purported judgment on that count was pending; that purported judgment, being void, was in effect no judgment. Therefore, if count 3 in fact stated a cause of action, that cause remained pending in the trial court after the entry of the judgment on counts 1 and 2."

[1] By the final judgment entered in this action on December 12, 1939, "nunc pro tunc as of March 14, 1935," in consequence of the motion therefor presented as aforesaid, it was adjudged that plaintiff take nothing by his complaint or any of the counts thereof; that the injunction theretofore issued should be dissolved as of February 27, 1935; that the answering defendants Anna Inez Mather and Lessie G. Williams have their costs; and that the Greenfield estate and its administrators pay to Anna Inez Mather the sum of $12,549.60, admittedly in their hands subject to the order and direction of the court. Examination of the findings originally made by the trial court reveals that the final judgment entered nunc pro tunc is substantially in accord therewith. There is no merit to appellants' argument that the final judgment is void because it provides for the payment to Anna Inez Mather of the sum alleged to be in the hands of the administrators of the Greenfield estate. The answer of these administrators placed this fund at the disposal of the court; and the court expressly found that plaintiff had assigned and transferred to Anna Inez Mather a one-half interest in his title to the claim against the estate. The discrepancy as to the proper proportionate division of this fund will be discussed later in this opinion as a matter for correction.

[2, 3] Likewise without force are appellants' contentions with regard to the changes made in the conclusions reached. "Where findings are filed, *which constitutes the rendition of judgment,* it has been repeatedly held that the court retains power to amend or change the conclusions of law so as to point to a different judgment, and to enter a judgment different from that first announced, and that this power continues until the entry of the judgment, *and such change may be made by a judge other than the one who tried the cause.* Until the judgment is entered the trial court retains complete jurisdiction of the case, *of which it cannot be divested by any unauthorized appeal,* and the mere fact that it has been affirmed on such an appeal does not prevent the subsequent entry of another and different judgment, *since no jurisdiction was acquired by the premature appeal* and the trial court still retained the power to make a different judgment." (Italics ours.) 14 Cal.Jur. 938, and cases there cited. The foregoing quotation serves to dispose of practically all of appellants' objections regarding both the entry of the final judgment and a stay of proceedings claimed to have been created by the premature appeal taken from the purported judgment upon demurrer to the third count. Moreover, with respect to this latter proposition, this court by its decision in Mather v. Mather, supra, dismissing the "purported appeal" from the so-called judgment upon demurrer, expressly recognized its lack of power to review such intermediate ruling on a preliminary question while there remained two other causes of action unimpaired pre-

senting matters to be litigated in the trial tribunal upon issues of fact incident to the entry of the final judgment determinative of the rights of the parties.

[4, 5] Authority of the court to enter judgment nunc pro tunc as in the instant case is established in Kowalsky v. Nicholson, 23 Cal.App. 160, 137 P. 607, and Haug v. Superior Court, 2 Cal.App.2d 547, 37 P. 2d 1048. The principle upon which such action is to be sustained is that justice may be done between the parties. Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 P. 328; Osmont v. All Persons, etc., 165 Cal. 587, 133 P. 480. The present case was ready for rendition of final judgment at the conclusion of the trial of the first and second counts, and the court's failure to have included all the issues in its adjudication as of that time, March, 1935, appears from the record to have been merely an inadvertence or mistake, and not a judicial error. The entry of the judgment here under appeal simply served to complete the judgment roll, and the supply of such deficiency in the record consummated the true intention of the court as expressed in its previous acts of decision disposing of the issues in controversy. In so according with the record evidence of the prior formal pronouncements of the trial court, such judgment operated to preserve the legitimate fruits of the litigation and to prevent the working of an injustice to the party prevailing in the action. In re Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396. The power to enter judgment nunc pro tunc under circumstances such as here presented is inherent in the courts. Norton v. City of Pomona, 5 Cal.2d 54, 62, 53 P.2d 952. And such power, where the record furnishes the basis for the retrospective entry, may be exercised by the court at any time, on its own motion or that of a party with or without notice. E. Clemens Horst Co. v. Federal Mutual Liability Insurance Co., 22 Cal. App.2d 548, 71 P.2d 599. Appellants' contentions as to insufficiency of the notice of the motion for entry of the final judgment are therefore immaterial.

However, the court found that Anna Inez Mather had but a one-half interest in the claim against the Greenfield estate. That being so, Anna Inez Mather should be entitled to only one-half of any moneys in the hands of the administrators for payment of the claim, in the absence of anything in the record to the contrary. The record does not show that the entire sum was being held for her. The answer of the estate merely alleged that the fund was being held on account of the claim itself. It appears, therefore, that the final judgment should be corrected to conform with the finding as to Anna Inez Mather's one-half interest. That said person was entitled to but one-half of any sums payable by the estate on the claim is further substantiated by the indenture attached as an exhibit to plaintiff's complaint, wherein it is declared that "one-half (½) of all sums becoming payable to said grantor (A. W. Mather) from said estate, both by way of principal and interest, shall hereafter be payable to said Dorothy Devore Mather."

As to appellants' statement that the amount of the costs awarded in the final judgment differs from that previously allowed in the partial judgment, entered after trial on the first and second counts, such observation is of no concern here. The question of costs is not properly before this court, and there is no basis for a decision thereon. It is impossible to determine from the record what the correct amount of costs should be, or that the statement thereof in the final judgment is not proper.

[6] The fact that other and further proceedings were taken in another action before entry of the final judgment in the instant case did not serve to deprive the trial court of its power to enter judgment upon the findings made herein, and upon the ruling on demurrer. Greenfield v. Mather, supra. Indicative of the trial court's jurisdiction in this respect is this court's reference to the point in its opinion in that case at page 232 of 14 Cal.2d at page 102 of 93 P.2d: "* * * if both the judgment of January 4th and that of March 14th were partial, each disposing of a fraction of the case, then the prior action [the instant action] was still pending, and appellant was at liberty to proceed in that action, or in the present action. * * * He had previously filed a cross-complaint in the present action." As previously noted, the determining condition was then adjudged to be the fact.

[7, 8] Appellants' contention as to the sufficiency of the third count of the complaint as amended is without substantial foundation. The property settlement agreement forming the basis of that count is alleged by plaintiff to have been made in Hawaii on June 16, 1933, at which time, according to the law then in effect in that jurisdiction, a married woman might not contract with her husband. It is further pleaded that the agreement was fully executed and performed in that territory at the date mentioned, and that plaintiff thereby "transferred, conveyed, assigned and set over unto the defendant Anna Inez Mather" certain specified property. Relying upon the principle that the lex loci contractus determines the validity or invalidity of such transaction, plaintiff sought rescission of the contract executed in contravention of the express stipulation of the Hawaiian law. However, granting that the agreement is vulnerable to plaintiff's pleading of the applicable statute, such admission does not avail him here. It is a well-settled general rule that a party to an illegal contract may not obtain the aid of the courts either to enforce such agreement directly or to recover any consideration parted with pursuant thereto; the law leaves the parties where it finds them. Restatement, Contracts, § 598; Woodward, The Law of Quasi Contracts, § 135; 17 C.J.S., Contracts, § 272, p. 656. Nor does there appear here to be any basis for application of the recognized qualification to this general rule, that a party not equally at fault may secure relief from the consequences of an illegal agreement. 17 C.J.S., Contracts, § 274, p. 660. Moreover, since plaintiff's ground for repudiation of the transaction runs counter to the established policy of this state regarding the right of married women to contract with their husbands as to property settlements, there are no extenuating circumstances of public interest which favor the plaintiff's position in this forum. It follows therefore that the trial court did not err in sustaining the demurrer to the thrice amended third count of the complaint, and did not abuse its discretion in refusing to allow plaintiff to make further amendment, for it is plain that no cause of action would lie on the basis of the Hawaiian law.

Appellants are not correct in contending that the sufficiency of the third count of the complaint in the present action was established by the decision in Greenfield v. Mather, supra. Such question did not enter as a factor in the disposition of the appeal in that case. As above stated, it was merely held there that since no final judgment had been entered in the present action, there was no valid plea in bar on that ground in the interpleader proceeding.

[9, 10] The remaining points presented here for consideration require but brief comment. The order granting entry of judgment nunc pro tunc, being an intermediate ruling of the court, is not appealable. As to the order denying the motion to vacate the judgment, under the settled law of this state an appeal will not lie from such order if the grounds upon which the moving party sought to have the judgment vacated existed before the entry of the judgment and were available on appeal therefrom. Lawson v. Guild, 215 Cal. 378, 381, 10 P.2d 459; Barry v. Learner, 113 Cal.App. 651, 653, 299 P. 82; Barker v. Ackers, 29 Cal.App.2d 162, 176, 84 P.2d 264; 2 Cal.Jur. 164. It is obvious that appellants' attempt to appeal from the order refusing vacation of the judgment merely constitutes a repetition of their appeal from the judgment.

The judgment appealed from is hereby modified to provide that the estate of Greenfield, Edna Greenfield, as administratrix, and Herman Wobber and Hugo D. Keil, as administrators thereof, do pay to said Anna Inez Mather, otherwise known as Dorothy Devore Mather, one-half of the sum of $12,549.60, admittedly in their hands subject to the order and direction of the court in this action; and as so modified the said judgment is affirmed. The attempted appeals from the order granting the motion for entry of the final judgment nunc pro tunc and from the order denying the motion to set the said judgment aside are dismissed. Costs on appeal shall be borne by the respective parties.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., and PETERS, J. pro tem, concurred.

21 Cal.2d 705

WILLSON v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. No. 18478.

Supreme Court of California.

March 3, 1943.

1. Judgment 🔑948(2)

Generally, the defense of res judicata may be raised by demurrer where the facts which give rise to it appear in the complaint.

2. Judgment 🔑948(2)

Where facts which give rise to defense of res judicata are not averred in complaint, the defense must be raised otherwise than by demurrer.

3. Evidence 🔑43(2, 3)

Generally, a court takes judicial notice only of proceedings in the same case, but in some circumstances judicial notice will be taken of proceedings in other cases in the same court in the interests of justice.

4. Evidence 🔑43(3)

In action by beneficiary of testamentary trust against former trustee for amount of trust property allegedly sold and illegally invested, superior court could not take judicial notice of accounting proceeding in the same court sitting in probate and involving the same trust property. Probate Code, § 1120, 1123.

5. Trusts 🔑371(4)

In action by beneficiary of testamentary trust against former trustee for amount of trust property allegedly sold and invested illegally, complaint was subject to special demurrer for failure to disclose whether trustee had accounted and had been discharged.

6. Trusts 🔑371(7)

In action by beneficiary of testamentary trust against former trustee for amount of trust property allegedly sold and invested illegally, where it appeared from uncontradicted matter in former trustee's brief that had beneficiary set forth facts they would inevitably have demonstrated that beneficiary's right to hold the former trustee personally liable for trust funds invested in purchase of mortgage participation certificate was foreclosed by orders approving former trustee's accounts, the Supreme Court would not direct that beneficiary be permitted to amend for purpose of clearing up uncertainty regarding whether former trustee had accounted and been discharged. Code Civ.Proc. § 472c.

7. Trusts 🔑375(1)

Court sitting in probate, although determining extent of individual liability of testamentary trustee, may not render a personal judgment against the testamentary trustee upon which execution may be had. Probate Code, § 1120.

8. Trusts 🔑375(2)

Probate decree determining extent of individual liability of testamentary trustee may be enforced by appropriate means, as by contempt if trustee is able to pay, or by an action at law based on probate decree.

9. Trusts 🔑327

A decree in an accounting proceeding of testamentary trustee, whether in equity or probate, determines the individual liability of the trustee since the whole purpose of the proceeding is to fix the amount for which the trustee is individually liable.

10. Trusts 🔑331

Where bank took note secured by trust deed and transferred such instrument to itself as trustee of a participation trust and bank then issued a participation certificate to itself as trustee of a testamentary trust, the individual liability of the bank as trustee by reason of that transaction, whether as purchaser or seller of the participation certificate was concluded by decree approving bank's account as testamentary trustee.

11. Trusts 🔑326

Where the question on settlement of account of bank as testamentary trustee was whether the bank should be held individually liable for amount of trust funds invested in participation certificate issued by bank as trustee of trust participation, for the purpose of determining question of the monetary liability of the bank as testamentary trustee the probate court could pass upon the validity of the security. Gen.Laws 1931, Act 652, § 104; Probate Code, § 1120, 1123.

CARTER, J., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Birdetta Willson against the Security-First National Bank of Los Angeles, a national banking association, and others, for amount of trust property allegedly sold and invested illegally, for damages for fraud and on a common count. Judgment for defendant, and plaintiff appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 126 P.2d 896.

Walter R. Powers and Lewis C. TeeGarden, both of Los Angeles, for appellant.

Newlin & Ashburn and A. W. Ashburn, all of Los Angeles, for respondents.

PETERS, Justice pro tem.

Plaintiff appeals from a judgment for defendant entered after general and special demurrers were sustained to the complaint without leave to amend.

It appears from the complaint that defendant bank was formerly trustee of a testamentary trust created in 1916 by the will of Calvin A. Willson, of which plaintiff, after June 15, 1926, was the sole beneficiary. It is alleged that defendant sold trust property for the sum of $10,000, which it invested in a participation certificate issued by it without securing a permit from the Commissioner of Corporations. The result is, in plaintiff's analysis, that the participation certificate was void and valueless, and she is entitled to recover the amount paid therefor. The position of defendant is that the certificate was issued under section 104 of the Bank Act, and that no permit was required from the Corporation Commissioner. Section 104, as it existed on March 28, 1931, when the certificate was issued, authorized a bank issuing such certificates to sell them to trusts administered by it. Stats. 1925, chap. 312, p. 510, at p. 526; Deering's Gen.Laws, 1931, Act 652.

It is averred that the certificate herein was one of several issued against a note for $50,000 executed by one Woodruff in favor of defendant bank, and was secured by a deed of trust on real property, and that the bank transferred the note and deed of trust to itself as trustee and created Participation Trust 6800–13, with the note and deed of trust constituting the corpus. On March 28, 1931, it issued Participation Certificate 17207 in the sum of $10,000 to itself as trustee of the Willson trust, and on August 30, 1940, it made out a new certificate in substitution therefor, which it assigned to plaintiff. Plaintiff alleges that she did not discover that the certificate was issued without authority of the Corporation Commissioner until after August 30, 1940.

Between April 17, 1934, and September 12, 1937, the defendant bank paid taxes and assessments on the property covered by the Woodruff deed of trust, upon the owner's default in discharging them, and paid to itself from the funds of the Willson trust a pro rata of such expenses. Plaintiff avers that she has been damaged in the amount of $10,000, the sum paid for the participation certificate, plus the amounts expended for taxes and assessments, making a total of $12,094.06, with interest, for which she prays judgment.

The complaint was filed May 2, 1941. Plaintiff alleges that defendant was trustee up to and including June 25, 1940, and, as set forth above, that on August 30, 1940, the defendant assigned the participation certificate for $10,000 to her. The complaint is silent as to the circumstances under which defendant ceased to be trustee, and as to whether it ever filed a final accounting, or any accounting. It is not averred that the trust has terminated, except as a termination is implicit in the allegation of assignment of the participation certificate to plaintiff. These uncertainties are made a ground of special demurrer.

In a second count plaintiff incorporates the allegations of the first count, and also avers that defendant represented on stated dates between August 1, 1932, and July 30, 1940, that the purchase of the participation certificate was authorized by law, and was carefully selected and made for the best interests of the plaintiff, and that the certificate was issued and sold under permit granted by the Corporation Commissioner; that these statements were false, fraudulent and untrue; that the investment was hazardous, speculative and not a proper one for trust funds; that the market value of the property securing the Woodruff note was less than sixty per cent of the amount of the loan. It is further alleged that plaintiff relied on the defendant's representations and failed to discover the true facts until subsequent to August 30, 1940. It is not alleged how the discovery was made, nor why the true facts were not discovered sooner.

A third count simply alleges that within two years last past defendant became indebted to plaintiff in the amounts totaling $12,094.06. The complaint does not purport to invoke the probate jurisdiction of the court.

Under section 1120, Probate Code, the court sitting in probate has jurisdiction of the accounts of a testamentary trustee. The section provides: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, or settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. * * *" The forerunner of this provision was section 1699 Code of Civil Procedure. Except for this grant of authority, jurisdiction of the accounts of a testamentary trustee would be in equity. Estate of McLellan, 8 Cal.2d 49, 55, 63 P.2d 1120; Parkman v. Superior Court, 77 Cal.App. 321, 246 P. 334.

In McLaughlin v. Security-First Nat. Bk., 20 Cal.App.2d 602, 67 P.2d 726, and Ormerod v. Security-First Nat. Bank, 21 Cal.App.2d 362, 69 P.2d 469, defendant herein was sued in equity for amounts paid to itself from other testamentary trusts for the purchase of participation certificates issued by it, on the ground that no permit had been obtained from the Corporation Commissioner. The complaints in those actions showed that the purchase had been reported in the trustee's accountings, that no objections had been filed, and that the accounts had been approved by the probate court. It was held that the complaints failed to state a cause of action for the reason that the orders in probate settling the trustee's accounts were res judicata as to the propriety of the investment in the participation certificates, and as to the validity of the certificates for the purpose of determining the trustee's personal liability to the beneficiary. Section 1123, Probate Code, provides: "A decree rendered under the provisions of this chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being."

In both cases the courts held that the complaints in equity failed to state a case for relief on the ground of extrinsic fraud from the probate orders settling the trustee's accounts; that in the absence of such fraud the beneficiaries had their opportunity to object to the investment in participation certificates when the trustee's accounts were settled, and they were concluded by the order of settlement.

In the cited cases the complaints in equity specifically alleged that the trustee's accounts reporting the purchase of the certificates had been approved. The complaint in the present case is silent as to whether the purchase has been reported to the probate court. That in fact it has been reported is set forth by respondent in its brief, and, in effect, conceded by appellant, although appellant does contend that such fact is immaterial.

In a supplement to respondent's brief are set forth copies of eight trustee's accounts, filed between September 28, 1931, and July 22, 1940, and also the orders settling the accounts as rendered. The last of these accounts is a final account. The beneficiary's receipt on distribution, and the order of discharge of the trustee thereon, are also included in the supplement.

It appears from the final account that the beneficiary of the trust, plaintiff herein, had brought an action in equity for its termination. On June 25, 1940, the court made its order to that effect, wherein it decreed that the defendant should forthwith file its final account in the court sitting in probate. A copy of the order of June 25, 1940, was attached to the final account. Doubtless the action in equity for termination was brought under the authority of In re Estate of Hubbell, 121 Cal.App. 38, 8 P.2d 530.

The account filed September 28, 1931, reported the purchase of the "Trust Participation Certificate" as follows: "1931 Mar. 30 $10,000 S–6800/163." Subsequent accounts listed the certificate as an asset of the trust and included a statement substantially as follows: "All investments made for said trust are in securities authorized by law or by the terms of said trust and have been carefully made for the purpose of serving the best interests of said trust and all persons interested therein." There was no statement, however, that the certificates had been issued without a permit from the Corporation Commissioner. The twelfth account reports the institution of foreclosure proceedings on the Woodruff deed of trust, and the fourteenth account, that a deed had been accepted in lieu of foreclosure. No objections to the accounts were filed by the beneficiary.

[1-4] It is the general rule that the defense of res judicata may be raised by demurrer where the facts which give rise to it appear in the complaint. This was the situation in the McLaughlin and Ormerod cases, supra. But where such facts are not averred, the defense must be raised otherwise than by demurrer. Mason v. Drug, Inc., 31 Cal.App.2d 697, 88 P.2d 929; Talbot v. City of Pasadena, 28 Cal.App.2d 271, 82 P.2d 483; 30 Am.Jur., § 264, p. 989; see annotation 101 A.L.R. 1325. Defendant herein contends that the trial court was entitled to take judicial notice of the

accounting proceedings in the same court sitting in probate, with like effect as if they had been pleaded in the complaint. The defense of res judicata was specifically raised by demurrer. Generally a court takes judicial notice only of proceedings in the same case. 10 Cal.Jur., § 52, p. 727, citing cases. But in some circumstances judicial notice will be taken of proceedings in other cases in the same court in the interests of justice. Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; Johnston v. Ota, 43 Cal.App. 2d 94, 110 P.2d 507. To hold that a court may generally take judicial notice of another proceeding with a view to determining whether it is a bar to the pending suit, would do away with the rule that the defense of res judicata may not be raised by demurrer unless the facts appear in the complaint, in those cases where the judgment relied on as a bar was rendered by the same court. In the case herein we are of the view that the judgment of the trial court must be sustained without reference to judicial notice.

[5] The allegations of the complaint that defendant was trustee up to and including June 25, 1940, and that on August 30, 1940, it assigned the participation certificate to plaintiff, indicate that defendant has ceased to be trustee. This action was filed May 2, 1941. The complaint is uncertain and incomplete in that it does not appear whether the trustee has accounted and been discharged. While it appears that the defendant is no longer trustee and that the participation certificate has been assigned to plaintiff, it does not appear whether this is an action brought after the trustee has accounted and his accounts have been settled, or whether an accounting proceeding is pending, or whether no account has been filed. The absence of allegations as to these matters was made a ground of special demurrer. In the event the trustee had accounted, the inference would be that it had performed its duty and reported the purchase of the certificate, in the absence of an affirmative allegation that it had not; and if the account reporting the purchase had been approved, the order of approval would be res judicata as to the trustee's liability therefor. The special demurrer based on these omissions is well taken.

[6] Plaintiff sought leave to file an amended complaint, which, however, was identical with the original except that it added specific allegations that the certificate purported to be issued under section 104 of the Bank Act. Plaintiff made no offer to clear up the above uncertainties, pointed out by defendant in its special demurrer. In these circumstances this is not a case where this court, under section 472c, Code of Civil Procedure, should direct that plaintiff be permitted to amend, for it appears from uncontradicted matter in respondent's brief that had plaintiff set forth the facts as to these matters they must inevitably have demonstrated that the plaintiff's right to hold the defendant personally liable for trust funds invested in the purchase of the participation certificate was foreclosed by the orders approving defendant's accounts.

No useful purpose would be served in discussing plaintiff's right to bring an action in equity had the trustee not accounted to the probate court, or to consider whether the jurisdiction conferred on the court sitting in probate by section 1120, Probate Code, supra, is exclusive, or is concurrent with the exercise of jurisdiction sitting in equity. As bearing on this question see: Dowdall v. Superior Court, 183 Cal. 348, 191 P. 685; King v. Chase, 159 Cal. 420, 115 P. 207; In re Estate of McLennan, 29 Cal.App.2d 666, 85 P.2d 499; Turney v. Shattuck, 96 Cal.App. 590, 274 P. 442; Barber v. Superior Court, 43 Cal.App. 221, 184 P. 952; Colden v. Costello, 50 Cal.App.2d 363, 122 P.2d 959; Howard v. Bennett, 53 Cal.App.2d 546, 127 P.2d 1012. Assuming that an accounting could be sought in equity as well as in probate, the present action is not for a general accounting, but seeks relief as to a single transaction.

[7, 8] It is true that the court sitting in probate, athough determining the extent of the individual liability of the trustee, may not render a person money judgment against him upon which execution may be had. In re Estate of McLellan, 8 Cal. 2d 49, 63 P.2d 1120; Costa v. Superior Court, 137 Cal. 79, 69 P. 840; In re Estate of Rey, 31 Cal.App.2d 648, 88 P.2d 718. But the probate decree may be enforced by appropriate means, as by contempt if the trustee is able to pay, or by an action at law based on the probate decree, in like manner as an order settling accounts and for final distribution in the estate of a decedent may be made the basis of contempt proceedings or an action at law. 11b Cal.Jur. § 1148, p. 617; see, also, §§ 1310–1312, pp. 818–821, citing cases; § 1021, Prob.Code.

Plaintiff does not contend that the facts are not exactly as stated by defendant. Rather it is her position that these facts as to defendant having accounted and been discharged have no bearing on the present suit. The present action, says plaintiff, is not against defendant as trustee, but as the issuer of the participation certificate. It is urged that the trustee in its individual capacity was the issuer of the certificate, and that this action is against it as an individual. Again the plaintiff contends that the basis of this suit is not anything done by the bank as trustee, but is for acts done as an individual. As trustee of the Willson trust the bank purchased the certificate, but in its individual capacity it issued and sold the certificate to itself as such trustee, in plaintiff's analysis. It is as if the bank as trustee had purchased the certificate from a third person, plaintiff contends.

[9, 10] The fact of the matter is, however, that the certificate was not purchased from a third party. It is of the essence of a decree in an accounting proceeding, whether in equity or probate, that it determines the individual liability of the trustee. The whole purpose of the proceeding is to fix the amount for which the trustee, or personal representative of a decedent, is individually liable. If the trustee, or personal representative, has acted in an unauthorized manner and by reason thereof is liable in a greater sum than that for which he charges himself, his account will be surcharged. The purchase of the participation certificate herein was a trust transaction. We are of the view that the individual liability of the trustee by reason of that transaction, whether as purchaser or seller, was involved in and concluded by the accounting decree. The individual liability of the defendant bank as to this transaction is the matter concluded, which means any and all individual liability in respect thereof. It would be anomalous if two separate proceedings were required to determine the individual liability to the same person on account of a single transaction of one who had acted as trustee.

In Carr v. Bank of America, etc., Ass'n 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282, the defendant bank was named both executor and trustee of a trust created by will. An agreement was made by the legatees and beneficiaries that stock in the estate be distributed to the trustee in kind in lieu of cash, and distribution was thus made. One of the beneficiaries thereafter brought an action against the bank in which he failed to show extrinsic fraud. It was held that the decree in probate protected the bank in its capacity as trustee as well as executor.

The present action is not one to subject assets of the participation trust, against which the certificate was issued, to plaintiff's claim of damage.

[11] The plaintiff further contends that the decree of the probate court in an accounting proceeding cannot determine the validity of securities, and that a determination of the validity of the certificate is, a fortiori, a determination of title, which cannot be had in the probate court. The question on the settlement of the trustee's account is whether the trustee shall be individually liable for the amount of trust funds expended for the certificate. For the purpose of determining this monetary liability the probate court can pass upon the validity of the security, even though such determination, binding as between the trustee and beneficiary, would not conclude a third party who had issued and sold the security. In the case herein the individual liability of the bank as issuer is concluded since it, and not a third party created the security.

It follows from the above discussion that the first count of the complaint is uncertain and the demurrer on that ground was well taken. It further appears from facts stated in respondent's brief as to matters of public record, which are not disputed, that any attempt to clear up the uncertainty would reveal that the accounting orders in probate bar the cause of action stated in the first count.

The second and third counts incorporate the first by reference. The second contains additional allegations as to defendant having represented to plaintiff that a permit had been procured from the Corporation Commissioner. In the second and third counts inhere the same uncertainty as in the first. The complaint does not seek to secure relief from the probate orders on the ground of extrinsic fraud. It contains no reference to any orders in probate as the foundation for extrinsic relief therefrom. In the absence of such allegations no cause of action has been pleaded.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. In this case it appears that the defendant corporation was the trustee of an express testamentary trust. Plaintiff is the beneficiary. In that capacity it transferred $10,000 of the trust funds to itself in its individual capacity to be and which was used by it in making a loan it made to a third person; the loan was secured by a trust deed on real property. In order to complete the loan it put other funds with the $10,000, and established a trust to hold the note and trust deed given by the debtor. It then issued participating certificates in the last-mentioned trust, one of which was transferred to it as trustee for the benefit of the trust here in question. The two chief allegations in the complaint are first that no permit was obtained by defendant from the corporation commissioner to issue or transfer the participating certificate to the trust pursuant to the Corporate Securities Act (Stats. 1917, p. 673; Deering's Gen.Laws, 1937, Act 3814), and, second that defendant falsely represented to plaintiff in 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, and 1940, that the sale of the participating certificate to the trust was authorized by law, that it was carefully selected, and that a permit therefor had been obtained from the corporation commissioner. Plaintiff believed and relied upon those false representations to her damage.

The majority opinion holds that an order settling the account of the trustee named in the trust is res judicata upon the validity of the purchase of the participating certificate by defendant trustee, and therefore is a bar to plaintiff's action. It refuses however, to determine the question of whether or not the certificate was embraced within the Corporate Securities Act, and hence, that a permit was necessary. That issue should been decided.

If the permit was required for the certificate and none was obtained, the sale of the certificate to the trust by defendant was void. A transaction falling within the terms of the Corporate Securities Act is declared by that Act to be void if no permit therefor is obtained. Stats.1917, p. 673, Deerings Gen.Laws 1937, Act 3814, sec. 16. The order of the probate court approving that transaction, is also void, if the rule stated in Hunter v. Superior Court, 36 Cal.App.2d 100, 97 P.2d 492, is followed. It is there declared that a judgment based upon a void contract is itself void. See People v. Burke, 72 Colo. 486, 212 P. 837, 30 A.L.R. 1085; Campbell v. McConnel, 214 Ill.App. 342; Bredin's Appeal, 92 Pa. 241, 37 Am.Rep. 677; Dial v. Kirkpatrick, 168 Okl. 21, 31 P.2d 591, 95 A.L.R. 1263. If the order settling the defendant trustee's accounts is void then it cannot be res judicata inasmuch as a void judgment is not res judicata. 15 Cal.Jur. 102.

It is no answer to the foregoing proposition to say that the invalidity of the participating certificate did not appear upon the face of the judgment roll in the proceedings and order settling the trustee's account, because the complaint may well be construed as alleging an action for equitable relief from the order. A prayer therefor is not made but plaintiff should be permitted to amend her complaint to state such an action. Furthermore, it must be remembered that this appeal is from a judgment entered as an order sustaining a demurrer to plaintiff's complaint. All the allegations of that complaint must be deemed admitted for the purpose of ruling upon the demurrer. Hence, it must be admitted that no permit was obtained from the corporation commissioner. An admission by defendant of the facts establishing the invalidity of a judgment justifying relief therefrom, is read into and considered a part of the record or judgment roll of the judgment attacked. Thompson v. Cook, 20 Cal.2d 564, 127 P.2d 909.

Thus, we must read into the order settling the account a determination that no permit was obtained for the participating certificate. The result is that the order is void upon its face and hence, is not res judicata. Under the present status of the case we are not now concerned with what may or may not be defendant's defense to the action, or what it may or may not admit by its answer.

Considering the second main allegation of the complaint, that charging fraudulent misrepresentations on the part of defendant, it is to be noted that the time of the making of those representations in each instance is just a short time prior to the filing by defendant of its annual accounts from 1932 to 1940. It must be taken as true that at those times defendant falsely stated to plaintiff that a permit had been obtained from the corporation commissioner. Such representations would be relied upon by plaintiff and prevent her from making any objection to the accounts. Certainly if she had known of the falsity of those representations she would have filed objections to the accounts. It is alleged that she did rely upon those representations, and although it is alleged that she did so to her damage rather than that she failed to object to the accounts for that reason, she should be permitted to amend her complaint to make such allegation. Liberality should be the guide for this court in determining upon appeal that amendments to pleadings should be permitted in order that a trial upon the merits may be had. See Wennerholm v. Stanford Univ. School of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

The foregoing discussion assumes that the fraudulent representations would constitute extrinsic fraud and hence make the order in probate subject to attack and relief in equity. That it would be such fraud cannot be doubted, if plaintiff was thereby prevented from contesting the accounts filed by defendant. She was deprived of her day in court. It was said by this court in Caldwell v. Taylor, 218 Cal. 471, 476, 23 P.2d 758, 760, 88 A.L.R. 1194, involving an attack on a probate order: "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side;—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

See, also, the case of Larrabee v. Tracy, Cal.Sup., 134 P.2d 265, decided by this court on February 25, 1943.

In my opinion the judgment should be reversed and the case disposed of on its merits.

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57 Cal.App.2d 180

HENDERSON et al. v. PROGRESSIVE OPTICAL SYSTEM et al.

Civ. 2696.

District Court of Appeal, Fourth District, California.

Feb. 17, 1943.

As Modified on Denial of Rehearing March 9, 1943.

1. Trial ⚷165

A motion for nonsuit made at close of plaintiffs' case operates as a demurrer to evidence and assumes that all evidence in favor of plaintiffs, if relevant to issues, is true.

2. Trial ⚷165

In passing on motion for nonsuit at close of plaintiff's case, court has nothing to do with question of credibility of witnesses.

3. Negligence ⚷32(1)

Optometrists owed business invitee duty of keeping floors in their premises reasonably safe.

4. Negligence ⚷121(1)

In action for injuries sustained by business invitee who slipped on waxed floor of defendants' office, it could be reasonably inferred that acts of the defendants, who were in control of the office, created floor's condition.

5. Negligence ⚷121(1)

In action for injuries sustained by business invitee who slipped on waxed floor in defendants' office, plaintiffs were not required to show that defendants, who were in control of office, had actual notice of dangerous condition, since, in view of inference that condition was created by defendants' acts, knowledge of condition would be imputed to them.

6. Negligence ⚷44

Although it is not "negligence per se" to have a waxed floor in an office, the floor may be so waxed as to make it slippery and dangerous.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

7. Negligence ⚡136(22)

In action for injuries sustained by business invitee who slipped and fell on floor of defendants' office, evidence indicating that floor had been recently waxed and that at place where business invitee slipped there was an excessive deposit of wax, was sufficient for jury on question whether floor condition was dangerous.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Nellie Henderson and another against the Progressive Optical System and others to recover for injuries sustained through a fall on a slippery floor. From a judgment of nonsuit, the plaintiffs appeal.

Judgment reversed.

John Preston King, of Lindsay, and Wild & Carlson and R. F. Maxwell, both of Fresno, for appellants.

Chester O. Hansen and John Said, both of Fresno, for respondents.

GRIFFIN, Justice.

This is an appeal by plaintiffs and appellants from a judgment of nonsuit entered against them and in favor of defendants and respondents E. L. Laisne, individually, and E. L. Laisne, transacting business under the firm name of "Progressive Optical System," E. W. Laisne, and Juanita Laisne. The complaint alleges that the defendants were in control and possession of certain described office floors and appurtenances on June 16, 1939, and on that day the plaintiff Nellie Henderson was in the office as an invitee (by the pleadings these facts are admitted); that the floors were for the use of persons lawfully in the premises; that the floor was so negligently cared for that it became slippery and dangerous; that the defendants, well knowing the premises, negligently left said floor in said slippery condition without guards or warning and that in consequence of said negligence and as a direct result thereof said plaintiff fell while properly and necessarily walking upon said floor. The complaint then sets forth the injuries sustained by the plaintiff and the resulting damages. The above-mentioned allegations were denied by the answer except it was admitted by the pleadings that the plaintiff Nellie Henderson slipped on the floor. It was alleged in this connection, however, that she was guilty of contributory negligence.

The evidence produced shows that appellants are husband and wife and that they resided in Lindsay, Tulare County, for over 35 years. The respondents are optometrists, maintaining upstairs offices over a store in Fresno. The respondents, on and prior to June 16, 1939, conducted an advertising campaign over the radio which the appellant Nellie Henderson heard. At that time she was wearing glasses which she thought needed examination and change. On that date, in response to the radio invitation, she traveled from Lindsay to respondents' offices in Fresno to have her glasses examined. She entered the offices a little before 11 a. m. It was the first time she had ever been there. Upon first entering the offices she talked to respondents' receptionist at a desk near the entrance door. She gave her name and address and waited at the side of the reception room until Dr. Laisne was at leisure. She was then taken into the examination room and her eyes were tested. Arrangements were made by her with the doctor for the purchase of glasses. Mrs. Henderson then went to a desk in an extension of the reception room where an employee of the respondents fitted her with bows for the glasses. She then commenced to walk leisurely across the reception room and when near the center of it her feet slipped out from under her and she fell. She claims that the fall was due solely to the condition of that part of the floor. The reception room floor was constructed of hardwood and had been very recently waxed. It was "highly polished." The floor was bare the full extent of the room and there were no rugs, runners nor other protection. Except for the floor wax, there were no foreign substances whatever on the floor and it was perfectly clean. The general area of the floor upon which Mrs. Henderson fell was "slippery" or "quite slick." She fell backwards and slightly to her left. The shoes worn by Mrs. Henderson were received in evidence. The evidence shows that such an excessive amount of wax had been placed on the area of the floor where the fall occurred that wax was peeled from the floor by her shoes; that part of it became attached, during the fall or immediately thereafter, to her left shoe on the left side thereof and across the heel and the back part of the shoe; that part of the wax that attached to the left side of the shoe was ground into the fabric of the shoe in one spot and shortly after the accident formed a central spot of wax "about the size of a dime" with "feathers of wax" extending therefrom. She testified that she had examined these shoes before the accident and no such spot was on them. She also testified that she had no warning from the general condition of the floor that this slippery area existed; that she had walked across other parts of the floor prior to her fall and experienced no difficulty and noticed no excessively waxed areas.

Mrs. Henderson was severely injured by the fall, sustaining a fracture of her left hip. The damage sustained by her appears to be considerable. A Miss Dowell, who accompanied Mrs. Henderson to Fresno, later in the day called at the doctor's office to meet Mrs. Henderson. As she entered the reception room Mrs. Henderson started to walk toward her and suddenly her (Mrs. Henderson's) "feet slipped out from under her and she fell." As to the condition of the floor, Miss Dowell testified that as she looked across it she "could see it had a gloss or sheen. It was not just like a—just ordinary piece of wood or something like that. It had a gloss on it, quite a sheen, I would say."

Dr. Moore, called by Dr. Laisne to attend Mrs. Henderson, testified that when he arrived he could see that the floor in the reception room was "quite slick"; that just as he entered the reception room "I had taken a couple of steps. I slipped slightly"; that he did not know the place on the floor where Mrs. Henderson had fallen but that "it appeared to be a very recently waxed floor, even had the odor of fresh wax in the room"; that as he came to the head of the stairs one of the girls employed by respondents said: "Look out. This floor is very slippery"; that he was shown Mrs. Henderson's left shoe in the respondents' office the day of the accident and it was smeared with wax on its left side; and that he knew it was wax because he could smell it. This is about the substance of the testimony produced by appellants. Respondents claim that the court was fully justified in granting the nonsuit upon this evidence.

[1, 2] A motion for nonsuit involves the legal effect of admitted facts. When made at the close of plaintiffs' case, it in purpose and effect operates as a demurrer to the evidence, and must therefore assume that all the evidence in favor of the plaintiff, if relevant to the issues, is true. On such a motion the court has nothing to do with the question of the credibility of the witnesses. The rules governing us in reviewing a judgment entered after granting a motion for nonsuit are clearly stated in Bosqui v. City of San Bernardino, 2 Cal. 2d 747, 43 P.2d 547. We will not repeat them here. Therefore appellants' evidence, to be hereinafter discussed, is at all times to be considered in the light of these rules.

[3-5] Mrs. Henderson was admittedly a business invitee at the time she slipped and fell. The duty owed her by the respondents was to keep the floors of their premises reasonably safe for those who must pass over them in the transaction of their business. Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P.2d 1128. Admittedly, the respondents were, at the time, in the control of the offices and of the floor which had been waxed by them. It may be reasonably inferred from the admissions and the evidence that the acts of the defendants created the floor's condition. Hatfield v. Levy Bros., 18 Cal.2d 798, 117 P.2d 841. Whether it was a dangerous floor condition is the main question to determine from all the facts and circumstances and from the inferences that might reasonably be drawn from those facts. Respondents argue that the burden was upon the appellants to show that respondents had either actual notice of the dangerous condition or that the condition complained of existed for so long a time that the respondents would be charged with notice of its existence, citing such cases as Gold v. Arizona Realty etc., Co., 12 Cal.App.2d 676, 55 P.2d 1254; Fuller v. Vista Del Arroyo Hotel, 42 Cal.App.2d 400, 108 P.2d 920; and Rothschild v. Fourth and Market St. Realty Co., 139 Cal. App. 625, 34 P.2d 734. In the cited cases the evidence did not show that the dangerous condition was created by the invitor or his agents. The principle there applied is not appliable here.

[6] It was held in Hatfield v. Levy Bros., supra, as it must be held here, that where there was an admission of joint control of the premises and floor in the building by the defendants, and where it was shown that the waxing of the floor was done in a negligent manner and was the defendants' act, and the one creating the dangerous or defective condition, it was not necessary for plaintiffs to prove by additional evidence that the defendants had notice or knowledge of the dangerous condition of the floor. Such knowledge is imputed. See, also, Sears, Roebuck & Co. v. Peterson, 8 Cir., 76 F.2d 243; Tuttle

v. Crawford, supra; Bury v. F. W. Woolworth Co., 129 Kan. 514, 283 P. 917. The only additional element needed by appellants here to establish their cause of action, based on the negligence of the respondents in creating a dangerous floor condition, is that the respondents' act of waxing the floor in the manner in which it was waxed, did create a dangerous floor condition, causing Mrs. Henderson's injuries. It has been often said that the mere fact that someone falls on a floor does not produce a reasonable inference that the floor is dangerous and that it is not negligence per se to have a waxed floor in an office. However, a floor may be so waxed as to make it slippery and dangerous. J. C. Penny Co. v. Robison, 128 Ohio St. 626, 193 N.E. 401, 100 A.L.R. 705.

[7] The kinds of evidence which have been held sufficient in California to take this question of dangerous floor condition to the jury will now be considered, together with the evidence presented by the appellants on this subject. The evidence shows that Mrs. Henderson's fall was caused by her foot slipping on the waxed floor and it may be reasonably inferred that it was due to the presence of a surplus or excessive deposit of wax. The evidence also indicates that it had been "very recently waxed"; that there was the odor of fresh wax in the room. There is evidence that at the place where Mrs. Henderson slipped there must have been a surplus or excessive deposit of wax placed on the floor. She contended that there was, and that her foot scraped up a portion of it in the fall, leaving a spot of wax on her shoe "about the size of a dime." The evidence would support such a conclusion, and that such a condition was a dangerous one. Tuttle v. Crawford, supra, was a case where a woman stepped on a wet space of cement floor in a store, slipped and fell, and fractured her right femur. The wet spot was caused by the act of the employees of the store in freshening heads of lettuce by immersing them in water. The court held that whether the floor of the store was so negligently maintained as to render the person responsible for its condition liable in damages, was a question of fact to be decided by the jury. Many cases are there cited dealing with injuries resulting from falls caused by feet slipping on account of oil or grease or other substances which sometimes become deposited on floor spaces, or injuries inflicted because of improper floor conditions, and in each case they are held to be properly referable to juries for decision.

In Sharpless v. Pantages, 178 Cal. 122, 172 P. 384, 385, the plaintiff fell in defendant's theatre due to the laying of a carpet in a loose condition. It was there held that since it was defendant's act that was complained of as creating a dangerous floor condition, notice was not involved in the case, and it was only necessary for plaintiff to show that defendant's act had created a dangerous floor condition causing plaintiff's injury. The plaintiff proved that her foot slipped as she stepped upon the carpet. Defendant moved for a nonsuit and the motion was denied by the trial court. In passing on the motion for nonsuit the Supreme Court said: "the fact that the plaintiff's foot slipped as she stepped upon the carpet is some evidence tending to show that defendant had failed" to use ordinary care to maintain the carpet upon the steps in such condition that it would be safe for persons to pass thereon in an ordinary manner, "and it is sufficient to sustain the decision upon the motion for a nonsuit." See, also, Brown v. Holzwasser, Inc., 108 Cal.App. 483, 291 P. 661; Lorenz v. Santa Monica, etc., District, 51 Cal.App.2d 393, 124 P.2d 846. Hatfield v. Levy Bros., supra, is factually similar to the instant case. There the defendant was charged with the negligent maintenance of the floor in its store. The invitee slipped on a floor that had been recently waxed by one of the employees. It was there said [18 Cal.2d 798, 117 P.2d 844]: "an excessive amount of wax would make the floor slippery. The evidence shows that a waxed floor is ordinarily not slippery unless an excess quantity of wax is applied which does not occur unless the one applying the wax is 'very careless.'" We are impelled to hold, in view of the evidence in the instant case and the reasonable inferences that might be drawn therefrom, that the nonsuit was improperly granted.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 482

LORTZ v. PHELPS.

Civ. 6689.

District Court of Appeal, Third District, California.

March 3, 1943.

1. Appeal and error ⚷1010(1)

The question as to delivery of a deed is one of fact, and the judgment of the trial court may not be disturbed if it rests upon evidence.

2. Deeds ⚷109

Evidence sustained finding that a deed was executed and delivered in escrow with intent to convey a present legal title to grantee reserving a life estate in grantor.

3. Deeds ⚷109

In determining whether a deed was executed and delivered in escrow with intent to convey a present legal title to grantee reserving a life estate to grantor, trial court properly considered fact that grantee was the only child and the natural object of grantor's bounty, and that grantee made extensive improvements on property at grantor's request.

4. Deeds ⚷109

In action to establish grantee's rights under a deed executed and delivered in escrow subject to life estate in grantor, evidence failed to establish grantor's agreement to give grantee equal right to possession during grantor's lifetime.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by M. E. Lortz against Inez L. Phelps for a declaratory judgment as to plaintiff's right in certain real estate, wherein defendant filed a cross-complaint seeking to quiet title as against plaintiff. Trial was to the court without a jury, and, from a decree for plaintiff, defendant appeals.

Modified and affirmed in part and reversed in part.

Preston & Gibson, of Ukiah, for appellant.

Taft & Spurr, of Ukiah, for respondent.

ADAMS, Presiding Justice.

Appeal from a judgment in an action for declaratory relief.

Plaintiff began this action February 1, 1939, alleging in his complaint that he was, and had been since about February 15, 1924, in possession of certain real property therein described; that on December 9, 1927, defendant was the owner in fee of said lands, and on said date executed a deed granting said lands to plaintiff, and delivered said deed to M. H. Iverson with escrow instructions to him to deliver it to plaintiff upon her death; that this was done with the intention of vesting plaintiff with the present legal title to the property, reserving to herself a life estate, and that said M. H. Iverson accepted the escrow of said deed and agreed to abide by said instructions; that both prior to and subsequent to the execution of said deed defendant asked plaintiff to improve the property saying that she would give same to him, and that relying upon her promises plaintiff had made improvements thereon at a cost to him of some $8,320, including the building of a dwelling house; that about March 14, 1935, defendant had secured the possession of said deed without the consent of M. H. Iverson and against his wishes and protests, and had refused to redeliver same to him; that she threatened to encumber or sell said property, and if she carried out said intentions the improvements made by plaintiff would be lost to him, together with his interest in the lands; that a controversy existed between the parties which plaintiff sought to have resolved by a decree that he was the owner of said lands, subject to a life estate in defendant, and enjoining defendant from disposing of or encumbering same, except as to her life interest.

Defendant filed an answer denying most of plaintiff's allegations but admitting that he was in possession of the dwelling house on the premises, that he had been for some time a lessee thereof during which period he had made some repairs, added some equipment and built the house, but that she had furnished all the money therefor. She admitted the taking of the deed from the custody of M. H. Iverson, but denied the other allegations of the complaint respecting its execution and delivery; and she filed a cross-complaint seeking to quiet her title as against any claims of plaintiff. In a second count she alleged that plaintiff was withholding possession from her, and sought restitution of the premises. Answering the cross-complaint plaintiff admitted that he was in possession of the dwelling house on the land, and that he had been served with notice to vacate, but alleged that his possession was by consent of defendant and pursuant to her agreement that he should have possession upon his making improvements as previously alleged, and asserting an estoppel against defendant. He prayed only for the relief demanded in his complaint.

The case was tried by the court, trial by jury having been waived, and at its conclusion findings were made sustaining the allegations of plaintiff's complaint. As to the execution and delivery of the deed in escrow to M. H. Iverson, it was found that it was delivered with the intent to vest a present legal title in plaintiff, reserving to defendant a life estate in the property and without any agreement or understanding that same could be withdrawn; as to improvements made upon the property it was found that they were placed there at the expense of plaintiff except the amount of $1,800 paid by defendant; and as to plaintiff's right of occupancy of the house upon the land, it was found that he had a right to occupy same with defendant, that neither party had the exclusive right of possession, and that said dwelling had been erected by plaintiff with the express direction and consent of defendant, and with the understanding and agreement that both might occupy same.

A decree followed, adjudging that there was a valid delivery in escrow of the deed in controversy, with intent on the part of the grantor to transfer title to plaintiff subject to a life estate in defendant; that plaintiff is the owner of the premises in fee; that the deed executed by defendant be held in escrow by the clerk of the court during the lifetime of defendant, and on her death be delivered to plaintiff; that the parties both have a right to possession of the dwelling house and outbuildings, together with the land upon which it is located, neither having the right to exclude the other therefrom; and that defendant take nothing by her cross-complaint.

In her briefs on this appeal appellant argues that the evidence does not support the finding that the deed was delivered in escrow with the intention of vesting plaintiff with the then present legal title; that no present interest vested in plaintiff as matter of law; and that at any event plaintiff has no right to retain possession of any portion of the premises at present.

Respondent answers that the evidence supports the finding of the court that the delivery of the deed in escrow was made with intent to vest title in plaintiff immediately, that it follows as matter of law that title vested in plaintiff subject to a life estate in defendant; and that as to the right to possession no contention is made by respondent that he is entitled to possession of the house as remainderman, but that his right to share possession thereof rests upon an agreement between the parties that plaintiff should have such right to possession in consideration for the improvements put upon the premises by him, and that defendant is estopped to deny such agreement.

At the time of the argument of the case before the court appellant's counsel urged that the decree did not show a life estate reserved in defendant, and that it should be modified to that extent at least; also that appellant should have judgment in ejectment against plaintiff at any event, because as life tenant she has right to possession. Thereupon counsel for respondent stated that no objection would be interposed to a modification of the decree to adjudge a life estate in defendant, and that possession of all except the dwelling and its immediate premises had been surrendered to defendant as life tenant.

We shall first consider the sufficiency of the evidence to sustain the finding of the trial court that defendant delivered the deed in escrow with intent to convey a present title, bearing in mind that if there be such evidence this court is bound by the findings of the trial court. Plaintiff himself testified that prior to the making of the deed his mother was contemplating marriage, and when plaintiff spoke to her about the improvements he had made she said, "You do not have to share it with anyone, we will go to Ukiah and fix it for you"; that thereafter Mrs. Phelps, with plaintiff and his wife, went to Mr. Iverson's office where she told Mr. Iverson that she wanted to make out a deed, so that if she got married the whole place would be plaintiff's, and whoever her husband was he wouldn't share in the ranch; that she didn't want the deed recorded because "it would be on record whoever she married—that she wouldn't have the ranch"; that Mr. Iverson told her that he would keep the deed and at her death Lortz could get it and no one would share in the improvements; that she could not get the deed back, and that Lortz could not get it until her death; and she said that was all right.

Mrs. Lortz, wife of plaintiff, testified that prior to the execution of the deed, Mrs. Phelps, in the presence of plaintiff and herself, stated that she was contemplating marriage and when Lortz asked what was going to become of the money he had put into the place said she would see Mr. Iverson and have a deed made out; that shortly thereafter the three of them went to Mr. Iverson's office and Mrs. Phelps told him she wanted to have a deed made out to her son Myrt; that she wanted it fixed up so the place could be his; that the deed was made out, and Mr. Iverson told Mrs. Phelps, "You understand you can't have this deed or Myrt can't either; it will be held in escrow, and at your death it will be given to Myrt," and that Mrs. Phelps said, "That's the way I want it." While defendant denied some of this evidence, her memory was bad and the trial court was justified in disregarding her denials. Also the manner in which she secured possession of the deed from Mr. Iverson indicates that she knew that her delivery of it to him was not with any understanding that she could repossess herself of it at any time.

[1-3] The question as to delivery of the deed is one of fact and the judgment of the trial court may not be disturbed if it rests upon evidence. The foregoing is sufficient to sustain the finding of the trial court that the deed was executed and delivered in escrow with intent to convey a present legal title in plaintiff, reserving a life estate in defendant. Also the trial court had a right to take into consideration the fact that plaintiff was the only child of defendant and the natural object of her bounty, that she loved him, as her letters to him show, though there were differences between them at times; and that he had worked and made extensive improvements upon the property at her request.

In view of the foregoing it cannot be said that there was not evidence to sustain the finding of the trial court as to the intention of defendant in executing and delivering the deed to Iverson; and the legal effect was to convey a present title to the grantee, reserving a life estate in the grantor. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Wilkerson v. Seib, 20 Cal.2d 556, 559, 560, 127 P.2d 904; Longley v. Brooks, 13 Cal.2d 754, 92 P.2d 394; Hinshaw v. Hopkins, 37 Cal.App.2d 230, 240, 99 P.2d 283.

[4] The second question propounded by appellant, as to whether defendant is estopped from claiming exclusive present possession of the buildings on the property described in the deed, involves, too, a question of fact, for it is not contended by respondent that a remainderman is entitled to possession of property as against the owner of the life estate. It is found by the court that plaintiff, at defendant's request, expended in excess of $6,000 of his own money in improving the property, particularly in building the house and outbuildings after the original ones had been destroyed by fire. This is sustained by the evidence. But the court also found that said dwelling was erected by plaintiff with the understanding and agreement that both might occupy same. We are unable to find any evidence of an agreement on defendant's part that in consideration of the improvements made by him he should have an equal right with defendant to occupy same during her lifetime. In so finding, the trial court followed the language of plaintiff's answer to defendant's cross-complaint; but plaintiff made no such contention in his complaint and the prayer thereof was merely that he be declared the owner of the lands subject only to a life estate in defendant. The prayer of his answer to the cross-complaint is that the relief prayed in his complaint be granted him.

During plaintiff's cross-examination he testified:

"Q. You always recognized, did you not, Mr. Lortz, that the ranch would be hers so long as she lived? A. Yes. I am not trying to take the ranch away from her.

"Q. You are perfectly willing to have her have the ranch while she is alive, are you? A. Sure, its hers.

"Q. You recognize that fact? A. Yes sir.

"Q. You are still living on the ranch? A. Yes sir.

"Q. Why don't you surrender it to her? A. Well, I imagine after this is over I will. I am willing to move any time, but I would like to know where that deed is going to.

"Q. You are just standing pat so far as the building is concerned until this litigation is determined relative to the deed? A. Yes sir, when this is finished I am ready to get up and leave.

"Q. You claim no rights there at all now? A. I would have left a long time ago if she left the deed back."

In view of the foregoing and of the relationship of the parties, as well as the evident desire of their respective counsel to arrive at an amicable adjustment of the differences between plaintiff and defendant, we trust that further interposition of a court may be avoided.

The judgment is amended so that the first two lines of the paragraph numbered (2) thereof shall read as follows: "That the plaintiff is the owner in fee of the lands and premises described in said deed, subject to a life estate in defendant."

And insofar as said judgment decrees that plaintiff has a present right to possession of the dwelling house and outbuildings together with the land upon which the same are located, said judgment is reversed, neither party to recover costs upon this appeal.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concurred.

57 Cal.App.2d 450

MENDOCINO COUNTY v. BARNARD.

Civ. 12424.

District Court of Appeal, First District, Division 2, California.

March 1, 1943.

1. Evidence 🔑471(26)

In action by county to recover old age security payments on ground that payments had been secured by defendant falsely representing that she did not own personal property in excess of $500 value, defendant was properly allowed to testify that money in two bank accounts in her name was her son's money, as against contention that such testimony was a "conclusion of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

2. Evidence 🔑471(26)

Generally, ownership of property is a fact to which a witness may testify.

3. Paupers 🔑40

Evidence presented question for jury as to whether defendant who received old age security payments from county received payments by falsely representing that she did not own personal property in excess of value of $500, so as to authorize county to recover the payments.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by County of Mendocino against Mrs. Lily Barnard to recover old age security payments made to defendant. From a judgment for defendant, the plaintiff appeals.

Affirmed.

James E. Busch, Dist. Atty., and George A. Faraday, Deputy Dist. Atty., both of Ukiah, for appellant.

Norman Johnson, of Ft. Bragg, for respondent.

DOOLING, Justice pro tem.

In this action appellant county of Mendocino sought to recover from respondent the sum of $1,197 paid to respondent as old age security payments on the ground that she had secured such payments by falsely representing that she did not own personal property in excess of the value of $500. The trial court found that respondent did not in fact own personal property in excess of $500 value. The only point urged on this appeal is that this finding is not supported by the evidence.

[1, 2] Admittedly there stood in respondent's name in two bank accounts, one a savings account and the other a checking account, an amount in excess of $500. As to these accounts respondent testified, over objection that the questions called for the witness' conclusion, that the money deposited in her name in the bank was not her own money, that it was her son's money.

Appellant claims that this testimony is a conclusion of law and will not support the finding. The cases in this state are to the contrary. "It has been held that the ownership of property is, as a general rule, a fact to which a witness may testify. Skinner v. City of Los Angeles, 5 Cal.2d 317, 319, 54 P.2d 446; Perkins v. Sunset Tel. & Tel. Co. 155 Cal. 712, 718, 103 P. 190; Diamond v. Grath, 46 Cal.App.2d 443, 446, 116 P.2d 114; Strauss v. Dubuque F. & M. Ins. Co., 132 Cal.App. 283, 294, 22 P.2d 582; St. Clair v. Joos, 90 Cal.App. 311, 265 P. 968.

[3] Accepting the proof, as the trial court did, that the money in bank was the

property of the son, respondent's personal property had a value of less than $500. While some of the testimony of respondent might support an opposite finding the question of fact was for the trial court and there was sufficient evidence to support the judgment. As the court said in St. Clair v. Joos, supra, 90 Cal.App. at page 313, 265 P. at page 969: "it is idle to assert that the law permits the introduction of evidence which, when received, would be without probative force."

Judgment affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

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57 Cal.App.2d 275

MEGEE v. FASULIS.

Civ. 6677.

District Court of Appeal, Third District, California.

Feb. 23, 1943.

Hearing Denied April 22, 1943.

1. Judgment ⇨199(1)

The power of the trial court to set aside verdict and enter contrary judgment is the same as its power to grant a nonsuit. Code Civ.Proc. § 629.

2. Judgment ⇨199(3)

Defendant's motion for judgment notwithstanding verdict for plaintiff may properly be granted when and only when disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support verdict for plaintiff.

3. Trial ⇨139(1)

The jury is the sole judge of weight and effect of testimony.

4. Theaters and shows ⇨6

Where plaintiff fell and sustained injuries while descending stairway in place of amusement operated by defendant, in personal injury action, whether defendant had permitted discharged cartridge cases to fall upon floor adjacent to stairway and to be upon the stairway, and whether plaintiff slipped on one of the empty cartridge cases, was for jury.

5. Theaters and shows ⇨6

Where plaintiff slipped and fell while descending stairway in place of amusement operated by defendant, in personal injury action, where there was evidence that person going down stairways would have to take two or three steps before handrail would become available to him, and plaintiff testified that he slipped and fell off the second step, whether plaintiff was contributorily negligent in not using handrail was for jury.

6. Theaters and shows ⇨6

Where plaintiff descending stairway in place of amusement maintained by defendant slipped and fell allegedly because of cartridge case on steps, in personal injury action, evidence supported finding that plaintiff's injuries were proximate result of defendant's negligence in maintaining stairway and that plaintiff was not contributorily negligent in failing to use handrail.

7. Appeal and error ⇨930(1)

Evidence must be construed most strongly against losing party and every reasonable inference and presumption which may fairly be deduced from evidence should be resolved in favor of verdict.

8. Appeal and error ⇨930(1), 989

The prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory to it must be disregarded.

9. Trial ⇨143

It is for jury to weigh conflicting testimony.

10. Release ⇨57(2)

Where plaintiff, confined in hospital, was without means of paying bills of hospital and physician, and had been informed that hospital could not continue to care for him without assurance of funds coming, and adjuster of defendant's insurer informed plaintiff that if he would sign paper, bills of hospital and physician would be paid, plaintiff signed paper without knowing that it was a release and turned money over to hospital manager, evidence supported implied finding of jury that release was invalid.

11. Release ⚷55

Party claiming fraud, undue influence or mistake of fact in execution of release must establish his claim, since the law presumes fair play and does not presume fraud or mistake of fact.

12. Release ⚷58(5, 6)

Where there is sufficient evidence on which finding of fraud, undue influence, or mistake of fact may be based, a finding by jury that release thus obtained is not binding may not properly be set aside by trial court.

13. Release ⚷16

Generally, where a person with a capacity of reading and understanding an instrument signs release, he is, in absence of fraud and imposition, bound by its contents and is "estopped" from saying that its provisions are contrary to his intentions or understanding, but if circumstances are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if he did not really assent to it.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Personal injury action by Robert L. Megee against John Fasulis. Judgment for defendant notwithstanding the verdict for plaintiff and plaintiff appeals.

Reversed with directions.

Manwell & Manwell, of Marysville, for appellant.

Butler, Van Dyke & Harris, of Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Appellant commenced an action against respondent to recover damages for personal injuries. Upon the conclusion of the introduction of evidence, respondent moved for a directed verdict, which motion was denied by the trial court. The jury thereafter returned a verdict in favor of appellant in the sum of $5,000, and respondent thereupon moved for judgment notwithstanding the verdict. Said motion was argued and submitted, and the trial judge vacated and set aside the verdict of the jury and entered judgment in favor of the respondent. This appeal is from said judgment.

Appellant's complaint alleged that respondent operated and conducted the Star Rendezvous and its amusement devices and stairway in a careless and negligent manner in that defendant allowed and permitted discharged .22 caliber cartridge cases ejected from the .22 caliber rifles used in and about the shooting device to lie scattered upon the floor space surrounding said shooting device, and negligently and carelessly permitted said discharged .22 caliber cartridge cases to be upon the stairway; and that on January 13, 1940, as a result of said negligence, appellant, while a patron of respondent, slipped and fell upon said stairway and received the injuries complained of.

Respondent's answer after admitting ownership and operation of the premises, that appellant was an invitee, and that appellant fell upon said stairway, denied any negligence on respondent's part; alleged contributory negligence on the part of appellant, and affirmatively pleaded that on February 9, 1940, appellant and respondent compromised and settled their differences, and that in consideration of $300 paid to appellant by respondent, appellant executed and delivered to respondent, in writing, a full and final "Release of all Claims" resulting from said accident.

Appellant contends that the trial court erred in granting respondent's motion for judgment notwithstanding the verdict, and there are two main questions that we must determine upon this appeal: First, was the evidence sufficient to support the verdict of the jury upon the issue of negligence? Second, if the first question is answered in the affirmative, was the court justified in determining that the evidence was insufficient to support the implied finding of the jury that the release relied upon was invalid and not binding upon appellant?

[1,2] As was said by our Supreme Court in the recent case of Neel v. Mannings, Inc., 19 Cal.2d 647, at page 649, 122 P.2d 576, at page 577: "It appears to be the well-established law of this state that the power of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its power to grant a nonsuit. Sec. 629, Code Civ.Proc.; Card v. Boms, 210 Cal. 200, 291 P. 190; Hunt v. United Bank & Trust Co. of California, 210 Cal. 108, 291 P. 184; 7 Cal.Jur. [10-

yr.] Supp. 268, sec. 65c. Therefore, a motion for judgment non obstante veredicto may properly be granted 'when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' Card v. Boms, supra, 210 Cal. at page 202, 291 P. at page 191."

Bearing in mind the rule just quoted, we will endeavor to give a brief summary of the evidence bearing upon the first question stated above.

On January 13, 1940, respondent owned and operated the Star Rendezvous, a Marysville bar and night club. The premises consisted of a bar and dance floor at street level, and certain other rooms, one of which was a lavatory, maintained for the use of male guests and patrons, one floor below the street level. Access to these rooms was had by means of one flight of stairs. The top of this stairway was enclosed on one side by the southerly wall of the premises and on the other by a balustrade several feet high and eight or ten feet long. Immediately adjacent to this balustrade and parallel thereto, the respondent operated a shooting device consisting of a long cylindrical metal tube into which automatic .22 caliber rifles were discharged at small targets. The larger end of this metal tube, and the end into which the rifles were shot was very close to the entrance to the stairway. In operation, the guns used in this shooting device automatically discharged the used cartridge cases downward, causing them to strike a board and bounce or roll, either into the tube or out upon the floor immediately adjacent to the head of the stairway. While descending this stairway on January 13, 1940, sometime after 5 p.m. for the purpose of entering the lavatory, respondent placed his foot upon the second step from the top, and, according to his testimony, his foot slipped upon some foreign object and he fell heavily down the stairway. At about 7:30 p.m. one W.M. Bright entered the premises looking for appellant, and in descending the stairway he, himself, slipped, and thereupon picked up from the stairway an empty .22 caliber cartridge case and also "saw one or two lying on the floor on the top side."

[3, 4] Respondent states that the uncontradicted evidence established the fact that the accident occurred between 11 and 12 p.m. (Fasulis being the only other witness as to the time), and refers to respondent Fasulis' testimony to this effect. Respondent then argues that Bright slipped upon the empty cartridge case and took it away with him. While it must be conceded that there would be ample support in the record for a finding that the accident happened after Bright had slipped on the cartridge case and had picked it up, yet we cannot say that a contrary finding is not supported by the record. It is true that appellant was not sure as to the time, saying he "was paying no attention to the time," but appellant did testify that he went back to the Star Rendezvous "somewhere in the neighborhood of five o'clock," and that at the time the accident happened he "hadn't been there so very long." We believe that the jury had a right to conclude from all the testimony that appellant had slipped and fallen before Bright slipped and fell. We are convinced further that the jury, which was the sole judge of the weight and effect of the testimony had a right to conclude from the testimony that respondent as the owner and operator of the premises, had permitted discharged empty cartridge cases to fall upon the floor adjacent to the stairway and to be upon the stairway, and that appellant had slipped upon one of these empty cartridge cases.

[5] It was not disputed that the stairway was well lighted and that there was a handrail on each side thereof. Appellant testified: "I fell down and I couldn't catch the railing as I went down. I didn't have hold of it at the time and missed it as I fell." Phil J. Divver, city engineer, testified that in his opinion a person going down a stairway would have to take two or three steps before the handrail would become available to him. Appellant testified that he slipped and fell when he placed his foot upon the second step. Under this evidence we cannot agree with respondent's contention that the record shows that appellant was guilty of contributory negligence as a matter of law. Whether appellant was guilty of contributory negligence under the circumstances here present was a question of fact for the jury.

Respondent cites the case of Marple v. Manspeaker, 88 Cal.App. 682, 263 P. 1022, as being "on all fours with the instant case, both as to questions of fact and as to questions of law." We would be inclined to agree with this contention if we believed it could be held that the jury could place no other construction on the facts than the one placed thereon by respondent. Respondent in his brief quotes much of the language of the opinion in the Marple case, but the following language quoted by respondent, and appearing on page 685 of 88 Cal.App., on page 1023 of 263 P., is, in our opinion, sufficient to distinguish that case from the instant case:

"We cannot say as a matter of law that the trial court erred in concluding that the plaintiffs had failed to produce evidence to support the material allegations of their pleadings. After an exhaustive search of the entire record we are unable to discover any testimony tending to sustain the averments that wet materials dropped from the balustrade to the steps upon which Mrs. Marple fell, or that she received her injuries through any defect in the stairway, or as a result of carelessness or negligence upon the part of the defendant, his agent, or servant. There is no showing that the steps were wet or unsafe in any other respect. The circumstances are not such as to warrant the application of the maxim res ipsa loquitur, and without it there is no basis for the belief that any negligence of the defendant contributed to the injury of the plaintiff Maud Marple. * * *

"The judgment is affirmed."

In the instant case, as we have already pointed out, there was evidence from which the jury had a right to conclude that respondent had so operated the shooting device and so maintained the premises that discharged cartridges had fallen upon the stairway and that appellant had slipped on one of them and had fallen. In the Marple case, it appears from the above quotation that the appellate court, after an exhaustive search of the record, found that "there is no showing that the steps were wet or unsafe in any other respect."

A case much more applicable is the recent case of Neel v. Mannings, Inc., supra, decided since the briefs in the instant case were filed. In that case defendant operated a balcony restaurant. Patrons reached the restaurant by a stairway. The stairs were in an open well with handrails. Although familiar with the stairs, plaintiff, while ascending, crowded over to the left to permit other patrons to pass out, and struck her head on the ceiling of the first floor just outside the handrail. In the resulting personal injury action the jury returned a $1,500 verdict in favor of the plaintiff. The trial court granted defendant's motion for judgment notwithstanding the verdict. In reversing the judgment our Supreme Court said at page 652 of 19 Cal.2d, at page 579 of 122 P.2d:

"It should be noted at this point that there was no question before the jury as to the legal relationship existing between the parties, for the defendant admitted in its answer that plaintiff entered upon its premises as an invitee. The long-recognized rule governing such status is succinctly stated in Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 670, 197 P. 427, 428: 'One who, during business hours, lawfully enters a store to purchase goods does so at the implied invitation of the owner (Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899), upon whom the law imposes the duty of exercising ordinary care and prudence to keep the aisles and passageways of the premises, in and through which, by their location and arrangement a customer in making purchases is induced to go, in a reasonably safe condition, so as to not unnecessarily expose him to danger or accident. Hart v. Grennell, 122 N.Y. 371, 25 N.E. 354; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206.'

"Under this condition of the evidence the questions presented to the jury for determination were: (1) Whether defendant was negligent by reason of the manner in which it maintained the stairway; and if so, (2) whether its negligence was the proximate cause of plaintiff's accident. The jury's findings upon these questions entailed consideration of the following matters: (3) whether plaintiff was negligent; and if so, (4) whether her negligence contributed to her injuries. In deciding these issues, the jury was privileged to consider the defendant's legal obligation to an invitee upon its premises. That there was substantial evidence to support the verdict in this case is apparent from the foregoing recital of the record, when viewed in the light most favorable to plaintiff and without regard for any asserted contradictions in the proof as the rule requires the court to do in determining the propriety of a judgment non obstante veredicto."

[6] Our conclusion is that there is sufficient evidence in the record to support

a finding that appellant's injuries were the proximate result of the negligence of respondent in maintaining said premises and stairway, and that appellant was not guilty of contributory negligence.

We proceed now to consider the question as to whether the trial court was justified in determining that the evidence was insufficient to support the implied finding of the jury that the release relied upon by respondent was invalid and not binding upon appellant.

It is not disputed by appellant that the release was executed by him but it is earnestly contended by appellant that the manner in which the release was obtained and the circumstances surrounding its execution, as shown by evidence or fairly deducible therefrom, were such that the jury was justified in concluding that said release was invalid.

The trial court correctly instructed the jury on this issue that it was for them "to determine from all the evidence and circumstances of this case, whether plaintiff fully understood the contents of the release at the time the same was signed by him and whether the same was fairly made with him, without fraud, misrepresentation or undue influence on the part of defendants or their agent, and unless you do so determine, you are instructed that such release would not release the defendants from liability."

[7, 8] Taking into consideration the familiar rule that the evidence must be construed most strongly against the losing party and that every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the verdict of the jury, and that the prevailing party's evidence must ordinarily be accepted as true, and that evidence which is contradictory to it must be disregarded, we will proceed to give a brief summary of the evidence upon this question.

[9] The accident happened January 13, 1940, and appellant entered the Rideout Hospital on January 21, 1940. After he had been confined in the hospital about ten days, G. A. Curtis, the manager of the hospital, approached him with reference to his bill, and was informed by appellant that he was not in a position to pay either the hospital or the doctor. Curtis then got in touch with respondent and was referred to respondent's insurance carrier. He got in touch with the insurance carrier, and a representative of the insurance carrier came to Marysville and talked with Mr. Curtis and Dr. Parkinson, the doctor, but not with appellant. Both the doctor and the hospital were anxious to get their money and agreed with the adjuster that they would accept the sum of $300 in settlement of their combined bills for medical services and hospitalization. A few days before the release was signed by appellant, Curtis told him that the hospital "couldn't care for him indefinitely without any assurance of funds coming." On February 9, 1940, George Bruni, an insurance adjuster representing respondent's insurance carrier, came to the hospital and had another conference with Dr. Parkinson and Mr. Curtis and informed them that he would not pay any more than $300. A little later on the same day Curtis took Bruni to the hospital room where appellant was confined and, according to the testimony of appellant, Bruni told appellant that if he would sign the paper his hospital and doctor bill would be paid and the doctor would have him out of the hospital within ten days, and also told appellant that he had no claim; that he did not read the paper and did not know what was in it; that he received none of the money, but signed the check he received and gave it to Mr. Curtis. Bruni testified that he was in appellant's hospital room not more than ten minutes, so it is apparent that the transaction in appellant's room was not delayed unduly. The testimony of appellant as to what Mr. Bruni told him and that he did not know what he was signing, was contradicted by Curtis and Bruni but we are not here concerned with conflicts in testimony, as it was for the jury to weigh the conflicting testimony. At the time the release was signed appellant was confined to his hospital room; he had a fractured jaw which was infected, and it was apparent to the doctor and to Curtis that he was far from recovered; he had no funds and he had been told by Curtis that the hospital could not continue to care for him without any assurance of funds coming. The record shows that appellant was treated by Dr. Parkinson until sometime in May and then was under treatment in the Veterans' Hospital at Fort Miley for about five months, and that on March 25, 1941, the date of the trial, the condition of his jaw was such that he was still unable to return to work. It is apparent that all the negotiations leading up to the signing of the re-

lease were between the doctor and the hospital manager and the insurance adjuster, and that appellant did not have the benefit of any independent advice.

[10] We do not mean to imply that the foregoing is a summary of all the testimony dealing with the matter of the release, or that there was not a great deal of testimony contrary to much of it. But we believe that the foregoing statement is supported by the record and the inferences which may reasonably be drawn therefrom. Upon such a state of facts can it be held that the evidence was insufficient to support the implied finding of the jury that the release relied upon was invalid and not binding upon appellant? We do not think so. We are inclined to agree with the statement made by the learned trial judge when he denied respondent's motion for a directed verdict in these words:

"On the release question, I am satisfied there is enough evidence in the case to be passed to the jury. The court can't say that plaintiff is absolutely bound by that release. The evidence shows without any question this whole arrangement was promoted by Mr. Curtis and the doctor and they wanted their money. Here is a man with a broken jaw that stood a good chance to be kicked out on short notice."

"It is a question for the jury to determine whether or not he knew of the fact he was absolutely precluded from thereafter maintaining any claim or action for his own personal benefit. There is no question about it there was three hundred dollars for the hospital and doctor. He didn't get five cents, he didn't have the benefit of counsel or any legal advice and while the court might decide one way or the other on the questions of fact, I do think that is a matter the jury should consider."

[11, 12] Numerous cases have been cited by both appellant and respondent. Each case must, of course, stand upon its own facts. The law presumes fair play; the law does not presume fraud; the law does not presume a mistake of fact. These are matters which must be established by the party claiming fraud, undue influence or mistake of fact. If, however, there is sufficient evidence upon which a finding of fraud, undue influence or mistake of fact may be based, a finding by a jury that a release thus obtained is not binding may not properly be set aside by a trial court.

The case of Tyner v. Axt, 113 Cal.App. 408, 298 P. 537, is similar to the instant case in many respects. In that case the defendant relied upon a release that had been executed by plaintiff while in a hospital recovering from injuries received in an automobile accident. The jury found in favor of plaintiff, and upon appeal the court, in affirming the judgment, said at page 414 of 113 Cal.App., at page 540 of 298 P.:

"No point has been made that the compensation named in the release was adequate. The testimony was to the effect that the respondent suffered permanent injuries and as a consequence thereof had not been able to do the work which she had formerly done in order to support herself. Considerable stress has been laid by the appellant upon the fact that the respondent before signing the release called upon her physician for advice. Although he should have occupied a confidential relation at the time, the respondent's physician was a stranger to her three days before, and it appears in the testimony that some time before the signing of the release he had been approached by the claim adjuster for the insurance company with which the appellant was insured, who told the physician that he would pay his bill if the physician could make a settlement with respondent, and that the physician would be taken care of. The physician expressed to the respondent the opinion that if she could get her expenses paid it would be a good thing. The record discloses that the testimony of the physician was grudgingly given, and his testimony and that of other witnesses indicates very strongly that during the transaction the physician was much more interested in having his own compensation secured than in any other matter, and as he expressed it, he didn't know what rights the respondent had outside of the payment of the medical and hospital bills and didn't know whether there was any other money due her.

"We have carefully reviewed the testimony, and while there is a conflict therein, the jury had the issues properly submitted to them and their conclusions as to the inferences to be drawn from the evidence cannot be disturbed. Smith v. Occidental Steamship Co. [99 Cal. 462, 34 P. 84], supra; Skaggs v. Wiley [108 Cal.App. 429] 292 P. 132. The agents of the insurance carrier sought the interview with respondent, and their importunities resulted in the execution of the release and the indorsement of the draft. Their visit to her within such a short time after the accident was an intrusion and an imposition upon her right to have her own counsel and to be independently advised in due course of time. Courts have inveighed against similar practices for many years and in many decisions. Transactions of this nature are subject to the closest scrutiny and, when revealed as an imposition upon the rights of the injured person, are to be severely condemned. Winstanley v. Ackerman [110 Cal.App. 641], 294 P. 449. It would tax the credulity of any jury, as well as that of any court, to be asked to believe that a woman of 60 years of age, suffering from nervous shock and the bodily injuries which have been heretofore described and laboring under the disabilities which beset her at the time she signed the purported release, was capable of giving to a business transaction the same calm judgment that she might have been able to give to it under normal circumstances, or that she was negligent in not giving to the situation, hastily pressed upon her by the agents of the defendant, the serious care that it should have been given under ordinary conditions. The solemnity of a contract entered into under such circumstances is to be seriously questioned. The surroundings indicate that neither her position nor the persons acting on behalf of the appellant and the insurance company informed the respondent as to the full effect of the execution of the release or the meaning thereof, and the verdict of the jury, under the authorities hereinbefore cited, finds sufficient support in the evidence to sustain it."

[13] The rule applicable to this class of cases has been stated in the case of Smith v. Occidental etc. Steamship Co., 99 Cal. 462, 34 P. 84, wherein it is said at pages 470, 471 of 99 Cal.App., at page 86 of 34 P.: "The general rule is that, when a person with a capacity of reading and understanding an instrument signs it, he is in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also a general rule that the assent of a party to a contract is necessary in order that it be binding upon him, and that, if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it."

In the case of Touhy v. Owl Drug Co., 6 Cal.App.2d 64, at page 67, 44 P.2d 405, at page 407, the court said:

"After this cause was submitted for decision on this appeal, it became obvious that there existed some error in the date alleged in the complaint as to the time of accident or in the dates contained in the release pleaded; for the complaint alleged that the accident occurred on August 31, 1930, whereas the release pleaded recited that it covered an accident occurring on August 22, 1930. Upon this discovery, and by consent of counsel for both appellant and respondent, under authority of section 956a of the Code of Civil Procedure this court ordered the taking of additional evidence in respect to the date of the accident described in the complaint and of the date of the execution of the release pleaded and of the accident therein described; and also evidence in avoidance of or sustaining the validity of such release, should the evidence connect it up with the accident on which the complaint was founded. Such evidence has been taken and considered by this court, and therefrom it was made to appear without dispute that the accident in question occurred on August 22, 1930, instead of August 31, 1930, as alleged, and that the release pleaded related to that accident and none other. The testimony of plaintiff and her son, on the one side and of Elwood A. Adamson, a claims adjuster representing the appellant in securing the execution of the release, on the other, was given and has been considered and weighed by this court. It is not necessary to herein repeat the same, but it will suffice for the purpose of this decision to announce that we find that owing to mental weakness, inexperience and intense suffering of respondent at the time of signing the release and accepting the $25 in consideration thereof, she was caused to believe and understand that she was signing a receipt for money advanced by appellant to pay for medicines and a doctor, and that she was not conscious of the fact that she was signing a full release for compensation for her injuries. The evidence also shows that both respondent and the claims adjuster were in ignorance of the nature and extent of respondent's injuries at that time, and that the apparent gross inadequacy of consideration for the release was the result of this mutual mistake as to such injuries and not to any deliberate or intended purpose on the part of the adjuster to secure an unconscionable advantage. Such, however, would be the result in the light of the facts should this release be sustained. Under the proofs we cannot permit such result. We therefore find that the release pleaded is invalid and does not constitute a defense to the right of respondent to recover."

Respondent has cited Berry v. Struble, 20 Cal.App.2d 299, 66 P.2d 746, and W. Ross Campbell Co. v. Sears, Roebuck & Co., 136 Cal.App. 765, 29 P.2d 910, as being the leading cases on the point now under discussion. We have examined those cases and, in our opinion, the factual situations therein are so different from the facts of the instant case as to make them of little value as authority here, and we therefore deem it unnecessary to discuss them in detail.

After a thorough examination and consideration of the entire record here, we are convinced that the trial court was in error in determining upon the motion for judgment notwithstanding the verdict that the evidence was insufficient to sustain the implied finding of the jury that the release was invalid and not binding upon appellant. We believe that there was sufficient evidence to justify the jury in concluding that the matter of the settlement and its amount was entirely arranged and agreed upon between the doctor, the hospital and the insurance adjuster; that after it had been fully agreed upon by them, the adjuster, with the release already prepared, wastaken by the hospital manager to the hospital room where appellant had been confined for more than ten days, and appellant was told by the adjuster that if he would sign the paper his hospital and doctor bills would be paid, appellant having some days previous to this, upon informing the hospital manager that he had no funds, been informed by the hospital manager that the hospital could not continue to care for him indefinitely without assurance of funds coming; that appellant was also informed by the adjuster that the doctor would have him out of the hospital in ten days, and that he had no claim; that he did not read the paper and did not know what was in it; that upon receiving the check or draft appellant immediately endorsed it over to the hospital and doctor and received none of it; that appellant was still being treated for the injuries more than a year after the release was signed, and that the amount paid was grossly disproportionate to the injuries sustained; that the adjuster was in the sick room not more than ten minutes and that appellant did not have the benefit of any independent advice. Taking all of these matters into consideration, together with all the inferences that might reasonably be drawn therefrom, we cannot say that the jury was not justified, under the evidence, in concluding, as it doubtless did conclude, that a release obtained under such circumstances was not so free from misrepresentation, undue influence and mistake, as to be considered binding upon appellant.

In view of the foregoing the judgment is reversed, and the trial court is hereby directed to enter judgment in favor of plaintiff for the sum of $5,000 in accordance with the verdict of the jury rendered in the action.

THOMPSON, J., and ADAMS, P. J., concurred.

Hearing denied; SHENK, EDMONDS, and TRAYNOR, JJ., dissenting.

57 Cal.App.2d 511

CAMPBELL v. WOOLNER.

Civ. 3203.

District Court of Appeal, Fourth District, California.

March 3, 1943.

1. Municipal corporations 🔑579
Taxation 🔑727

Where property subject to lien of improvement bonds has been sold to state for delinquent taxes, law as it existed at time property was deeded to state five years after sale to state and not as it existed at time of such sale or at time of sale by state to purchaser is controlling as to rights of purchaser from state and purchaser on foreclosure of improvement lien.

2. Municipal corporations 🔑579
Taxation 🔑509, 733

Where at time property subject to lien of improvement bonds was deeded to state for delinquent taxes Political Code, § 3897, providing for conveyance of clear title by tax deed had been repealed and neither repeal of § 3787 declaring effect of a deed to state nor enactment of Revenue and Taxation Code was yet in effect, under §§ 3833.2 and 3836.1 defining "direct assessment" and providing that deed from tax collector to state should convey clear title except for liens for direct assessments, tax lien and lien of improvement bonds were in "parity" and sale of property under either lien did not extinguish the other. Pol.Code, §§ 3787, 3833.2, 3836.1, 3897; St.1939, pp. 1274, 1374.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Assessment" and "Parity".

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by M. C. Campbell against Henry S. Woolner to quiet title to land. From a judgment for plaintiff defendant appeals.

Reversed and remanded.

John F. Bender, of Los Angeles, for appellant.

Waldo Willhoft, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title, the facts being undisputed. On May 9, 1930, two bonds were issued as a lien on the property in question pursuant to the Improvement Act of 1911 (Stats.1911, p. 730; Deering's Gen.Laws, 1937, Act 8199), as amended. On March 5, 1934, a tax assessment for the fiscal year 1934-5 became a lien on the property. This tax was not paid and on June 29, 1935, the property was sold to the State of California under section 3771 of the Political Code, as then in effect. On August 2, 1940, a tax deed issued to the State of California based upon the sale to the state on June 29, 1935. On June 2, 1941, the state deeded the property to one Opal Campbell and the plaintiff, M. C. Campbell, the sale being held in accordance with division 1, part 6, chapter 7 of the Revenue and Taxation Code as then in force, St.1939, p. 1334 et seq. On June 5, 1941, Opal Campbell conveyed her interest in the property to the plaintiff M. C. Campbell. In the meantime, and on July 10, 1936, a foreclosure action was begun on the two street improvement bonds issued on May 9, 1930. On January 3, 1939, judgment was entered in that action and on January 31, 1939, a commissioner's certificate of sale was issued and recorded. On April 8, 1940, a commissioner's deed in the foreclosure proceedings was issued to Trompeter & Co., a corporation. On May 1, 1940, Trompeter & Co. conveyed its interest in the property by quitclaim deed to the defendant Woolner.

In this action which followed, the court found that the plaintiff was the owner in fee of the property in question and that the defendant Woolner had no right, title or interest therein. From a judgment quieting the plaintiff's title the defendant Woolner has appealed. The question presented is whether the tax deeds relied upon by the respondent have the effect of extinguishing the lien of these street improvement bonds and shutting off the rights of the appellant which rest upon a foreclosure and sale after default on those bonds.

It was formerly held, under then existing statutes, that such a tax lien and such a street improvement lien were on a parity and that a tax title was not paramount over one acquired through foreclosure of a street improvement lien. Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 82; La Mesa, etc., Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143; Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408; Bank of Hawaii v. Gibson, 15 Cal.App.2d 407, 59 P.2d 559. It was held to the contrary in Smith v. Addiego, 54 Cal.App.2d 230, 129 P.2d 953, 956, because of a change in one of the statutes. In that case the street improvement bonds were issued in 1928, the property was sold to the state in 1930 for taxes for the year 1929–1930, the property was deeded to the state on June 29, 1935, a certificate of sale upon foreclosure of the improvement bonds was issued on November 30, 1935, followed by a commissioner's deed dated January 2, 1938, and on January 27, 1938, the property was sold to an individual, a deed from the state issuing on February 4, 1938. The court pointed out that the transactions in the "parity" cases above referred to had taken place in the few years immediately prior to 1931; that at all times from 1927 down to 1939, "when it was transferred to the Revenue and Taxation Code," section 3787 of the Political Code, declaring the effect of a deed to the state, had remained the same and as construed in the "parity" cases; that the statutory provision declaring the effect of a tax deed from the state to an individual had been drastically changed by amendments in 1931 and 1933; that after 1933 section 3897 of the Political Code clearly provided that a tax deed from the state to an individual should convey title to the purchaser free and clear of all liens and assessments of the kind here involved; and that this statutory change had been made with the legislative intent to do away with the "parity" rule followed in the other cases above cited. It was then held that this change in section 3897 of the Political Code, which change was made after the property had been sold to the state in 1930, operated to extinguish the lien of the street improvement bonds.

The rule applied in Smith v. Addiego, supra, would apply, of course, only if section 3897 of the Political Code was in effect at the time any deed claimed to be affected thereby was given. In the instant case the deed to the state was given in 1940 and the deed from the state in 1941. But in 1939, section 3897 of the Political Code was repealed (Stats.1939, p. 1917) effective as of September 19, 1939. Also, in 1939, the Revenue and Taxation Code was adopted (Stats.1939, chap 154, p. 1274), to become effective February 1, 1941.

It was formerly held that the law in force at the time of sale of property to the state for nonpayment of taxes applied to all later proceedings depending on that sale, and that later amendments could not be made retroactive. Teralta Land, etc., Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am.St.Rep. 194; Johnson v. Taylor, 150 Cal. 201, 88 P. 903, 70 L.R.A.,N.S., 818, 119 Am.St.Rep. 181; Scott v. Beck, 204 Cal. 78, 266 P. 951; Biaggi v. Ramont, 189 Cal. 675, 209 P. 892; Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408. Without directly overruling those cases, two late cases have adopted as controlling the law as it existed at the time the property which had been sold to the state for delinquent taxes was deeded to the state after the expiration of the five-year period. Smith v. Addiego, supra and Bray v. Jones, 20 Cal.2d 858, 129 P.2d 357. In the first of these cases the property was sold to the state in 1930 and deeded to the state in 1935. It was there held that a subsequent amendment of section 3897 of the Political Code was controlling, and that the provisions of that section as they read in 1935, when the deed was made to the state, operated to extinguish the lien of the street improvement bonds. In Bray v. Jones, supra, the property was sold to the state in 1930, deeded to the state in 1935, and deeded by the state to the plaintiff in 1937. An attack was made upon the notice of the sale of the property in 1930, and the Supreme Court held that section 3897 of the Political Code, as it read in 1935, the date of the deed to the state, governed the sale to the purchaser from the state in 1937 and not that section as it read in 1929 when the taxes were assessed.

[1] Under the decisions last referred to, the law in force at the time the property here in question was deeded to the state, on August 2, 1940, is controlling and governs the rights of the parties to this action. At that time, section 3897 of the Political Code had been repealed and, while the Revenue and Taxation Act was not yet in effect, sections 3833.2 and 3836.1 had been added to the Political Code, effective as of September 19, 1939. (Stats. 1939, chap. 529, p. 1917.) Section 3836.1, thus added, provided that the deed from the tax collector to the state should convey a clear title free of all encumbrances except "(c) Any lien for direct assessments." Section 3833.2 defined a direct assessment as "an assessment levied by a district the bonds of which are secured by assessments levied on a particular parcel of land described in the bond." The assessment under which the appellant claims was a direct assessment, as thus defined, with the result that in 1940, when the deed was issued to the state, section 3836.1 of the Political Code provided that such a deed should not operate to extinguish the lien of the street improvement bonds issued pursuant to the Improvement Act of 1911. While section 3787 of the Political Code was repealed in 1939 (Stats.1939, Chap. 154, p. 1374), the repeal thereof did not become effective until February 1, 1941, the result being that during 1940, when the property here in question was deeded to the state, that section applied as it had been construed in the parity cases. It thus appears that the law, as it stood in 1940, was the same as it was when the parity cases were decided and those cases would seem to be controlling here, the amendment to section 3987 of the Political Code, which was followed in the case of Smith v. Addiego, supra, being at that time ineffective.

[2] It follows that the tax lien and the lien of the street improvement bonds upon the property here in question were in parity and that the sale of the property under either lien did not extinguish the other lien. The trial court was, therefore, in error in finding and holding that the appellant had no right, title or interest in this property and that the respondent was the owner thereof in fee, free from any lien arising out of the street improvement bonds.

The judgment is reversed and the cause remanded.

MARKS, and GRIFFIN, JJ., concurred.

57 Cal.App.2d 532

ERIKSEN v. ERIKSEN.

Civ. 12259.

District Court of Appeal, First District, Division 1, California.

March 5, 1943.

1. Domicile ⚷4(2)

There must be a concurrence in act of abandonment of one residence with intent to establish a new residence elsewhere in order to effect a change of residence.

2. Domicile ⚷10

The place of domicile is mainly a question of intent which may be shown by testimony of parties considered in connection with surrounding circumstances plus corroboration when essential.

3. Pleading ⚷377

Ordinarily failure by way of answer to deny allegations of residence in complaint, or affirmative allegations in that regard by cross-complaint preclude introduction of evidence on that point as allegation is admitted. Code Civ.Proc. § 462.

4. Divorce ⚷109

In a divorce action, interest of state in continuance of marriage and specific prohibition of obtaining of a divorce by collusive agreement precludes application of general rule that failure by way of answer to deny allegations of residence in complaint or affirmative allegations in that regard by cross-complaint preclude introduction of evidence as to residence. Code Civ.Proc. § 462; Civ.Code, § 114.

5. Divorce ⚷124

In a divorce action, proof of residence of plaintiff is essential to jurisdiction, and in absence of such proof or in the event of a simulated residence there can be no valid decree.

6. Divorce ⚷108

In divorce action, refusal to permit defendant to introduce evidence contradicting plaintiff's claim that she was a resident of state was error notwithstanding defendant's admission in the pleadings of plaintiff's residence.

7. Appeal and error ⚷1176(1)

Where respondent on appeal from judgment awarding her a divorce admitted that court erred in granting a decree without corroboration of respondent's testimony concerning residence and cruelty and in awarding to respondent appellant's separate property and community property of parties situate in another state, but there was some evidence as to plaintiff's residence, District Court of Appeal in reversing decree refused to direct entry of judgment that respondent take nothing by reason of her complaint. Civ.Code, § 128, 130, 139.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Annie Eriksen against Sigurd A. Eriksen for divorce. From a judgment for plaintiff, defendant appeals.

Reversed.

William E. Ferriter and James C. Purcell, both of San Francisco, for appellant.

J. J. Bullock, of Redwood City, for respondent.

WARD, Justice.

Appeal by defendant from a judgment granting plaintiff a divorce on the ground of extreme cruelty, allotting to her all of the community property, much of the separate property of the husband, and also a parcel of real property in the State of Washington purchased during the existence of the marriage.

Plaintiff and defendant married in 1937 and during their residence in California accumulated several pieces of property. In March of 1941, they went to the State of Washington, where they had purchased a piece of ranch property. They took with them two loads of furniture, and defendant advised business acquaintances that he was giving up his business, that of contracting, in this state. The couple retained their California holdings, and rented their home furnished, the rental therefor being applied toward a mortgage on the property. Approximately six months later both returned to California, where plaintiff commenced divorce proceedings. The cross-complaint of defendant gave his residence, also, as California.

Defendant, appellant herein, argues that the court committed reversible error in considering the suit for the reason that there was no corroboration of plaintiff's testimony that she had been a resident of this state for the required statutory period, also in refusing to allow defendant to prove that plaintiff was not a resident of the state for the required period of time, but of the State of Washington; and further contends that there was no sufficient evidence (for lack of corroboration) of extreme cruelty; that the court had no jurisdiction to make an award of the husband's separate property, nor of realty situated in another state. For these reasons he contends that the judgment herein should be reversed and the lower court directed to enter judgment for him.

On the questions of lack of corroboration of the testimony concerning plaintiff's residence, and of cruelty (Civ. Code, § 130), of the order awarding defendant's separate property (Civ. Code, § 139), and the community property of the parties situated in another state, to plaintiff (Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074), it is admitted by plaintiff that the court erred and that the decree must be reversed.

The sole issue before this court is whether or not there should be an order directing judgment for defendant. Involved in that consideration is the question whether the evidence, as a matter of law, shows that plaintiff was not a resident of this state, and the county of San Mateo, for the statutory period immediately preceding the filing of the complaint. Civ. Code, § 128.

The evidence shows that plaintiff and her husband resided in San Mateo County, California; that upon their purchase of a ranch in the State of Washington, they lived in that state for six months just prior to the commencement of the present action. Plaintiff testified that at the time she accompanied her husband to Washington it was not her intention to abandon her California domicile. At the trial defendant's counsel made an offer of proof, presumably to show the intention of both parties when they departed for Washington of abandoning their California domicile. The trial court sustained an objection by plaintiff apparently upon the ground that defendant's pleadings admitted residence in this state for the statutory period.

[1, 2] In order to effect a change of residence, there must be a concurrence in the act of abandonment of one residence with the intent to establish a new residence elsewhere. It is mainly a question of intent, which may be shown by the testimony of the parties, considered in connection with the surrounding circumstances, plus corroboration when essential. Bragg v. Bragg, 32 Cal.App.2d 611, 90 P.2d 329.

[3, 4] Ordinarily a failure by way of answer to deny allegations of residence in a complaint, or affirmative allegations in that regard by cross-complaint, preclude the introduction of evidence on that point as the allegation of the pleading is deemed to be admitted. Code of Civ.Proc. § 462. This rule does not apply in a divorce action for the reason that the state has an interest in the continuance of the marriage contract and specifically prohibits the parties from obtaining a divorce by collusive agreement. Civ.Code, § 114; Kegley v. Kegley, 16 Cal.App.2d 216, 60 P.2d 482. In Bennett v. Bennett, 28 Cal. 599, it was held that while residence is not in itself a ground for divorce, it is the basis upon which jurisdiction rests. In Flynn v. Flynn, 171 Cal. 746, 748, 154 P. 837, 838, the court said: "The well-settled policy of the law is to protect the marriage relation and to prevent its dissolution in any case, even where the parties consent to or desire its dissolution, unless cause recognized by the law as warranting the same exists. Section 130, Civil Code, provides as it has ever since the year 1874, that: 'No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, * * * require proof of the facts alleged.' The object of this provision is, of course, to prevent the obtaining of a divorce by collusion between the

parties, where no lawful ground for a divorce exists. Its effect necessarily is to make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action. That a party appealing from a judgment of divorce may successfully urge such error as a ground for reversal, even though the essential fact was admitted by the pleadings, appears to follow, and was decided in Bennett v. Bennett, 28 Cal. 599."

[5-7] Proof of residence is essential to jurisdiction, and a valid decree may not be founded upon a simulated residence. Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556. A divorce obtained with the aid of an assumed residence as one of its bases is not in good faith. Kegley v. Kegley, supra. Parties may not by consent confer jurisdiction. Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069. If it was necessary that plaintiff prove residence—which must be conceded—it was the right of the defendant to introduce evidence contradictory or inconsistent with her claim in that regard. Notwithstanding the pleadings, he should have been permitted to introduce evidence that plaintiff was not a resident of the county of San Mateo, State of California for the period provided in the statute. Flynn v. Flynn, supra. However, the contention of appellant—that the cause be remanded with directions to enter judgment "that plaintiff take nothing by her complaint" is without merit. Upon the admissions by respondent of error, and for the reasons stated herein, the judgment is reversed.

PETERS, P. J., and KNIGHT, J., concurred.

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57 Cal.App.2d 350

POWER et al. v. SHERIFFS' RELIEF ASS'N OF LOS ANGELES COUNTY.

Civ. 13869.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1943.

Rehearing Denied March 22, 1943.

Hearing Denied April 26, 1943.

1. Insurance 🔑718

The relationship between unincorporated mutual benefit association and its individual members is contractual in nature and is controlled by association's constitution and by-laws.

2. Insurance 🔑719(1)

Members of unincorporated mutual benefit association who, on becoming members, agreed to be governed not only by constitution and by-laws, but also by any amendment which might thereafter be added, have no "vested right" in or to sick benefits, and by-laws governing payment thereof may be amended even during the period during which they are being paid, but such amendment must be reasonable.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

3. Insurance 🔑719(1)

The power of amendment of by-laws of unincorporated mutual benefit association may not be used to repudiate association's obligations which in equity and justice association should continue to pay.

4. Insurance 🔑719(1)

Since a by-law of a mutual benefit society to be valid must be reasonable in character, an amendment thereto must also be reasonable, and that requirement is not dispensed with because the association has made an express reservation of the right of amendment.

5. Insurance 🔑805(1)

Ordinarily, a court will not interfere with a voluntary mutual benefit association, where the association has by-laws applicable to the difficulty out of which the litigation arises.

6. Insurance 🔑817(1)

In action by members of unincorporated mutual benefit association to compel association to pay sick benefits which had been discontinued after amendment of by-laws providing for sick benefits, burden was on association to show that amendment was reasonable.

7. Insurance 🔑819(1)

In action by members of unincorporated mutual benefit association to compel association to pay sick benefits which had been discontinued after amendment of by-laws providing for such benefits, judgment for association was without support where, though it was shown that association had limited membership and that monthly dues were quite low, so that long-continued payments of sick benefits might bankrupt association, there was no showing what financial status of association was.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by William Power and others against the Sheriffs' Relief Association of Los Angeles County to compel defendant to pay the plaintiffs sick benefits in accordance with by-laws and constitution of defendant before amendment of by-laws so as to terminate sick benefits. From an adverse judgment, the plaintiffs appeal.

Judgment reversed.

Thomas R. Lynch, of Los Angeles, for appellants.

Chas. E. R. Fulcher, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Sheriffs' Relief Association of Los Angeles County, State of California is an unincorporated mutual benefit association, its membership limited to civil-service employees of the Los Angeles County Sheriff's Office. Rights of members are governed and controlled by a constitution and bylaws.

In 1924 and 1925 the four plaintiffs in this action became members of the association. Two of them are living, and two of them are appearing by their personal representatives; but this circumstance makes no difference so far as the principles of the case are concerned.

In 1934 and 1935 the four plaintiffs retired from the sheriff's office, each receiving a pension of less than $100 per month. The constitution and by-laws of the association provided that in such event the retiring member retained his membership, and if he was sick and disabled, he was entitled to benefits of $40 per month. Each of the plaintiffs was sick and disabled and thereafter received sick benefits of $40 per month provided by the by-laws. In 1941 the association amended its by-laws in such manner as to terminate all sick benefits to retired members receiving pensions of less than $100 per month. In other words, by amendment to its by-laws, the association discontinued the sick benefits of $40 per month being paid to each of the plaintiffs.

Plaintiffs then brought this action seeking to compel the payment to each of them of $40 per month. The issues were submitted to the superior court on an agreed statement of facts, and judgment followed against the plaintiffs.

When the plaintiffs became members of the association, they subscribed their names to, and agreed to be governed not only by the constitution and by-laws then in force, but also by any amendment which might thereafter be added thereto. Defendant association contends that it had plenary power to amend the by-laws and to thereby discontinue the payments it was making to plaintiffs. This is the sole question involved on this appeal.

[1,2] The relationship between its individual members and a voluntary association such as the defendant is contractual in nature and is controlled by the constitution and by-laws. Members have no vested right in or to sick benefits, and by-laws governing the payment thereof may be amended even during the period during which they are being paid. Stohr v. San Francisco Musical Fund Soc., 82 Cal. 557, 22 P. 1125; Bowie v. Grand Lodge, 99 Cal. 392, 34 P. 103; Robinson v. Templar Lodge, 117 Cal. 370, 49 P. 170, 59 Am.St.Rep. 193.

It was apparently upon the theory that these authorities are controlling that the trial court in this case rendered judgment against the plaintiffs.

[3] But there is an exception to the general rule that a voluntary association having reserved the power to amend its bylaws may thereafter change the rights of its members to receive sick benefits. Such amendment must be reasonable. Stated conversely the power of amendment may not be used to repudiate obligations of the association which in equity and justice it should continue to pay. This exception is well stated in 38 Am.Jur., section 22, page 459.

[4] "Since a bylaw of a mutual benefit society to be valid must be reasonable in character, an amendment thereto must also be reasonable; and it cannot be contended that this requirement is dispensed with by the fact that the association has made an express reservation of the right of amendment. Rather, the authorities are practically unanimous in holding that the general consent and agreement of a member of an association of this character, to be bound by all future changes in the constitution, bylaws, and rules of the society that it may see fit to enact, is subject to the implied condition that they must be reasonable."

Cases cited in support of this quotation indicate that the rule has been followed in Colorado, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New York, North Carolina, West Virginia, and Wisconsin.

[5] For illustration: Assume that three persons, and three only, enter into the contractual relationship of a voluntary mutual benefit association. These three make monthly payments to the association over a period of years for the purpose of providing sick benefits in the event any of them shall need the same. Then one of the members falls sick; whereupon immediately the other two, having the power to amend the by-laws, so change them that no sick benefits may thereafter be paid to the sick member. Obviously such an amendment would be unreasonable, and the courts in such a case would afford some relief to the third member.

In Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 45 P. 685, in a case setting aside the expulsion of a member of a voluntary association, our Supreme Court pointed out that ordinarily a court will not interfere where the society has by-laws applicable to the difficulty out of which the litigation arises. In Caldwell v. Grand Lodge, 148 Cal. 195, 199, 82 P. 781, 783, 2 L.R.A., N.S., 653, 113 Am.St.Rep. 219, 7 Ann.Cas. 356, the court states: "where the contract between the member and the order is as here disclosed, it is never to be disputed that all subsequent rules, regulations, and by-laws, *not in themselves unreasonable, against express law or public policy,* enter into and govern all of his rights and relationship with the association." (Italics ours.)

[6, 7] Therefore in this case we must now determine whether the amendment of the by-laws of the defendant association and the effect thereof upon the four members was or was not reasonable. All that the record here before us discloses is that the amendment was made and that the payments to these members of the association were stopped. The only thing in the record which could possibly support the amendment as being reasonable was that the monthly dues were quite low, $1.00 a month as to certain members and $2.00 a month as to certain other members. With a limited membership, and with such low monthly payments, long continued payments of $40 per month per member as sick benefits could bankrupt the association. But the record does not show what the financial status of the defendant association was. If there were now before the court a record upon which the trial court could have found that the amendment to the by-laws was in fact reasonable because of the financial situation of the association, or for any other good reason, there would be no grounds upon which to reverse a judgment against the plaintiffs based upon such a finding. The burden is on the defendant in such circumstances and in the absence of such a showing as in the case at bar, the judgment is without legal support.

The judgment is reversed

YORK, P. J., concurred.

DORAN, J., dissented.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

57 Cal.App.2d 506

VAN DOREN v. THURBER.

Civ. 3202.

District Court of Appeal, Fourth District, California.

March 3, 1943.

1. Mines and minerals 🔑68(1)

Terms of mining lease would be construed as authorizing lessee, in event he failed to produce specified amount of ore each month, to pay amount agreed upon as a substitute for the other requirement, with right at later time to remove an amount of ore corresponding with advanced royalties paid.

2. Mines and minerals 🔑68(3)

Where mining lease required lessee to work property in such manner as to produce a yield of at least 70 tons of ore per month and then provided that lessee should guarantee result of such production by paying $70 per month during term of the lease as advanced royalties in case such amount of ore was not actually mined, lessor's acceptance of monthly payments without complaint constituted a "waiver" of lessee's default, if any, in failing to mine stipulated amount of ore, and lessor was "estopped" from thereafter claiming any such default.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Waiver".

3. Mines and minerals ⚷68(1)

Evidence supported finding that lessee had not abandoned mining lease by failing to do any work thereon for 180 consecutive days as required by lease.

4. Mines and minerals ⚷68(2)

Even if lessee's failure to mine at least 70 tons of ore per month constituted a breach of the mining lease, lessor's purported notice of forfeiture which failed to give lessee 30 days in which to comply with such requirement after service of notice did not comply with requirement of lease and was insufficient to support an action for terminating the lease.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by C. S. Van Doren against W. E. Thurber for declaratory relief, to cancel a lease of certain mining claims, and to enjoin defendant from going upon the claims or claiming any interest therein. From a judgment for plaintiff, the defendants appeal.

Reversed.

Jesse W. Curtis, Jr., of San Bernardino, and Brittan & Mack, of Bakersfield, for appellants.

Harry H. Parsons, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for declaratory relief, to cancel a lease of certain mining claims and to enjoin the defendant from going upon the claims or claiming any interest therein.

The lease, which was executed on March 8, 1939, recited that the claims were leased to the lessee for the sole purpose of exploring, operating, mining, developing and removing minerals "and to sell the products thereof and to pay to the lessor the royalties hereinafter particularly set forth." It provided for a royalty of $1.00 per ton on ore of a certain mineral content with a proportionate higher or lower royalty for ore of a greater or less mineral content. It provided that the lessee was to enter the premises and diligently work the same in miner fashion and in a manner necessary to take out the greatest amount of minerals that the property would yield "at least to the amount of Seventy (70) tons per month." This was followed by a provision that the lessee "agrees and guarantees that at no time during the life of this contract and lease while same is in effect shall the production from said mine be less than seventy (70) tons, (2,000 lbs.) per month of forty (40%) manganese ore, and that the sum of Seventy ($70.00) Dollars per month commencing on the 8th day of April, 1939, will be on the 8th day of each and every month thereafter, while this contract is in full force and effect deposited in said bank to the credit of said C. S. Van Doren time being the essence of said payments of minimum royalties." It was then provided that this minimum payment of $70 per month "shall be considered as advanced royalties and that the Lessee may remove all minerals, metals, ores and/or metallic substances upon which the agreed royalties have been paid, if not removed prior to the payment thereof at any time while this lease is in full force and effect."

The lease further provided that if the lessee should abandon the premises and should fail to do any work thereon for a period of 180 consecutive days such failure should be conclusive evidence of an abandonment of the lease, and that in case of any default with respect to any provision of the lease notice thereof must be given and if the default for which notice was given was not remedied within thirty days the rights of the lessee should then terminate.

Previous to the making of this lease the plaintiff had mined about 450 tons of ore which he had been unable to sell and which remained on the dump when the defendant took over under this lease. The evidence shows, without dispute, that the ore from this mine was of a lower grade than that mentioned in the lease and that there was no market for the ore contained in these claims until shortly before this suit was filed, when war conditions brought about a change which developed such a market. While it is conceded that the appellant did no actual mining on this property, because there was no market for the ore, he took possession in June, 1939, and thereafter spent about $3,100 upon the claims building a road, a tent house, digging a well and in sampling and assaying the property. He continued sampling operations and his attempts to find a market for the ore until this suit was brought. He did the assessment work on the claims, or had the same done, and paid the $70 per month provided for in the lease each and every month up to November, 1941, although the plaintiff testified that on many occasions this was paid after notice of default was given by him. In October, 1940, after such a notice, the defendant paid the arrearages for seven months. It was conceded at the trial that "he has complied with the requirements of the contract by either offering to pay or paying the $70 a month."

On November 26, 1941, the plaintiff gave the defendant a written notice that this lease "is hereby forfeited, canceled and avoided" for the reasons that the defendant had failed to mine and produce 70 tons of ore per month, that he had failed to do the annual assessment work, that he had failed to post nonliability notices, and that he had permitted more than 180 days to elapse without work or development operations. The plaintiff admitted that about December 1, 1941, the defendant gave him a check for the November payment of $70 and that he subsequently gave him another check for the December payment. The plaintiff kept these checks, filed suit on December 31, 1941, and some time in January, 1942, returned these two checks to the defendant.

The court found for the plaintiff finding, among other things, that the defendant has not used said lease to mine ores or to work said properties; that he had not met his guarantee that at no time would he produce less than 70 tons of ore a month; that he had not vacated the premises when he failed to do any work or make any improvements for consecutive periods of 180 days; and that he did not surrender possession after service of the thirty days' notice. No finding was made on the issue as to whether the monthly payments of $70 had been properly made. A judgment was entered decreeing that the plaintiff is the sole and exclusive owner of these claims, that the defendant is without any right therein or to any part thereof, canceling the lease, decreeing that an abandonment had taken place and enjoining the defendant from entering the premises or asserting any rights thereto. From this judgment the defendant has appealed.

It is obvious that the judgment is erroneous in enjoining the appellant from entering the premises and asserting any rights under the lease. Aside from other considerations, the appellant paid $70 a month for nearly three years and under the plain provisions of the contract he was entitled to remove several hundred tons of ore represented by said advanced royalty payments at any time while the lease was in effect. Not only was a proper notice necessary in order to terminate that right, but there was and could be no default in having failed to mine and remove that amount of ore which he was particularly authorized to mine and remove at a much later date.

[1, 2] More important, however, an apparent misinterpretation of the terms of the lease has led to findings which are not supported by the evidence. The court found that the appellant was in default because he had failed to actually work the mines and produce not less than 70 tons of ore per month. The lease provided that the claims were leased to the appellant not only for the purpose of exploring, developing and removing ores, but also for the purpose of selling the products and paying the respondent the royalties which were particularly set forth. While the lease provided that the appellant was to work the properties in such manner as to produce a yield of at least 70 tons of ore per month it was then provided that the appellant should guarantee the result of such a production by paying $70 per month during the term of the lease as advanced royalties in case that amount of ore was not actually mined. All parts of an instrument must be considered together and the only reasonable interpretation of these provisions is that the lessee, in the event he failed to produce that amount of ore each month, should have the right to pay the amount agreed upon as a substitute for the other requirement, with the right at a later time to remove an amount of ore corresponding with the advanced royalties paid. There is no question that the appellant made all of these payments, two of which were paid and accepted even after the final purported notice of default was served. Not only is this the only reasonable construction of the contract but it was interpreted by the parties in pre-

cisely that manner for nearly three years. The advanced royalties thus provided for were accepted by the respondent with no claim that the contract provided that ore should actually be mined and without making the objection that actual mining operations were required, and many notices of default were served and complied with on the theory that the monthly payments of $70 were a sufficient compliance with these provisions of the lease. It should also be observed that by accepting these monthly payments throughout the entire period the respondent waived any default covered by this finding and that he is estopped from now claiming any such default. Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P.2d 71, 80 A.L.R. 453; McPherson v. Empire, etc., Co., 122 Cal.App. 466, 10 P.2d 146. When changed conditions indicated that the claims might be operated at a profit this action was filed, but there is an entire absence of evidence to sustain a finding of default in this respect.

[3] There is no evidence in the record to sustain the court's finding of default on the part of the appellant with respect to the doing of the annual assessment work, or with respect to the failure of the appellant to carry a policy of Workmen's Compensation Insurance. There is also no evidence to sustain the court's finding that the appellant had abandoned the lease by failing to do any work thereon for a period of 180 consecutive days. The evidence discloses, without conflict, that up to November, 1941, about a month before this action was filed, the appellant was continuing his work of sampling and ascertaining what ore was there and his attempts to find a market for the ore which was there and which might be produced, and that he was still making his payments of $70 per month and in all respects complying with the contract in the manner which had theretofore been entirely satisfactory to the respondent.

[4] Finally, the purported notice of forfeiture given in November, 1941, did not comply with the requirements of the lease and was insufficient to support an action brought for the purpose of abruptly terminating the lease and the lessee's rights thereunder. In that notice, for the first time, the respondent disclosed that he claimed an interpretation of the lease differing from that previously accepted and acted upon by the parties. If, as then claimed for the first time, it had been respondent's duty to actually work the claims and produce at least 70 tons of ore per month he would still have been entitled to thirty days in which to comply with that requirement after service of the notice. This opportunity was not given him and two further monthly payments were accepted by the respondent, followed immediately by the bringing of this action. On the record before us, the evidence fails to support the essential findings.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concurred.

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57 Cal.App.2d 477

HULBURD v. WORTHINGTON.

Civ. 12292.

District Court of Appeal, First District,

Division 2, California.

March 3, 1943.

Hearing Denied April 29, 1943.

1. Trial 🔑110, 114

In personal injury action, statements by plaintiff's counsel that defendant's counsel was skilled in trying to mislead a jury, and questions asked during examination of witnesses by plaintiff's counsel, despite trial court's action sustaining objections, seeking to convey impression to jury that a police officer had issued a citation to defendant for violating the law at time of the accident, constituted "misconduct". Const. Art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

2. Appeal and error 🔑1170(6)

Each case must stand upon its own particular facts in determining whether judgment should be set aside or a new trial should be granted because of misconduct of counsel. Const. art. 6, § 4½.

3. Appeal and error 🔑1170(6)

A judgment should not be set aside or new trial granted because of misconduct of counsel merely for sake of punishing offending counsel, but only for purpose of preventing a miscarriage of justice. Const. art. 6, § 4½.

4. Appeal and error ⚷1170(6)

Trial court's conclusion as to whether a verdict is probably due wholly or in part to alleged misconduct of counsel will not be disturbed on appeal, unless under all circumstances appearing it is plainly wrong. Const. art. 6, § 4½.

5. Appeal and error ⚷1170(6)

Trial court's conclusion that misconduct of plaintiff's counsel was not prejudicial, so as to authorize new trial, would not be disturbed on appeal, where it appeared that great preponderance of evidence was in favor of plaintiff. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Katheryne L. Hulburd against May Worthington for injuries sustained by plaintiff when struck by defendant's automobile. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Hoge, Pelton & Gunther and A. Dal. Thomson, all of San Francisco, for appellant.

Alvin Gerlack, of San Francisco, and Hildebrand, Bills & McLeod, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries sustained when she was struck by the automobile of defendant. The jury returned its verdict in favor of plaintiff in the sum of $10,000 and judgment on said verdict was entered. Defendant appeals from said judgment.

The sole contention of defendant on this appeal is that the judgment should be reversed because of the prejudicial misconduct of counsel for plaintiff. Plaintiff makes no serious attempt to deny the charge of misconduct but earnestly contends that the misconduct was not prejudicial. Under these circumstances we will refer only briefly to the nature of the alleged misconduct.

On the voir dire examination of the jurors, counsel for plaintiff, without any apparent provocation or justification, volunteered the statement before the prospective jurors that "Mr. Hoge is very clever and very skilled in trying to mislead a jury * * *." Again on the voir dire examination, counsel for plaintiff made certain statements in an apparent attempt to rebuke the members of a jury, which had been selected from the same panel and which had served in another case in which case counsel for defendant had represented another defendant, for bringing in a verdict in favor of the plaintiff in that case for only nominal damages. In the discussion between court and counsel regarding this matter, the following occurred, "The Court. Do you know anything about that case? Mr. Hildebrand. Not a thing. * * * The Court. Mr. Hildebrand, you shouldn't criticize the jury when you don't know anything about the case. Mr. Hildebrand. I know it." During the examination of the witnesses, counsel for plaintiff repeatedly attempted, despite the trial court's action in sustaining objections, to convey the impression to the jury through objectionable questions that a police officer had issued a citation to the defendant for violating the law at the time of the accident. This subject was pursued, on the cross-examination of defendant, to the point where counsel for plaintiff asked the defendant: "Q. And you paid the fine too?" Timely objections were made and sustained and the trial court immediately admonished the jury. However, defendant's motion to declare a mistrial was denied.

[1-4] It requires no citation of authority to support the conclusion that counsel for plaintiff was guilty of inexcusable misconduct in making the above mentioned statements and in asking the improper questions after objections thereto had been repeatedly sustained. We will refer only to the case of Burbank v. McIntyre, 135 Cal.App. 482, 27 P.2d 400, in connection with the improper questions put to the witnesses for the purpose of implying that defendant had suffered an arrest and conviction as the result of the accident. It was held in that case that the conduct of counsel constituted prejudicial misconduct requiring a reversal of the judgment. But each case must stand upon its own particular facts in determining whether the judgment should be set aside or a new trial should be granted because of misconduct of counsel. Such action should not be taken merely for the sake of punishing offending counsel but only for the purpose

of preventing a miscarriage of justice. It becomes our duty therefore to examine the entire record including the evidence to determine whether such action should be taken here. Const., art. VI, § 4½. In this connection, it should be stated that defendant made a motion for a new trial, based upon the alleged prejudicial misconduct, and that the trial court denied said motion. In Lafargue v. United Railroads, 183 Cal. 720, at page 724, 192 P. 538, at page 540, the court said: "The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong." See, also, Aydlott v. Key System Transit Co., 104 Cal.App. 621, 286 P. 456; Girard v. Irvine, 97 Cal.App. 377, 275 P. 840. Therefore, the real question before us here is whether, under the circumstances appearing from the record, it may be said that the conclusion of the trial court in determining that the misconduct was not prejudicial and in denying the motion for a new trial was plainly wrong.

Defendant concedes that there was ample evidence to sustain the implied findings of the jury relating to negligence on the part of the defendant, the absence of contributory negligence on the part of plaintiff and the extent of the damage. Plaintiff, a retired school teacher, 68 years of age, sustained a fracture of both the tibia and fibula of the left leg and a fracture of both the ulna and radius of the left arm resulting in a non-union of the radius with no reasonable hope of a permanent union. She was still in the hospital at the time of trial, about seven months after the accident, and had incurred special damages for hospital and medical care in the sum of approximately $2,500. It is the claim of defendant, however, that there was a "sharp conflict" in the evidence and that the evidence was "so evenly balanced that there is no reason to believe that the jury would have decided this case in favor of plaintiff had the trial taken its normal course and been unaffected by the highly unfair tactics indulged in by the attorney for the plaintiff."

Our review of the record leads us to the conclusion that the great preponderance of the evidence was in favor of the plaintiff. The facts shown by this evidence will be briefly set forth. The accident occurred in the City of Oakland at about 4:50 p. m. on the afternoon of October 20, 1941, at the intersection of Broadway and McArthur Boulevard, formerly Moss Avenue, and hereinafter called the boulevard. The boulevard runs in a general easterly and westerly direction. Broadway runs in a general northerly and southerly direction. Both streets are very wide and are very heavily travelled. There are double street car tracks on Broadway and there is a parked area in the center of the boulevard dividing the two sides thereof. The distance from the parked area in the center of the boulevard to the curb on either side is 39 feet. The curb lines on the four corners of the intersection are rounded to form large arcs. On each of the four corners is an electric traffic signal of the customary type, showing alternately red and green lights to control the movement of vehicles and pedestrians. There are plainly marked pedestrian lanes across the intersection which are in prolongation of portions of the wide side-walk areas. It was raining quite heavily at the time that the accident occurred.

Plaintiff had visited the Andrew Williams Store on the southeast corner of the intersection and had made some purchases. She left the store and, after awaiting the change in signal, she was walking in a northerly direction across the boulevard in the marked pedestrian lane on the easterly side of Broadway when defendant, who had driven southerly along Broadway and was turning easterly on the boulevard at a speed of between 12 and 20 miles per hour, struck plaintiff, causing her to be thrown or carried in an easterly direction beyond the pedestrian lane and to be slid along the wet pavement a few feet beyond the point where the automobile was stopped. We believe that the only conflict in the evidence on any important point was in the evidence regarding the position of plaintiff at the time she was struck. The only testimony which had any tendency whatever to show that plaintiff was not in the pedestrian lane, as claimed by defendant, was the testimony of defendant herself. The testimony of plaintiff and the disinterested witnesses who testified on the subject showed definitely that plaintiff was in the pedestrian lane. As we read the record, we believe that the alleged conflict was not a very substantial one and that it cannot be said that the evidence was evenly balanced as claimed by defendant.

[5] Police officers arrived at the scene shortly after the accident had happened. They took certain measurements which were made from the prolongation of the easterly curb-line of Broadway. They testified that the distance from the prolongation of said east curb line to the front bumper of defendant's car where it had been stopped was approximately 26 feet. In the statement made by defendant to the officers, which was signed by defendant at the hospital, defendant stated, "I had made my turn and I was about 25 feet east of the east curb line when I—when all at once a pedestrian appeared in front of my right front fender. I was going slow and stopped at once at the point shown the officer." The point "shown the officer" where the automobile stopped was accurately located by the officers on a diagram when the officers testified as witnesses at the trial. That point was but 7 feet east of the easterly boundary of the pedestrian lane. Said pedestrian lane was 10 feet wide, the westerly boundary thereof being located 9 feet east of the easterly curb-line of Broadway. The easterly boundary thereof was therefore located 19 feet east of said curb line. In her testimony on the trial, defendant claimed that the accident occurred when the front of defendant's car was about 25 feet east of the easterly line of the pedestrian lane rather than of the easterly curb-line. It was the theory of defendant's counsel that plaintiff could not therefore have been walking in the pedestrian lane. Counsel for defendant still adheres to this theory and even in his reply brief he insists that defendant "immediately informed a police officer that the accident happened at a point 25 feet east of the east line of the pedestrian walk," giving a transcript reference to support his assertion. Turning to the portion of the transcript to which reference is made, it appears therefrom that defendant then stated that the accident occurred "at a point 25 feet east of the east curb-line." But all of the testimony in the record, other than that of defendant, shows that plaintiff was struck while walking in the pedestrian lane and that defendant's automobile stopped with its front bumper only 7 feet beyond the easterly line of said cross-walk. The statement of defendant made immediately after the accident substantially supported the testimony of the other witnesses and said statement discredited defendant's testimony given on the trial. It is for this reason that we are convinced that the evidence preponderated in favor of plaintiff and that no different verdict would have been reached if there had been no misconduct whatever. We therefore are of the view that, under the circumstances presented by the record in this case, the misconduct of plaintiff's counsel was not prejudicial. In any event, we cannot say upon the state of the record before us that the trial court's conclusion that said misconduct was not prejudicial was plainly wrong.

The judgment is affirmed.

NOURSE, P. J., concurred.

Hearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

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57 Cal.App.2d 336

SCHEIBE v. SCHEIBE.

Civ. 12188.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1943.

1. Divorce 🔑184(4)

On appeal from judgment granting divorce to wife, every intendment was in favor of trial court's finding.

2. Divorce 🔑130

Evidence justified granting of divorce to wife on ground of husband's "cruelty" where for several years prior to their separation the parties had been living together under strained relations, and there had been frequent quarrels not due to wife's fault. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Cruelty".

3. Divorce 🔑27(5), 184(6)

No arbitrary rule can be laid down as to what facts justify a finding that the complaining party has undergone grievous mental suffering constituting extreme "cruelty" authorizing a divorce, but decision of such cases depends upon the sound sense of justice of the trial court, and in each case, it is a pure "question of fact" to be deduced from the circumstances, keeping in mind the intelligence, refinement, and delicacy of sentiment of the complaining party. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

4. Divorce ⚷27(1)

In determining existence of grievous mental suffering as constituting extreme "cruelty" authorizing divorce, trial court may consider acts committed subsequent to separation of the parties. Civ.Code, § 94.

5. Divorce ⚷184(6)

In divorce action by husband, where wife filed cross-complaint for divorce on ground of cruelty, whether husband's acts inflicted mental suffering upon wife was a "question of fact" for the trial court of the case. Civ.Code, § 94.

6. Divorce ⚷184(10)

Trial court's conclusion in favor of wife on question whether husband's acts inflicted mental suffering upon wife authorizing granting of divorce to wife on ground of cruelty was binding on appeal, where although the evidence would have supported an adverse finding, it was sufficient to sustain the affirmative finding. Civ.Code, § 94.

7. Divorce ⚷184(6)

It is only where the evidence is so slight as to indicate an abuse of discretion that the trial court's conclusion on issue of cruelty as ground for divorce will be disturbed. Civ.Code, § 94.

8. Divorce ⚷184(6)

In divorce action by husband where wife filed cross-complaint for divorce, weight and sufficiency of evidence as to husband's alleged acts of cruelty which allegedly occurred some six months prior to date of separation of husband from wife were for trial court. Civ.Code, § 94.

9. Divorce ⚷27(1)

In divorce action by husband, where wife filed cross-complaint for divorce, wife was entitled to have trial court consider husband's alleged acts of cruelty which allegedly occurred some six months prior to date of husband's separation from wife, where such acts were allegedly part of a continuous course of cruel conduct. Civ.Code, § 94.

10. Divorce ⚷231, 244

Under statute authorizing an allowance to divorced wife for the husband's offense, trial court was authorized to order husband to pay specified sum to wife and to subject husband's half of joint tenancy building-loan association account to a lien for payment thereof, notwithstanding absence of allegations or evidence relating to alimony, and that husband's half of the account constituted his separate property, where divorce was granted to wife on cross-complaint on ground of husband's cruelty. Civ.Code §§ 94, 139.

11. Divorce ⚷231

The statutory allowance authorized to be made to divorced wife for husband's offense is not "alimony" or a substitute for wife's interest in the community or separate property of the husband, but is an allowance authorized to be made by way of compensation for the wrong done to the wife, and is a "penalty" imposed upon the husband. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony" and "Penalty".

12. Divorce ⚷240(2)

The court is to fix the statutory allowance authorized to be made to divorced wife for husband's offense by having regard to the circumstances of the parties respectively, and the allowance may be entirely independent of property then in esse. Civ. Code, § 139.

13. Divorce ⚷231

The trial court's power to make a statutory allowance to divorced wife for husband's offense is incidental to determination of the divorce action, and the award may be made in absence of allegations or evidence showing that the husband then owned either separate or community property to which resort may be had to enforce its payment, or that he has ability to pay. Civ.Code, § 139.

14. Divorce ⚷231

That judgment granting statutory award to divorced wife for husband's offense lacks the support of a finding or that no evidence was presented in that behalf is no ground for reversal of such judgment. Civ.Code, § 139.

15. Divorce ⚷239

An allowance of alimony, or money for support of the wife is an incident to a divorce action, and the determination as to allowance of alimony is not the trial of an "issue" in the case. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Issue".

16. Divorce ⚷241, 243, 244

The trial court may award a gross sum to a divorced wife for the husband's offense, or may require periodical payments by the husband, or may provide that such payments start from the date that husband filed his appearance in the action, or from commencement of the action, and the judgment may provide that as security for the payment, a lien be imposed upon husband's separate property. Civ.Code, § 139.

17. Divorce ⚷235, 286

Since granting or refusal to grant future maintenance to the divorced wife is within trial court's discretion, before a reviewing court will interfere, it must clearly and affirmatively appear upon the face of the entire record that such discretion has been abused. Civ.Code, § 139.

18. Divorce ⚷235

Record established that granting of statutory award to divorced wife for husband's offense did not constitute an abuse of discretion, where divorce was granted on ground of husband's cruelty and there was no question as to the husband's ability to pay the award. Civ.Code, §§ 94, 139.

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Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Divorce action by Harry Scheibe against Martha Scheibe wherein defendant filed a cross-complaint. Judgment for defendant on the cross-complaint and plaintiff appeals.

Affirmed.

Roland Maxwell, of Pasadena, for appellant.

John J. Jones, of San Jose, for respondent.

KNIGHT, Justice.

These two appeals, numbered 12188 and 12189, were taken from final judgments entered in separate actions and are presented on two clerk's transcripts, one reporter's transcript, and a single set of briefs. The parties to the actions are husband and wife; and the husband appeals. The grounds urged for reversal involve the sufficiency of the evidence and the validity of certain provisions embodied in the judgments.

The parties were married in Wisconsin in 1914, and moved to San Jose in 1920, where they lived together until September 8, 1932. On that date appellant went to Los Angeles county permanently to reside, and respondent continued to live in the San Jose home the parties had theretofore acquired. After a lapse of nine years appellant brought the present actions in Los Angeles county, one for divorce upon the ground of desertion and cruelty, and the other for the partition of a balance of approximately $2,085 plus interest on deposit in a joint tenancy account the parties carried with San Jose Building-Loan Association. The actions were subsequently transferred to and heard and determined in the county of Santa Clara.

In the partition suit respondent joined in the request that the money be divided and in the other action she filed a cross-complaint for divorce upon the grounds of desertion, wilful neglect, and cruelty. There was one child, a son, but at the time of the commencement of these actions he was 26 years old. In their respective divorce complaints the parties alleged that the home and the furnishings therein were community property. Appellant asked that said property be divided equally and respondent asked that all of it be awarded to her. In her cross-complaint she alleged that the money on deposit also was community property, but in the prayer of her cross-complaint she requested that only half thereof be set aside to her. She made no request for alimony, but asked for an allowance of attorney's fees and prayed for general relief.

The causes came on for trial on December 17, 1941, and in the partition suit it was agreed that the money on deposit should be divided equally. However, both parties claimed an allowance therefrom as attorneys' fees, whereupon the trial court stated that its ruling on the application for attorneys' fees would be reserved until the divorce case was tried. The court then proceeded with the hearing of the divorce action, and at the conclusion of the evidence announced that no allowance for attorneys' fees would be made in either case; that the divorce would be granted to the wife on the ground of cruelty, and that she would be awarded the dwelling and the furnishings; furthermore that the wife would be awarded seventy-five per cent of the money on deposit in the joint tenancy account. Counsel for appellant protested against awarding respondent three-quarters of the money upon the ground that under the joint tenancy law the husband was entitled to half, and that at the commencement of the trial it had been so agreed. The court stated, however, that if counsel did not "want it that way" the court would "do it some other way," by making an allowance as alimony and "put a lien" on appellant's half of the moneys in said joint account. Following some discussion permission was granted to file briefs, and thereafter, on January 13, 1942, the trial court filed its findings and judgments whereby the divorce was granted to respondent on the ground of cruelty and she was awarded the dwelling and furnishings; the balance on deposit in the joint account was divided equally, each party being awarded $1074.39; but it was ordered that appellant pay to respondent "as alimony" the sum of $50 a month for ten months and $37.19 for the eleventh month, commencing as of April 17, 1941 (presumably the date of the commencement of the action), and aggregating $537.19; and to secure the payment of said aggregate sum a lien was impressed on appellant's half of the moneys in the joint account.

[1, 2] Appellant's first main contention is that the evidence did not justify the granting of the divorce on the ground of cruelty; that the "only proper ground" upon which the divorce could have been granted was desertion, and that consequently he was entitled to an equal division of the community property. Civ.Code, § 146. We are unable to agree with this contention. As in other cases, every intendment is in favor of the findings of the trial court in a divorce case (9 Cal.Jur. p. 780); and although in the present case it must be conceded that the evidence upon which the trial court based its conclusion that a case of cruelty was established, is rather weak, it is legally sufficient in our opinion to preclude interference by a reviewing court. Much of it is conflicting, and that being so no useful purpose would be served by a detailed narration thereof. Speaking generally, it appears therefrom that for two or three years prior to their separation in 1932, the parties had been living together under strained relations, and that there were frequent quarrels which the trial court evidently believed were not due to any fault on the part of respondent. A number of those quarrels were brought about by appellant's failure to secure lucrative employment during the depression years of 1931-2. It appears that during that period respondent was able to find work in the fruit industries, and in the packing houses, but she claimed that appellant made no honest effort to obtain steady employment. Furthermore, there was some testimony of intoxication on the part of appellant, and other evidence tending to show that prior to his departure for Los Angeles appellant had been receiving letters in a clandestine way from some woman friend, which apparently provoked domestic disturbances and led respondent to believe, as she asserted, that it was because of the other woman that appellant left home. On the other hand, appellant claimed that he was continually "nagged on" by his wife because he was not working all the time; that she repeatedly told him "to get out and stay out and leave everything as it was and just go"; so he "finally had to pick up and go." At any rate, so the evidence shows, on the morning of the day appellant went away he drove his wife to her place of employment in their De Soto automobile and told her she would have to take the street car in going home; that he was going away and would not be back. She protested his leaving, but he ignored her protests, and afterwards drew $100 from the bank and left town in their automobile. She did not know where he had gone, but about six months later learned through his sister that he was in southern California. In 1936 he wrote respondent three letters in which he made it plain that he would never again live with her and that his only purpose in writing was to arrive at some sort of an understanding as to a severance of their marital status and to obtain an agreement as to their property rights; and the last letter, especially, contained several statements which the trial court was justified in construing as showing a pronounced feeling of disrespect and contempt for respondent. For example, the opening salutation was in these words: "My Wife. Well I got your letter and I must say it is rotten nothing but money thats all you have in your mind * * * "; and she was accused of lying and being "money greedy." Among other things he said were: "* * * I never had a chance to get into any business with your constant nagging and I never will amount to anything as long as you are connected to my affairs"; also, "I can't see why you want to hang onto me. Im telling you, I would never live with you and be contended and I never was contented in all the years of our married life." The letter contained other expressions equally scorn-

ful and harsh, but those mentioned are sufficient to show the apparent feeling of bitterness and dislike he entertained toward his wife.

[3-7] As defined by section 94 of the Civil Code, extreme cruelty is the wrongful infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage; and ever since the decisions in Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660, and Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124, it has been repeatedly held that no arbitrary rule of law can be laid down as to what particular facts must be proved to justify a finding that the complaining party has undergone grievous mental suffering; that a correct decision in such cases depends upon the sound sense of justice of the trial court and that in each case it is a pure question of fact to be deduced from all the circumstances of each particular case, keeping in mind always the intelligence, apparent refinement and delicacy of sentiment of the complaining party. Thoele v. Thoele, 102 Cal.App. 387, 282 P. 1001; Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1; Cline v. Cline, 4 Cal.App.2d 626, 41 P.2d 588; Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876. Furthermore, it is held that in determining such question the trial court may consider acts committed subsequent to the separation of the parties. Palmanteer v. Palmanteer, 11 Cal.2d 570, 81 P.2d 910. It is apparent, therefore, that in the present case the question of whether the acts and conduct of the appellant were of such a nature as to inflict mental suffering upon respondent was one of pure fact for the determination of the trial court from all the facts and circumstances of the case; and while the state of the evidence may have been such as would have supported an adverse finding of cruelty, it is also legally sufficient to sustain an affirmative finding on that issue; therefore the trial court's conclusion is binding on appeal. In other words, as said in Keener v. Keener, supra, it is only where the evidence is so slight as to indicate an abuse of discretion that the trial court's conclusion will be disturbed; and in the present case it is our opinion that we would be unwarranted in so holding.

[8, 9] Nor is there any merit in appellant's contention that the trial court committed error in denying his motion to strike out certain testimony given in behalf of the respondent as to alleged acts of cruelty which respondent claims took place at least six months prior to the date of the separation. As in other cases, the weight and sufficiency of the evidence offered in a divorce action is a matter for the trial court, and while the acts here complained of as having occurred more than six months from the date of the separation may have been somewhat remote, it was claimed that they were part of a continuous course of cruel conduct; consequently respondent was entitled to have the trial court consider the same and attach thereto such weight as it deemed proper under the circumstances.

[10] Appellant's final contention is that in the absence of allegations or evidence relating to the matter of alimony the trial court was without legal authority to order appellant to pay to respondent any sum of money, or to subject his half of the joint tenancy account to a lien for the payment thereof. This contention is not sustainable. The award was made by the trial court in the exercise of the authority conferred by section 139 of the Civil Code, the pertinent provisions of which declare: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects."

[11-17] As pointed out in some of the earlier decisions, notably Ex parte Spencer, 83 Cal. 460, 23 P. 395, 7 Am.St.Rep. 266, and Honey v. Honey, 60 Cal.App. 759, 214 P. 250, 251, also in California Jurisprudence (vol. 1, p. 1010), the award made under said section 139, properly speaking, is not alimony, nor is it merely a substitute for the wife's interest in the community or separate property of the husband. It is an allowance authorized to be made by way of compensation for a wrong done to the wife, and in that sense is regarded as a penalty imposed upon the husband. "'It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled her to enforce

this obligation, and for the wrong which thus deprived her of the benefit of the obligation, he must make her compensation. The court is to fix the measure of that compensation by "having regard to the circumstances of the parties respectively"; those circumstances furnishing the best means for determining the extent of her loss. * * * This allowance may be entirely independent of the property then in esse.'" Honey v. Honey, supra, citing Ex parte Spencer, supra, and Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79. The power to grant such an award is incidental to the determination of a divorce action, the same as is the right of a trial court to award the custody of children (Honey v. Honey, supra; Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86), and the award may be made in the absence of allegations or evidence showing that the husband then owned either separate or community property to which resort may be had to enforce its payment, or that he has the ability to pay. Gaston v. Gaston, supra; Honey v. Honey, supra; Ex parte Spencer, supra. Nor is it a ground for reversal that the judgment granting the award lacks the support of a finding or that no evidence was presented in that behalf. Stanton v. Stanton, 113 Cal.App. 462, 298 P. 524, 525. In so holding the court in the case last cited went on to say: "It is true that no evidence relating to an award of money for the support of respondent and the minor child was presented. It is also true that the court made no finding in the matter of such an award. For that matter, the complaint contains no specific prayer for support. But it is to be borne in mind that an allowance of alimony or money for the support of the wife is an incident to a divorce action and the determination as to allowance of alimony is not the trial of an issue in the case. Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86; Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, 52 Am.St.Rep. 180; 1 Cal.Juris. p. 1011." Furthermore, the trial court may award a gross sum (1 Cal.Jur., p. 1018); or require periodical payments; and in a proper case may provide that the latter shall start from the date the husband files his appearance in the action or from the commencement of the action (1 Cal.Jur., p. 1012, citing authorities); and the judgment may provide also that as security for the payment a lien be imposed upon the separate property of the husband. Honey v. Honey, supra. Therefore, since the granting or refusal to grant future maintenance is a matter which lies largely within the discretion of the trial court, before a reviewing court will interfere it must clearly and affirmatively appear upon the face of the entire record that this discretion has been abused. 1 Cal.Jur., p. 1012.

[18] Here there is no question as to appellant's ability to pay the award, because the money is on deposit in the joint account; and it is apparent that in view of all the circumstances shown by the entire record it cannot be held as a matter of law that the granting of the award constitutes an abuse of discretion.

The arguments advanced by appellant and the cases relied upon by him in support thereof would be pertinent if we were here dealing with an award pursuant to section 137 of the Civil Code, which grants power to a trial court to award alimony pendente lite, that is, so-called temporary alimony, or if this were a default divorce case. Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64. But neither of those situations is here presented. Westphal v. Westphal, 122 Cal.App. 379, 10 P.2d 119, and Clopton v. Clopton, 161 Cal. 481, 119 P. 651, cited by appellant, were cases involving alimony pendente lite granted pursuant to said section 137, and for that reason they are not in point. In Willey v. Willey, 51 Cal.App. 124, 196 P. 101, 102, also cited by appellant, it was held merely, so far as we are here interested, that under the allegations and the evidence, the trial court was justified in granting future maintenance pursuant to section 139, despite the fact that the prayer of the complaint was for a specific sum per month "as temporary alimony pending the trial of this action." And assuming, as appellant contends, that under the law as laid down in the case of Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003, appelant's half of the money in the joint tenancy account constituted his separate property, the trial court was nevertheless authorized under the legal principles above set forth to impose a lien thereon as security for the payment of the sum awarded respondent.

The judgment entered in the divorce action (appeal No. 12188) is affirmed.

PETERS, P. J., and WARD, J., concurred.

57 Cal.App.2d 1019

Harry SCHEIBE, Appellant, v. Martha SCHEIBE et al., Respondents.

Civ. 12189.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1943.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Affirmed.

Roland Maxwell, of Pasadena, for appellant.

John J. Jones, of San Jose, for respondents.

KNIGHT, Justice.

Plaintiff appealed from judgments entered in two actions brought by him against his wife. One was for divorce, and the other (the present one) for the partition of a sum of money on deposit in a joint tenancy account carried by them with San Jose Building-Loan Association, in which the latter was joined as a party defendant. Both appeals were presented on a record consisting of two clerk's transcripts, one reporter's transcript and one set of briefs. The judgment in the divorce action has this day, been affirmed (134 P.2d 835), and all questions involved in the present appeal are therein discussed and decided. For the reasons set forth therein, the judgment in the present case is likewise affirmed.

PETERS, P. J., and WARD, J., concurred.

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57 Cal.App.2d 521

CHURCHILL v. PETERS et al.

Civ. 3038.

District Court of Appeal, Fourth District, California.

March 4, 1943.

1. Appeal and error 🔑907(3)

Where verified answer denied that purported limited partnership's agreement attached to complaint was a true copy of agreement, reviewing court on appeal on judgment roll alone would not disturb finding that no limited or general partnership, association, or joint adventure was created, but that a voluntary trust resulted. Civ. Code, § *2478*.

2. Appeal and error 🔑907(3)

Where there is no bill of exceptions or duly authenticated record affirmatively showing alleged error, an appellate court on appeal on judgment roll alone must presume that findings and judgment were regular.

3. Appeal and error 🔑901

A trial court's error or facts necessary to establish it must be shown affirmatively by appellant.

4. Appeal and error 🔑931(1)

Where finding is made on subject matter involved, it will be presumed that there was received into the record evidence sufficient to support it.

5. Appeal and error 🔑544(2)

On appeal on judgment roll alone, only ultimate facts found can be considered and not probative facts which have no proper place in findings.

6. Appeal and error 🔑544(2)

On appeal on judgment roll alone, findings of probative facts will control that of ultimate fact and so deprive judgment of support only where it clearly appears that ultimate fact found is based upon findings of probative facts, and it is plain that the latter do not justify nor support ultimate fact.

7. Trusts 🔑95

Where defendant not only sold certificates of interest in a purported limited partnership and oil and gas lease without complying with corporate securities act, but also obtained money for certificates by means of false representations, an "involuntary trust" was created in favor of the investors paramount to any alleged interest of defendant in lease or profits therefrom. Civ.Code, § *2224*; St.1917, p. 673, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Trust".

8. Judgment 🔑256(6)

Where court found that an involuntary trust arose as result of defendant's acts in obtaining funds from investors to drill an oil well, findings with regard to defendant's misappropriation of funds received and of proceeds from operation of well supported money judgment entered against defendant.

9. Trusts ⚿**179**

A trustee had duty to act in highest good faith to his beneficiaries and not obtain any advantage therein over them by the slightest misrepresentation, concealment, or adverse pressure. Civ.Code, §§ 2228–2233.

10. Trusts ⚿**231(1)**

A trustee should not use or deal with trust property for his own profit nor undertake another trust adverse in its nature so as to acquire any interest or take any undue advantage adverse to interest of beneficiary without beneficiary's knowledge or censent, and any violation of such duties constitutes a fraud against beneficiary. Civ.Code, §§ 2228–2234.

11. Trusts ⚿**377**

Where plaintiff's suit to determine interest of plaintiff and others in an oil and gas lease was for benefit of all investors, and court found that defendant was liable as a trustee, allowance of attorneys' fees out of trust fund was proper.

◆

Appeal from Superior Court, Tulare County; K. Van Zante, Judge Assigned.

Suit by A. L. Churchill against E. A. Peters and others to obtain an accounting and an adjudication as to whether a limited partnership had been created and as to the interest certain persons had in an oil and gas lease, to have a receiver appointed, and to dissolve the limited copartnership if it existed. From a judgment in favor of the plaintiff and the defendants other than the named defendant, the named defendant appeals.

Judgment affirmed.

J. D. Willard, of Los Angeles, and Richard V. Aten, of Fresno, for appellant.

Russell & Heid, of Tulare, for respondents.

GRIFFIN, Justice.

This is an appeal on the judgment roll alone. Therefore, no evidence introduced at the trial of the case is before this court for consideration. This is of particular significance in considering the three questions which appellant argues in his brief on appeal.

Plaintiff and respondent instituted this suit to obtain an accounting; to have the court adjudicate the question whether, by the evidence and a certain document attached to the complaint as an exhibit, a limited partnership had been created; to have it adjudged and determined what interest plaintiff, as well as about 70 named defendants, had in a certain oil and gas lease; to have a receiver appointed pending the determination of the litigation; to dissolve the limited copartnership if such should be found to exist; and for general relief. Defendant and appellant Peters, in due course, filed an answer in which he denied many of the material allegations and admitted others. Other defendants also appeared and set forth the amount of their investments in the enterprise. After an extended trial the court made findings of fact and conclusions of law and ordered judgment against defendant and appellant Peters and in favor of the plaintiff and the other defendants.

The verified complaint, filed August 7, 1939, alleges generally that sometime prior to March 1, 1939, defendant and appellant Peters represented to plaintiff that he had a lease in an oil field in Los Angeles County and that he was about to form a limited partnership for the purpose of drilling an oil well, and would assign the lease to the partnership; that Peters represented that plaintiff could have a one per cent interest in the lease, well and partnership for $750; that plaintiff paid the $750 and received a certificate evidencing his interest; that purported articles of limited partnership of the "E. A. Peters Oil Company" were executed April 22, 1939, by plaintiff and defendants (other than defendant Peters and Peters Royalty Corporation) and that the plaintiff and the other investors were designated as limited partners and E. A. Peters as the general partner. The exhibit attached to the complaint and designated "Articles of Limited Partnership of the E. A. Peters Oil Company," recites that the undersigned desires to engage in the business of drilling for and producing oil, gas and other hydro-carbon substances; and that the principal place of business of the partnership shall be the county of Fresno. It sets forth as the property of the partnership an assignment of an oil and gas lease, executed on September 8, 1938, by defendant Iola S. Baass, as lessor, and defendants H. R. Eyer and Imogene Eyer, his wife, as lessees, which provides for a 16⅔ per cent royalty interest to defendant Iola S. Baass, the lessor and landowner, and an overriding royalty interest to be paid as follows: two-thirds of one per cent to defendant Imogene Eyer; two-thirds of one per cent to defendant Ora S. Stoner; 12 per cent to defendant Ora P. Burns. The purported partnership therefore owned 70 per cent of all of the oil and gas and other hydro-carbons to be produced on the real property. The purported articles then provided that E. A. Peters was to be a general partner and that the other named contributing defendants were to be limited partners. Their specific interests were designated by per cent, as representing the amount of cash contributed by each limited partner. Under its terms the general partner was to receive all net profits not allocated to the limited partners. The percentages of net profit so allocated to them were to be percentages of the 70 per cent allowed the partnership for the development and production of oil and gas above stated. It also provided that upon the dissolution of the partnership all net profits of the partnership should be distributed to the general and limited partners as their respective interests may appear, and that such net profits were to be determined after deduction of all operation and development work expenses, and the sinking funds were to retire current liabilities and operating reserves from the gross receipts. The remainder thereof was to be designated as the net profit. Upon the dissolution of the partnership the limited partners were to participate in the distribution of the assets in the same percentage as they participated in the net profit. The general partner was entitled to draw a sum not to exceed $300 per month as an overseeing charge. After reciting the conditions of the agreement, the exhibit above mentioned which was attached to the complaint then contained the following notation: "(Signatures and acknowledgments of persons heretofore listed as limited partners omitted for brevity.)" The complaint further recites that a producing well was brought in on the property on April 5, 1939, and that the defendant Peters and Peters Royalty Corporation, which corporation drilled the well (under contract for $35,000), sold oil from the well in quantities unknown to the plaintiff, kept the proceeds, refused to account to the investors and threatened to continue such conduct; that Peters and Peters Royalty Corporation were insolvent; that creditors of the defendants whose claims arose out of the drilling operations, were threatening to place liens on the property; that Peters was mismanaging the well and that the well and the products thereof would be lost to the investors unless a receiver was appointed.

The verified answer of defendant and appellant Peters denied all charges of misconduct and mismanagement, and it specifically denied that Exhibit B, attached to plaintiff's complaint, was a "true or correct copy of the limited partnership agreement." It alleged that the earnings from oil sold were being used to pay the cost of drilling the well. Peters denied that the Peters Royalty Corporation had anything to do with the sale of the products of the well and alleged that that corporation was in bankruptcy. The lack of a permit from the Commissioner of Corporations authorizing the sale of interests in the oil well was admitted, but it was alleged that a permit was not necessary. The various defendant investors filed answers setting forth their respective interests, some admitting the allegations of the complaint and others denying them for lack of information. Two groups of investors claimed that the purported partnership articles, set forth as an exhibit to the complaint, gave the E. A. Peters Oil Company a different percentage in the will than the articles which they signed, and claimed that Peters misrepresented the percentage to them. The lessor of the oil property, Iola S. Baass, answered and set up her claimed interest. Ora P. Burns, who claimed a 12 per cent royalty interest as given in the articles of limited partnership, also filed her answer.

The court then specifically found that Ora P. Burns did not sign Exhibit B but did invest $3,600 and was not entitled to her 12 per cent royalty interest but was entitled to share proportionately in the general property and assets. The trial court then found generally in accordance with the allegations of the complaint; that the plaintiff and defendants, other than E. A. Peters, Peters Royalty Corporation, Imogene Eyer, Ora S. Stoner, Ora P. Burns, and Iola S. Baass paid to Peters certain specified sums, and found the amount contributed and the fractional interest or share each had in the oil lease and property. It was further found that Peters executed and delivered to them a certificate or security (Exhibit A) evidencing the interest of the respective parties in the oil and gas lease, well and partnership.

The findings then recite that Peters thereafter prepared and purported to sign, as general partner, and plaintiff and the investor defendants referred to, purported to sign, as limited partners, an instrument designated "Original Articles to Certificate of Limited Partnership of the E. A. Peters Oil Company, a Limited Copartnership," attached to plaintiff's complaint and marked Exhibit B; that by said certificate the principal office and place of business of said purported limited copartnership was designated as Fresno County, and that the instrument was delivered to Peters for the purpose of filing in the office of the County Clerk of said county and in the office of the County Recorder of said county; that said certificate was not filed as required by section 2478 of the Civil Code in the clerk's office or in the recorder's office; that said certificate was not sworn to by any of the signers thereof and that the laws of the state relating to the formation of limited copartnerships were not complied with and that no limited copartnership was organized by defendant Peters as a result of the proceedings or actions; that no limited partnership, general partnership, association or joint venture was thus organized or created but an involuntary trust, within the meaning of section 2224 of the Civil Code, resulted from said transactions. It then found that on the first day of October, 1938, Peters, acting on behalf of the investors in the enterprise, entered into a written contract with defendant Peters Royalty Corporation, of which said corporation Peters was president and manager and in sole charge of its business affairs, wherein and whereby Peters Royalty Corporation agreed (for the sum of $35,000) to drill and furnish the necessary equipment to place the well upon production, and that pursuant to the terms of the agreement, Peters Royalty Corporation did commence the drilling of a well upon the premises about November, 1938, and that the drilling was completed about April 5, 1939, and thereafter oil and gas were produced therefrom, which oil and gas were sold by Peters until the appointment of a receiver by the court, whereupon the receiver continued to operate the well and to sell the oil and gas produced therefrom; that part, only, of the monies so collected by Peters, was deposited in the bank account, carried in the name of E. A. Peters Oil Company, and that from time to time prior to the commencement of the suit, Peters rendered statements to the investors which were incomplete and did not conform to the facts; that Peters did not pay any profits or income from the sale of oil or gas to the investors; that when Peters commenced to sell certificates or purported interests in the purported limited partnership, he deposited some of the receipts in his personal bank account and made no entries in any books and kept no record thereof, and that thereafter, as collections were received from sales, defendant Peters deposited the monies in the bank account of Peters Royalty Corporation, as purported payment on account of the drilling contract of $35,000; that no entries in the books of either E. A. Peters Oil Company or Peters Royalty Corporation were made of these payments, nor was any permanent record kept thereof and because of such lack of records it was difficult for the court to determine the amount of money collected by Peters or the amount of money actually paid by him to Peters Royalty Corporation on account of the drilling contract; that Peters created debts and obligations in connection with the drilling of the well, many of which debts and obligations were due from Peters Royalty Corporation and included in the contract price of $35,000; that prior to the commencement of this suit the Peters Royalty Corporation was adjudged bankrupt by the United States District Court and Peters was and is insolvent. It was then found that the certificates of interest sold in connection with the purported gas lease and partnership, under the circumstances, constituted a security within the meaning of the Corporate Securities Act, was in violation of law, and that a fraud was perpetrated upon the investors by Peters in the sale of such securities; that Peters fraudulently represented to plaintiff and defendant investors that the total royalties required to be paid from the oil and gas purchased from the well amounted to 18 per cent and that in many instances he obtained signatures to the purported certificate by representing that the same were to be used for purposes other than signatures on the certificate or limited partnership agreement; that all the monies hereinbefore found to have been paid or delivered to Peters by plaintiff and defendant investors was actually invested in the lease, well and property; that the monies which Peters collected from the investors, as found, was by Peters paid to Peters Royalty Corporation, to be applied on account of the drilling contract of $35,000, and that Peters collected from the investors and paid to said Peters Royalty Corporation the sum of $37,200, thus making an excess payment of $2,200, for which amount Peters was held to be liable and indebted to the investors; that in addition to the collections and payments Peters, out of receipts for oil and gas sold from the well, paid to Peters Royalty Corporation, the sum of $2,550 for which Peters was also held liable and which was held to be owing from Peters to the investors; that out of the production of oil and gas from the well the investors therein were entitled to receive 82 per cent thereof; that the total invested by all investors was $40,800; that Ora P. Burns paid Peters $3,600, for which sum Peters failed and refused to account, and that Peters is indebted to the investors in that sum; that during the time the well produced oil and gas under the management of Peters he collected on account of sales thereof $9,043.20, and that out of said sum he paid to the Natural Gasoline Company the sum of $422.64 upon an account for fuel furnished to Peters Royalty Corporation and used in drilling the well; that this indebtedness was an obligation of Peters Royalty Corporation solely, and that Peters wrongfully paid that sum out of the funds and property of the investors and that Peters is therefore indebted to the investors in that amount; that Peters, on behalf of Peters Royalty Corporation, entered into a contract with Natural Gasoline Company pursuant to which it furnished Peters Royalty Corporation fuel used in connection with the drilling of the well; that this contract provided that the cost of the fuel should be paid out of gas produced from the well; that the Natural Gasoline Company did furnish Peters Royalty Corporation fuel in the sum of $1,090.78, of which Peters paid out of gas produced from the property of the investors, the sum of $422.64, leaving a balance owing at the time of the appointment of a receiver, the sum of $668.14, which amount was a proper obligation of the Peters Royalty Corporation and which the investors had to pay through the receiver, and that Peters, on account thereof, became indebted to the investors in the sum of $668.14; that during the 4 months' period the operation of the well was under the management of Peters, he was entitled to be paid a reasonable compensation as an overseeing charge in the sum of $75 per month, or a total sum of $300; that Peters withdrew from the funds of the investors, as an overseeing charge for that period, the sum of $2,100, thereby withdrawing and paying himself $1,700 in excess of that to which he was entitled, in which amount Peters was held indebted to the investors; that during the course of drilling operations Peters, on behalf of himself and the Peters Royalty Corporation, entered into a conditional sales contract with J. D. Rush Company, whereby well casing and other equipment was purchased and used in the drilling and equipping of the well, which property was required to be furnished by Peters Royalty Corporation pursuant to the terms of the drilling contract; that neither Peters Royalty Corporation nor Peters paid for it; that J. D. Rush Company threatened to remove the personal property from the well and it became necessary for the investors, through the receiver, to pay the balance of the indebtedness due on account of the purchase, in the sum of $4,238.27, for which Peters was liable; that in addition to the payment of $4,238.27, Peters paid Rush Company, on account of purchase of personal property, out of the proceeds of oil produced from the well, the property of the investors, the sum of $2,324.85, for which Peters was also held liable. The court then found that Peters was indebted to the plaintiff and investors in the total sum of $17,703.90; that the plaintiff instituted and prosecuted this action for the use and benefit of himself and the defendant investors, and that this action was not prosecuted by plaintiff in his own right nor for his own exclusive benefit; that plaintiff and defendant investors are jointly interested in the fund, properties, and assets obtained and preserved as a result of this action and that the plaintiff is entitled to an allowance for his expenses, including a reasonable counsel fee, fixed at the sum of $1,500, payable from the funds in the hands of the receiver. The court then found the respective interests of the plaintiff and respondent defendants in and to the proceeds of the lease and property above mentioned. Judgment was rendered accordingly. Defendant E. A. Peters, only, appealed on the judgment roll alone.

[1-6] Appellant first argues that the findings are insufficient to support the judgment in this, that the complaint, which in-

cludes the purported limited partnership agreement, shows on its face that such a partnership was in fact formed. We see no merit to this argument in view of the fact that the appeal is on the judgment roll alone and the evidence on the subject is not before us for consideration. It is true a purported partial copy of Exhibit B was attached to plaintiff's complaint. Appellant's verified answer does not admit its due execution, but on the other hand, he denies that it is a "true and correct copy of the limited partnership agreement." The record of the trial court containing the original exhibit and the evidence on the subject was not brought up on this appeal. In view of the record before us, we therefore are compelled to hold that there was evidence supporting the finding of the court that no such limited partnership was "created or organized" under section 2478 of the Civil Code, and that no general partnership, association or joint adventure was thus organized or created, but an involuntary trust resulted from the transaction. Willett v. Schmeiser Mfg. Co., 82 Cal.App. 249, 255 P. 529. Where there is no bill of exceptions or duly authenticated record affirmatively showing alleged error, an appellate court, on appeal on the judgment roll alone, must indulge in a presumption in favor of the regularity of findings and judgment, and if a trial court commits error, that error or facts necessary to establish it, must be shown affirmatively by appellant, and where a finding is made on the subject matter it will be presumed that there was received into the record evidence sufficient to support it, and upon an appeal on the judgment roll alone only the ultimate facts found can be considered, not the probative facts which have no proper place in the findings, and it is only in those cases where it clearly appears that the ultimate fact found is based upon and adduced from findings of probative facts and it is plain that the latter do not justify nor support the ultimate fact found that findings of probative facts will control that of ultimate fact and so deprive the judgment of support. Whitney v. Redfern, 41 Cal.App.2d 409, 106 P.2d 919.

[7] The next contention is, assuming as true that the certificates of interest in and to the oil lease and contemplated limited partnership did constitute a security within the meaning of the Corporate Securities Act, St.1917, p. 673, as amended, and were consequently void, this fact was not sufficient in and of itself to constitute a fraud on the investors authorizing them to deprive appellant of his claimed interest in the lease or profits therefrom, citing Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 86 P.2d 102. The particular fraud mentioned is not the only fraud claimed and found to have been perpetrated by appellant. In addition to the failure of appellant to obtain a permit under the Corporate Securities Act, it was found that appellant fraudulently represented that the total royalties required to be paid from the oil and gas produced from the well amounted to 18 per cent; that in many instances he obtained signatures to the purported limited partnership agreement representing that the signatures were to be used for other purposes. Based upon these general findings of fraud, the court concluded that an involuntary trust was created within the meaning of section 2224 of the Civil Code. As appellant has not furnished any record supporting any claim of his to a purported share of the proceeds and assets of the involuntary trust, we find nothing in the decisions cited by appellant which would sustain his contention under the facts found, that those persons who were fraudulently induced to invest money in the oil well and property should not be held to be the equitable owners thereof. Section 2224, supra, provides that "one who gains a thing by fraud * * * the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." See, also, Heinrich v. Heinrich, 2 Cal.App. 479, 84 P. 326.

[8-10] From the pleadings before us, based on the judgment roll alone, we are not able to hold as a matter of law that the trial court erroneously and without substantial evidence deprived appellant of any of his legal rights in and to the proceeds of the lease or trust. The argument that the money judgment entered against appellant is not supported by the findings is likewise untenable. The findings reflect that Peters collected large sums of money from the investors at the time he was president and manager and in sole charge of the business and affairs of the Peters Royalty Corporation. Acting on behalf of the oil enterprise and also acting on behalf of his corporation, Peters executed a contract where-

by his corporation agreed to drill a well upon the leased premises and to furnish the necessary equipment to place the well upon production. For this work and materials the corporation was to be paid $35,000. Peters was a trustee for this oil enterprise and the investors therein. As such trustee it was his bounden duty to act in the highest good faith to his beneficiaries and not obtain any advantage therein over them by the slightest misrepresentation, concealment, or adverse pressure of any kind. He was not permitted to use or deal with the trust property for his own profit and was not permitted to undertake another trust adverse in its nature so as to acquire any interest or take any undue advantage adverse to the interest of his beneficiary without the knowledge or consent of the latter. Civ.Code, §§ 2228 to 2233, inc. Any violation of the foregoing duties constituted a fraud against the beneficiary. Sec. 2234 Civ.Code; Overell v. Overell, 78 Cal.App. 251, 248 P. 310; Vail v. Pacific Fish Products Co., 76 Cal.App. 58, 243 P. 869.

[11] The last contention to the effect that the court erred in allowing attorneys' fees out of the trust properties is not well taken. Appellant proceeds on the theory that he was the owner of a large interest in the property or trust and should not be compelled to pay out of his interest any part of the attorneys' fees. If Peters owned no interest in the lease or assets of the trust, as found by the court, the allowance of attorneys' fees could not very well affect him. Where the plaintiff instituted and prosecuted the action for the benefit of himself and defendant investors and not for his own right or his own exclusive benefit, and where each was jointly interested in the fund, the property and assets obtained, and each was benefited as a result of the action, plaintiff was entitled to an allowance of his reasonable attorneys' fees. Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 41 P. 328; Farmers, etc., Nat. Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867. The allowance of the attorneys' fees to be paid from the trust fund, under the circumstances here related, is not unreasonable.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 516

BARTON v. CAPITOL MARKET et al.

Civ. 12244.

District Court of Appeal, First District,

Division 1, California.

March 4, 1943.

1. Trial 🔑139(1)

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

2. Trial 🔑139(1)

Unless it can be said as matter of law, that no other reasonable conclusion is legally deducible from evidence, and that any other holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as matter of law, trial court is not justified in taking case from jury.

3. Municipal corporations 🔑808(1)

In absence of statute, abutting property owner has no affirmative obligation to keep sidewalk in safe condition.

4. Municipal corporations 🔑808(1)

If abutting owner by positive action creates condition which is likely to cause harm to persons lawfully using sidewalk, and person is injured as a proximate result thereof, abutting owner is liable.

5. Municipal corporations 🔑821(17, 19)

In action for injuries to pedestrian who slipped on sidewalk in front of defendants' place of business, evidence that defendants had frequently sprayed corner of building where accident occurred resulting in an oily, slippery stain running down building and across sidewalk, was sufficient for jury on issues of defendants' negligence and proximate cause.

6. Trial 🔑142

As long as inference is not contrary to reason, to physical laws, or to course of nature, it is for jury and not the trial judge to determine whether inference shall be drawn. Code Civ.Proc. § 1958.

7. Trial 🔑165

On motion for nonsuit, trial court must indulge in favor of plaintiff in every legitimate inference which can be drawn from the evidence.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Maude Barton against the Capitol Market, a corporation, and others to recover for injuries sustained through a fall on a slippery sidewalk in front of defendants' premises. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Elliott Johnson, of Oakland, for appellant.

Weinmann, Quayle & Berry, of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit. The action was instituted by plaintiff to recover for personal injuries received when she slipped and fell on the sidewalk bordering defendants' place of business. The theory of plaintiff was that defendants had frequently sprayed the corner of the building where the accident occurred, resulting in an oily, slippery stain running down the building and across the sidewalk upon which she slipped. At the conclusion of plaintiff's case defendants moved for a nonsuit on the grounds that no evidence had been offered to show that defendants had placed or permitted to remain any oily or greasy substance on the sidewalk where plaintiff fell; that there was no evidence proving, or from which it could be inferred, that defendants were guilty of negligence, or that plaintiff fell as the proximate result of any negligent acts of defendants. The court granted the motion and stated: "* * * the Court feels that the case as it now stands, is not one in which the Court could conscientiously permit a verdict to stand in favor of the plaintiff, it being necessary to indulge in speculation, guess, surmise and conjecture, so far as defendants' connection with the condition there existing at the time of the accident is concerned."

[1, 2] The rules applicable to the power of the trial court to grant a nonsuit are too well settled to require extended discussion. They were succinctly stated in In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, as follows: "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama-Pacific International Exp. Co., 179 Cal. 63, 175 P. 454; [In re] Estate of Sharon, 179 Cal. 447, 177 P. 283; [In re] Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal.Jur., pp. 912–918. Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 228, 263 P. 799." See, also, In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; Berger v. Lane, 190 Cal. 443, 213 P. 45; McClurken v. Ralph's Grocery Co., 130 Cal. App. 529, 20 P.2d 66.

[3, 4] Inasmuch as this accident occurred on the public sidewalk, there is another rule of law that must be kept in mind. In the absence of statute there is no affirmative obligation on the abutting property owner to keep the sidewalk in a safe condition. Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435; Daly v. Mathews, 49 Cal.App.2d 545, 122 P.2d 81. It is equally well settled, however, that if the abutting owner by positive action creates a condition which is likely to cause harm to persons lawfully using the sidewalk, and a person is injured as a proximate result thereof, the property owner is liable. Stated another way, the owner of premises abutting a sidewalk is under a duty to refrain from doing any affirmative act that would render the sidewalk dangerous for public travel. (See cases collected 43 C.J. p. 1101, sec. 1865.)

With these rules in mind, we turn to a consideration of the evidence. The defendants Murphey and Hefter own and operate the Capitol Market at Shattuck Avenue and Vine Street in Berkeley, California. Shattuck Avenue runs north and south, while Vine Street runs east and west. The store is on the southwest corner of the intersection, the front and entrance being on Shattuck Avenue, while the side of the building extends westward along Vine

Street. The sidewalk, on both Shattuck Avenue and Vine Street, abuts the market. Above the market, at the corner, there projects, from the second story over the sidewalk, a bay window. Facing Shattuck Avenue there is a large display window, and facing Vine Street there is a smaller display window. Beyond the latter, on the Vine Street side, the building is of normal wooden construction. Several drain pipes run down the side of the building and drain directly on the Vine Street sidewalk. There is a definite down-grade from Shattuck Avenue to Henry Street, the next street paralleling Shattuck Avenue to the west. The sidewalk on the Vine Street side also has a slight down-grade toward the gutter. The corner of the building, below the display windows, is constructed of black material Under the display windows the construction is of white tile and stucco.

The accident occurred on October 7, 1940, at about 5:45 p. m. It was dark, raining, and the streets and sidewalk were wet. There was a sheet of water running on the Vine Street sidewalk abutting the market caused by the drainage discharged thereon from the building. The plaintiff testified that she had taken the electric train and alighted at the intersection; that she immediately proceeded to take shelter under the awning of McHaffie's Drug Store, located on the southeast corner of the intersection; that after waiting a short period she crossed Shattuck Avenue and proceeded onto the sidewalk on the corner on which defendant's store is located; that she walked in close to the side of the building so that she might avoid the sheet of water running on the sidewalk, and in order to get the protective shelter afforded by the projecting bay window; that she took about two steps westerly from the Shattuck Avenue property line of the store when she slipped and fell and broke her wrist; that she was close to the side of the building when she fell; that the sidewalk where she fell was slippery and greasy; that the hand upon which she fell was so greasy and she was unable to support herself on it; that there was grease and oil on her hand; that when she arose to her feet her "shoes were full of oil and my coat was full of oil, or grease."

Plaintiff produced two other witnesses—Fred L. Gibson, who had worked at McHaffie's Drug Store for six years, and who observed the accident, and Mrs. Mary Potts, who had lived in the immediate vicinity for ten years. Gibson testified that the store owners in the neighborhood were in the habit of spraying their buildings, but the court refused to permit him to testify as to the nature of the spray used by the merchants for spraying purposes. He did testify that prior to October 7, 1940, he had observed men coming out of defendants' market and spraying the corner of the building where the accident occurred. Mrs. Potts testified that on several occasions prior to October 7, 1940, she had observed the boy who drove defendants' delivery truck spraying some sort of liquid on the corner of the building where the accident occurred. Gibson testified that prior to the accident he had noticed there were "black oily stains" on the Vine Street sidewalk bordering defendants' premises, and that the side of the building at the corner was similarly stained; that the spraying he had observed was right at the corner. Mrs. Potts testified that prior to October 7, 1940, she had observed an oily stain on the Vine Street sidewalk extending from the tile beneath the display window of the store out across the sidewalk in a diagonal line; that the stain "leads from the tile out onto the sidewalk"; that the stain "runs a little way along the building and then down"; that she had observed this condition for four or five years prior to the accident; that when it rains, water sweeps in sheets across the sidewalk from the building drains; that the stains had the appearance of oil, and that she could see the oily substance anytime the street happened to be wet. Defendant Murphey, called under section 2055 of the Code of Civil Procedure, testified that dogs had, from time to time, "created nuisances" on the side of the building, and admitted that spraying had been done near the Shattuck Avenue entrance of his store but denied that the spraying had been done to repel dogs, stating that it was done to control ants, and denied that any spraying at all had been done on the corner of the building.

[5] This is a fair summary of the evidence on the issue of liability. Tested by the standards set forth in the In re Estate of Lances, In re Estate of Flood, and the other cases cited, supra, there can be no reasonable doubt but that plaintiff established a sufficient case to go to the jury. She offered evidence which, if believed, established that defendants' employees used some substance to spray the corner of the building where the accident occurred; that where the building was so sprayed a stain formed; that the stain ran down from the

building across the sidewalk; that the stain was continuous from the building and across the sidewalk; that on the sidewalk, particularly when wet, the stain was oily, greasy and slippery. From that evidence, the inference reasonably could be drawn that the spraying caused the stain.

[6, 7] In the nature of things it frequently happens that a fact must be proved by indirect evidence. The Code of Civil Procedure § 1958 defines an inference as "a deduction which the reason of the jury makes from the facts proved." As long as the inference is not contrary to reason, to physical laws, or the course of nature, it is for the jury and not the trial judge to determine whether it shall be drawn. On a motion for a nonsuit the trial court must indulge in favor of plaintiff in every legitimate inference which can be drawn from the evidence. Tested by these standards, it is apparent that it was for the jury and not the trial judge to determine whether the spraying caused the stain.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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57 Cal.App.2d 455

SIEVERS et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 12423.

District Court of Appeal, First District, Division 2, California.

March 2, 1943.

1. Judgment 🔑279

A notice of motion to dismiss a declaratory judgment action was not a "pleading" within statute providing that the judgment roll includes the "pleadings", and such notice was not a part of the "judgment roll". Code Civ.Proc. §§ 422, 670, subd. 2; § 1003 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment Roll" and "Pleading".

2. Appeal and error 🔑544(3)

On appeal on the judgment roll alone, District Court of Appeal is not authorized to consider any documents not legally a part of the judgment roll. Code Civ.Proc. § 670.

3. Appeal and error 🔑1135

Where appellant failed to supply a record supporting her claims of error, judgment was affirmed.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Declaratory judgment action by P. F. Sievers and others against the Pacific Gas & Electric Company, a corporation, and others. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Dennett & Paul, of Modesto, for appellants.

Thos. J. Straub and W. R. Dunn, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal from a judgment dismissing an action for declaratory relief. The appeal is taken on the judgment roll alone. The notice of appeal recites:

"Said appeal will be taken upon the Judgment Roll and the said appellant requests that a transcript be prepared of the said Judgment Roll."

The transcript certified by the clerk consists of copies of the complaint, a notice of motion to dismiss, the judgment of dismissal and the notice of appeal. The points urged for reversal are all based upon the claimed insufficiency of the grounds of motion set out in the notice of motion to dismiss. In this respect appellants state in their closing brief: "The only issue is whether or not a motion will lie to dismiss an action on the grounds specified."

Respondents object to a consideration of any of these grounds because the notice of motion to dismiss is no part of the judgment roll and hence not properly before us. We are convinced of the correctness of this position.

[1] Section 670 Code of Civil Procedure provides in detail what shall constitute the judgment roll. No mention is made therein of a notice of motion to dismiss, or any other notice. Subdivision 2 of that section does include "the pleadings," but a notice of motion is obviously not a pleading. Section 422 Code of Civil Procedure enumer-

ates the pleadings allowed to both plaintiff and defendant and no mention is made therein of any notice of motion. Section 422 is found in tit. VI, part II, Code of Civil Procedure which deals with the subject of pleadings in civil actions. The subject of motions, including notices of motion, is dealt with in an entirely distinct portion of the same code, chaps. IV and V, tit. XIV, part II. There is no basis upon which a notice of motion can be held or considered to be a part of the judgment roll. Overton v. Noyes, 177 Cal. 450, 454, 170 P. 1110; King v. Dugan, 150 Cal. 258, 260, 88 P. 925; Bacon v. Robson, 53 Cal. 399; Morris v. Angle, 42 Cal. 236; Bossen v. Bean, 62 Cal.App. 293, 216 P. 404.

[2] It is a commonplace of our appellate procedure that on an appeal on the judgment roll alone we cannot consider any document not legally a part of the judgment roll. 2 Cal.Jur. p. 520 sec. 529; 1 Cal.Jur. 10-Yr. Supp. 373-374; 1 Cal.Jur. 1942 Pocket Pt. 134.

[3] Because of the failure of appellants to supply a record supporting any of their claims of error the judgment must be affirmed. It is so ordered.

NOURSE, P. J., and SPENCE, J., concurred.

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57 Cal.App.2d 230

HUMMINGBIRD v. ULLMAN.

Civ. 3000.

District Court of Appeal, Fourth District, California.

Feb. 19, 1943.

1. Mines and minerals 🔑98

All property, real and personal, which is contributed to company's stock at formation of mining partnership, and all that is subsequently acquired thereby, is "partnership property" in which the partners have undivided interest, and which is subject to sale and accounts between the partners and to payment of partnership debts.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership Property".

2. Mines and minerals 🔑99(2)

Evidence failed to disclose an accounting had between mining partners and to support judgment for $2,150 for plaintiff for breach of contract.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Mavro Hummingbird against Emil J. Ullman for declaratory relief. From a judgment dissolving mining partnership and awarding plaintiff damages for breach of contract, defendant appeals.

Reversed.

Martin C. Casey, of San Bernardino, for appellant.

Harry H. Parsons, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment dissolving a mining partnership and awarding plaintiff $2,150 for breach of contract.

The complaint in this action is primarily one for declaratory relief. There are allegations which might support an accounting between the parties.

Besides admitting the due execution of contracts, out of which the mining partnership arose, the answer denied the material allegations of the complaint. Defendant also filed a cross-complaint which contained allegations evidently intended to support an action for damages because of fraud, the recovery of $350 loaned by defendant to plaintiff, and the recovery of the value of a jack hammer alleged to have been loaned to plaintiff and not returned.

Both the pleadings and the evidence in this case leave much to be desired. Counsel for plaintiff, with much justification, thus describes them in his brief: "A 'blunder-buss' is a shotgun having a barrell which flares or 'opens out' at the muzzle like a trombone or a French horn. You load it; then you go to the edge of a field or the timber, point it in the desired direction, shut your eyes, pull the trigger, and then go around the neighborhood and 'see' whether you have killed or hit any game. The pleadings and the evidence in this case are of that kind,—difficult to tell what was aimed at, and what, if anything, was hit."

The present counsel for defendant did not represent him at the trial.

Under date of February 1, 1941, L. P. Scaroni, as lessor, and Mavro Hummingbird, as lessee, entered into a contract whereby the lessor leased to the lessee for the term of five years certain copper mining claims in San Bernardino County upon a royalty basis. The lease provided for continuous mining operations and prohibited the lessee from assigning the lease in whole or in part, and from subleasing the property without the written consent of the lessor. It also contained forfeiture clauses. The mining claims contained a lode and also a liquid carrying copper in solution.

Under date of February 1, 1941, but executed several days thereafter, Mavro Hummingbird assigned to defendant a forty-nine per cent interest in the lease in consideration of $1,000 which was paid him.

Defendant agreed to furnish and install the necessary equipment for extracting copper from the solution, not to exceed a cost of $9,000. Profits and losses were to be shared by the parties in proportion to their interests in the mine.

Scaroni consented in writing to the assignment of the forty-nine per cent interest in mining the solution but not in the copper lode. It seems to be agreed that there was no intention of conveying to defendant any interest in the lode.

According to his testimony, defendant installed equipment and machinery of the value of $6,500, but, as found by the trial court, its value was $5,000. He operated the extraction process for about six and one-half months and recovered about five tons of copper which he testified had a market value of three cents a pound. He sold no part of it. He testified that "it disappeared."

He also testified that the solution was exhausted by September 10, 1941, and that he conveyed his interest to a Mr. Goodwin whom he claimed owned the mining claims instead of Scaroni.

Defendant admitted removing some of the equipment he had purchased and placed on the claims. Plaintiff admitted that some of this machinery and equipment remained there in his possession, including a dump truck which had cost defendant about $350. There is no evidence showing the value of the property taken by defendant or of that remaining in the possession of plaintiff.

[1] In speaking of mining partnerships in 17 Cal.Jur., p. 442, it is said: "All property, whether real or personal, which is contributed to the company stock at the formation of the partnership, and all that is subsequently acquired thereby is partnership property, in which the partners have undivided interests, and which is subject to sale and accounts between the partners and to payment of the partnership debts."

The trial court found that the mining partnership between the parties had been dissolved by the conduct of defendant. And further: "The Court finds from an accounting and the premises that the plaintiff, Mavro Humming Bird has been and is injured and damaged, and has due, owing and unpaid to him from the defendant Ullman, the sum of twenty-five hundred ($2,500.00) Dollars, minus the sum of three hundred and fifty ($350.00) which the said Humming Bird borrowed from said Ullman, making a balance as compensation and damages due plaintiff Humming Bird of twenty-one hundred and fifty ($2,150.00) dollars, for and in whuch said sum he is entitled to decree and judgment."

[2] We have searched the record in vain for any evidence of an accounting having been had. There is defendant's evidence that five tons of copper was produced having a value of three cents a pound. There is his undisputed evidence that this copper was not sold but just disappeared. There is nothing to indicate that this disappearance was due to any wrongful act or neglect on the part of defendant. There is nothing to indicate the cost of recovering this copper except the testimony of defendant that the mine was operated for six and one-half months with from two to five men employed. The contract provided that some of them would receive seven dollars a day so the only indication in the record is that the mining operations were conducted at a loss. There is no evidence to the contrary and nothing in the record to support the challenged finding except the portion of it relating to the $350 which plaintiff admitted owing defendant. Further, we find no evidence furnishing a measure of damages nor the amount of any damages suffered by plaintiff.

The contract provided that Mrs. Effie Ullman would act as bookkeeper for the business at a salary of $125 per month. Defendant called her as his witness but her evidence was excluded on objection of counsel for plaintiff. Defendant made no proffer of what he expected to prove by this witness so we are left entirely in the dark on that subject. She had her books of account with her but we can only assume that she might have given testimony as to the cost of the mining operations.

There being no evidence of an accounting having been had and no evidence supporting the money judgment against defendant, it cannot be supported here.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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57 Cal.App.2d 599

HECK v. HECK BROS. et al.

Civ. 3095.

District Court of Appeal, Fourth District, California.

March 9, 1943.

1. Appeal and error 🔑14

The law contemplates that but one appeal shall be taken from a judgment. Code Civ.Proc. § 963.

2. Appeal and error 🔑80(4)

Where a decree is made fixing the liability and rights of the parties and referring the case to a master or subordinate tribunal for a judicial purpose such as the statement of an account upon which a further decree is to be entered, the decree is not "final" as a general rule. Code Civ. Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Decree".

3. Appeal and error 🔑80(4)

A judgment, declaring that plaintiff was owner of partnership obligation and that an accounting be made to determine creditors of partnership, assets and amount due to plaintiff in order that money judgment might be entered for plaintiff, was an "interlocutory judgment" from which appeal did not lie, since further judicial action was necessary before there could be a final determination of the controversy. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Interlocutory Judgment".

4. Appeal and error 🔑870(1)

On an appeal from final judgment, the propriety of any interlocutory judgment may be questioned. Code Civ.Proc. § 963.

◆

Appeal from Superior Court, Kings County; Ernest Klette, Judge Assigned.

Action by Rose Heck against Heck Brothers, a copartnership, and others, for a judgment declaring the rights and duties of the plaintiff and the defendants concerning note of partnership to O. C. Heck for advancements, which note plaintiff alleged was her property. From the judgment rendered, the defendants appeal.

Appeal dismissed.

Kendall & Howell, of Bakersfield, and Sidney J. W. Sharp, of Hanford, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Rose Heck, and defendant and appellant O. C. Heck, were married on March 27, 1925. They separated on March 13, 1941. Subsequently, Rose Heck filed this action against her husband, O. C. Heck, and E. P. Heck, his brother, who were conducting a farming business as a copartnership under the firm name of Heck Bros. She alleges generally in her complaint that on November 18, 1920, prior to her marriage, O. C. Heck advanced $33,656.59 to the partnership, and that the partnership agreed to repay said sum to O. C. Heck during the course of administration of the partnership or upon its dissolution; that a promissory note was given to O. C. Heck by the partnership evidencing such advance or loan; that O. C. Heck, shortly prior to their marriage, made a gift to her of the obligation of the copartnership and that she is now the owner thereof; that said sum is now due, owing and unpaid by the copartnership and that certain sums may have been heretofore paid thereon by the copartnership to O. C. Heck but that the amounts so paid are not within her knowledge; that the sums so received by O. C. Heck as payment on said obligation are held in trust by him for her benefit; that since their separation "there has arisen an actual controversy between the plaintiff and defendants herein concerning the status and character of said obligation and whether or not said obligation is barred by any statute of limitations"; that defendants refused to account to plaintiff for such sums as are due, if any; that the obligation of the defendants should be ascertained and fixed and be made a charge upon all the assets of the copartnership; that some of the copartnership assets are held in the name of O. C. Heck individually, and some in the name of E. P. Heck individually. Judgment was sought declaring that "the rights and duties of the plaintiff and defendants concerning said obligations be fixed and determined"; that the defendants be compelled to account; that the amount of the unpaid obligation, together with interest, be fixed and determined; that judgment be rendered that the copartnership owes to the plaintiff $33,656.59; that judgment be entered for such other sum as may be found owing and unpaid on account of the obligation; that that sum be made a charge upon all the assets of the copartnership and be adjudged to be a claim ranking in priority to the claims of the copartners upon the copartnership for capital contributions and for accrued profits; that O. C. Heck be required to account for such sums, if any, as he may have received on said obligation for and on behalf of this plaintiff and that a trust be imposed upon said funds in the hands of the defendant O. C. Heck or upon the properties in which said funds were invested, and that judgment be given the plaintiff accordingly.

Defendants answered, admitted certain advances in the form of a loan were made by O. C. Heck in the sum of $33,656.59, and that the partnership agreed to repay to him the loans; that the agreement was evidenced by a promissory note executed on November 18, 1920, in said sum; and that the note was never endorsed nor delivered to plaintiff but is now the property of O. C. Heck.

The answer alleges that the statute of limitations has run on the note; denies that any sums were theretofore paid to O. C. Heck on behalf of plaintiff E. P. Heck or the partnership; denies that any controversy has arisen between plaintiff and defendants concerning the status and character of the obligation; that no consideration passed to defendants for the alleged gift of the obligation or note to the plaintiff. They deny generally other allegations of the complaint and pray for a judgment for defendants. After trial the court made purported findings finding generally in accordance with the allegations of the complaint and entered a judgment which appellants claim is a final judgment and from which they have a right of appeal, and that the appeal therefrom is proper. Respondent claims that the judgment is interlocutory and that an appeal does not therefore lie from an interlocutory judgment, and contends that the appeal should be dismissed. This is the only question here presented.

Appellants and respondent agree that if the judgment appealed from is interlocutory, appellants' appeal is premature and should be dismissed. Section 963 of the Code of Civil Procedure sets forth the cases in which an appeal may be taken from judgments of the superior court and in effect provides that no appeal may be taken, except from a final judgment, other than from interlocutory judgments in cases of partitions and divorces. The judgment signed by the court recites that the copartners are indebted to plaintiff "for an amount found to be owing and unpaid on the obligation, hereinafter described, by the accounting hereinafter ordered by the court"; "That the plaintiff Rose Heck is the owner of said obligation, and said obligation is a valid and subsisting and continuing obligation of said copartnership to said plaintiff; that no part of the principal or interest of said obligation has been paid; * * * that said obligation is the agreement of said copartnership * * * for the payment in due course of administration of said copartnership, of the said principal sum of $33,656.59, and said interest because of advances of capital to said copartnership by the said O. C. Heck on or prior to November 18, 1920, and said obligation is payable out of the assets of said copartnership after the payment of the creditors of said copartnership other than partners; * * * that an accounting be made before this court by the defendants of the affairs of said copartnership to ascertain and determine the creditors of said copartnership other than partners, to determine the assets of said copartnership, and all the dealings and transactions had between said copartners and said copartnership, and to determine the amount owing to plaintiff on said obligation and that a money judgment be entered herein in favor of the plaintiff and against the defendants for the said amount so found to be owing to the said plaintiff as the result of said accounting, and for her costs of suit; * * * that it is not fair, just nor equitable that the payment of said obligation be delayed, and it is therefore ordered, adjudged and decreed that said judgment be a lien on * * * all of the assets and properties of said copartnership to secure the payment of said judgment * * * that unless the said judgment of plaintiff is paid within sixty days from the entry of the said money judgment, that said lien be foreclosed * * *."

After the entry of that judgment a motion for new trial was made and denied. On August 27, 1942, plaintiff noticed a motion to set the case for trial for the purpose of making the accounting provided for in the judgment. The motion was granted and the matter was set down for hearing for October 27, 1942. Notice of trial was given. Notice of appeal was filed on October 14, 1942. Objection was made by appellants to the jurisdiction of the court to proceed. The court ordered that no further proceedings be had until the disposal of the appeal.

[1-3] The law clearly contemplates that but one appeal shall be taken from a judgment. Learned v. Board of Education, 37 Cal.App.2d 561, 99 P.2d 1100. It is a general rule that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. Whether, under certain facts, an order for judgment is interlocutory or final, may be a close question in some cases. Two conflicting lines of authority bearing upon the subject are reviewed in Security-First Nat. Bank v. Superior Court, 132 Cal.App. 683, 23 P.2d 1055; and reiterated in Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11. We are persuaded, however, from an examination of the more recent authorities, that the judgment entered herein was interlocutory in character and there remained further judicial action on the part of the court before there could be a final determination of the entire controversy between them. Gunder v. Gunder, 208 Cal. 559, 561, 282 P. 794.

In Lyon v. Goss, supra, it was held (quoting from the syllabus) that: "As a general test, which must be adapted to the particular circumstances, where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, the decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory."

Under these rules, an examination of the judgment appealed from in the instant case clearly and conclusively shows the interlocutory nature of its terms. The judgment appealed from first adjudges that the defendants are copartners. It then adjudges that they are indebted to the plaintiff for the amount found to be owing and unpaid under the obligation, by an accounting hereinafter ordered by the court. The obligation is payable out of the assets of said copartnership, after the payment of the creditors of said copartnership other than partners. An accounting is ordered to be made before the court by the defendants, of the affairs of the copartnership, and "to determine the amount owing to plaintiff on said obligation" and "that a money judgment be entered herein in favor of the plaintiff and against the defendants for the said amount so found to be owing to said plaintiff as the result of said accounting and for her costs of suit." A lien is imposed upon the assets of the copartnership, and it is further ordered that "unless the said judgment of the plaintiff is paid within 60 days from the entry of said money judgment" that the lien be foreclosed. It is obvious that something judicial in nature remains to be done other than the compliance or noncompliance with the order. Each of the foregoing involves a judicial determination, which is a necessary determination upon which to base the final judgment. It is to be noted that the amount actually due to the plaintiff is not fixed in the judgment appealed from but is left to be determined by an accounting, and to be imbodied in the final judgment. The attempted appeal is from a judgment obviously interlocutory in nature and should be dismissed.

[4] Appellants' position on this appeal is well understood by this court. Many cases are cited following the general statement quoted from 2 Cal.Jur. 142, sec. 20, and from an observation of that general statement it is sometimes very difficult to determine whether a decree or judgment is a "final judgment" within the meaning of that term as used in our statutes concerning appeals. Therefore, appellants were placed in a position where they could not sit idly by believing the judgment to be interlocutory in character and later find that they had lost their right of appeal because it might be subsequently determined, in view

of some of the older decisions, that the judgment was a final determination of their rights. While it might be argued that it would be less expensive to the litigants to have the correctness of the trial court's decision in the interlocutory judgment first determined before consuming further time and expense in having an accounting or further action of the trial court in determining the remaining issues, we cannot, in view of the later decisions and the statutes applicable, hold contrary to the view expressed that the law does not permit a multiplicity of appeals from the same judgment in the same action, but contemplates that there shall be but one final judgment and but one appeal therefrom. Learned v. Board of Education, 37 Cal.App.2d 561, 99 P.2d 1100. However, a consideration of the propriety of any interlocutory judgment may be questioned upon an appeal from the final judgment. Lyon v. Goss, supra, 19 Cal.2d at page 671, 123 P.2d at page 11.

Appeal dismissed.

BARNARD, P. J., and MARKS, J., concurred.

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57 Cal.App.2d 451

CAMPODONICO et al. v. MARCHESOTTI.

Civ. 3043.

District Court of Appeal, Fourth District, California.

March 1, 1943.

1. Factors 🔑6

A contract whereby potato grower agreed to deliver designated number of cars of potatoes to be handled by brokers who were to receive a certain commission per car, did not vest in brokers a "power coupled with an interest" and hence grower could revoke agency at any time, and after revocation brokers had no remedy other than an action for damages suffered prior to time of revocation. Civ. Code, § 2356, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Power Coupled With an Interest".

2. Factors 🔑6

In action by brokers to recover damages for potato grower's breach of contract authorizing brokers to sell grower's potatoes, evidence that brokers suffered no damage prior to grower's revocation of agency *held* not to warrant recovery. Civ. Code, § 2356, subd. 1.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by F. J. Campodonico and another against Joe Marchesotti for damages for breach of contract authorizing plaintiffs to act as brokers for defendant in sale of potatoes. From a judgment for plaintiffs, defendant appeals.

Reversed.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for appellant.

West & Vizzard, of Bakersfield, for respondents.

MARKS, Justice.

This is an action for damages for breach of a contract authorizing plaintiffs to act as brokers for defendant in the sale of about fifty cars of potatoes. Plaintiffs recovered judgment for $1,000 and defendant has appealed.

Plaintiffs were duly licensed brokers authorized to handle potatoes for customers. Defendant was a farmer who raised about fifty-three cars of potatoes on land in Kern County. John T. Battaglia was the agent for plaintiffs and acted for them in the transaction with defendant.

Plaintiffs and defendant entered into the following agreement:

"This Agreement made and entered into this 22nd day of January, 1940, by and between F. J. Campodonico and E. P. Tiscornia of the City of Stockton, County of San Joaquin, State of California, parties of the first part, and Joe Marschesotti, County of Kern, State of California, party of the second part,

"Witnesseth

"It Is Hereby Agreed that the Party of the Second Part, growing seventy (70) acres of potatoes about eight (8) miles south of Arvin, located in Kern County, agrees to deliver approximately 50 cars of potatoes or more, in sacks, to be handled by party of the First Part as follows:

WLB k
J "If sold F.O.B. Trac~~t~~, $20.00 per car

"If sold delivered where an outside brokerage is to be charged, Party of the Second Part agrees to pay $30.00 per car and Party of the 1st Part is to pay all telegrams and office expense, etc., out of this, but Party of the Second Part agrees to pay all commissions and outside brokerages that it takes to handle the car at destination.

"IN WITNESS WHEREOF, the parties hereto have placed their hands and seals the day and year first above written.

"F. J. CAMPODONICO
"E. P. TISCORNIA
"Parties of the First Part.
"JOE MARCHESOTTI
"Party of the Second Part."

Battaglia testified that on the morning following the execution of the contract he had a telephone conversation with defendant which he described as follows:

"Q. Now just tell us what Mr. Marchesotti said to you at that time? A. He said he didn't want to deal with Tiscornia and Campodonico.

"Q. Isn't it true, Mr. Battaglia, that he asked you at that time to give the contract back to him? A. He did.

"Q. And didn't you tell him you were going to? A. Well, I told him I would take it up with Campodonico first.

"Q. But you may answer my question: Didn't you tell him that you were going to try to get the contract back for him and give it back to him? A. I told him I would try, yes.

"Q. Don't you recall his calling you on the phone in the evening after the contract was signed and telling you that he didn't realize that that contract was made with Campodonico and Tiscornia and as soon as he discovered it, he called you on the phone and told you he would not deal under those circumstances? A. I think it was the following morning, I am not positive as to that."

There is other undisputed evidence that on several subsequent occasions defendant asked for a return of the contract and informed Battaglia that he did not want to deal with plaintiffs.

Section 2356 of the Civil Code provides in part as follows:

"Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:

"1. Its revocation by the principal; * * *."

[1] It is clear that the contract did not vest in the agents a power coupled with an interest, so that defendant had the right to revoke the agency at any time, and after revocation plaintiffs had no remedy other than an action for any damages suffered by them prior to the time of the revocation. Roth v. Moeller, 185 Cal. 415, 197 P. 62; Capital National Bank of Sacramento v. Stoll, 220 Cal. 260, 30 P.2d 411.

[2] We have searched the record and have found no evidence of any damages suffered by plaintiffs prior to the telephone conversation between defendant and Battaglia. It is true that Campodonico testified that his firm had brokerage contracts covering several hundred acres of potatoes; that letters were written to customers in the east offering the potatoes for sale; that he made a trip east in connection with the sale of the potatoes of the various growers with whom plaintiffs had contracts.

There is no evidence that plaintiffs had found a purchaser for defendant's potatoes prior to his telephone conversation with Battaglia. Neither is there evidence that anything was done by plaintiffs towards marketing defendant's potato crop or that plaintiffs had expended any time or money in an endeavor to do so prior to this conversation. In the absence of any supporting evidence we cannot assume that any of the acts specified by Campodonico were done in the very short time elapsing between the execution of the contract and the telephone conversation revoking it. Plaintiffs' right to a commission depended on their sale of the potatoes. As they did not find a purchaser for them and, as far as the evidence discloses, did nothing towards selling prior to the revocation of this agency, it follows that the judgment for damages is without evidentiary support.

This conclusion makes it unnecessary to consider the other questions argued by counsel. However, we may point out that it was alleged and found that plaintiffs had found "purchasers ready and willing to buy said potatoes." There was neither an allegation nor a finding that any purchaser so found was financially able to make the purchase. This seems to have been assumed at the trial.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

57 Cal.App.2d 456

LABADIE v. LABADIE.

Civ. 6870.

District Court of Appeal, Third District, California.

March 2, 1943.

1. Deeds 🔑208(3)

Evidence that deed to plaintiff executed by her husband was kept in safe deposit box held in joint tenancy by the parties and that, upon husband's death, box and its contents were in sole control of plaintiff who then exercised control over property covered by deed, established delivery of deed. Civ.Code, § 1055.

2. Deeds 🔑194(3)

When deed is found in grantee's possession, the presumption is that it was delivered at time of its execution. Civ.Code, § 1055.

3. Deeds 🔑208(3)

A grantee's possession of deed creates prima facie evidence of title to land described therein, even though deed has been placed in joint safe deposit box of parties and is not recorded until after death of grantor who, in the meantime, exercises control over property. Civ.Code, § 1055.

4. Deeds 🔑85

When deed is actually delivered to grantee, fact that it is not recorded until after grantor's death, does not impair validity thereof.

5. Deeds 🔑208(3)

In suit to quiet title to land covered by deed executed by plaintiff's husband conveying land to her, where defendant had not contended that deed was void for lack of delivery and there was a presumption of delivery from fact that deed was placed in joint safe deposit box of the parties, court properly found that deed was delivered. Civ.Code, § 1055.

6. Deeds 🔑3

If deed from husband to wife has been delivered, it is immaterial that purpose of transfer was to avoid cost and delay of probating husband's estate.

7. Deeds 🔑208(3)

Evidence of circumstances in connection with execution of deed by plaintiff and her husband to their son, who never saw deed until he removed it from their safe deposit box several years later shortly before husband's death, and concerning son's authority to secure deed and to place it in his own safe deposit box established that deed was void for lack of delivery to son, who, after father's death, failed to claim title or to record deed for eight years, and who permitted plaintiff to handle property.

8. Deeds 🔑208(1)

The fact that plaintiff, who, with her husband, deeded property to son, retained possession thereof and exercised acts of proprietorship over it evidenced ownership and lack of delivery of deed.

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Suit by Mary Ann Labadie against Thomas W. Labadie to quiet title to land. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

Ralph McGee and Albert J. Brown, both of Jackson, and Evan J. Hughes, of Sacramento, for respondent.

THOMPSON, Justice.

The plaintiff brought suit against her son, Thomas W. Labadie, to quiet title to land in Amador County. In 1924 she joined her husband, Peter Labadie, in a deed to their son. The deed was not delivered, but was placed in their safe deposit box in a bank. At the time of the death of Peter Labadie in December, 1932, the defendant procured the deed and took it to the plaintiff's home. Eight years later he recorded it, claiming title to the land. The trial court held that the deed was void for lack of delivery. Findings were adopted favorable to the plaintiff. A judgment was rendered quieting title in plaintiff. From that judgment the defendant has appealed.

The plaintiff and her husband, Peter Labadie, who had resided in Amador County for many years, were the parents of the defendant, Thomas W. Labadie, and of two married daughters, Mrs. Mae Matulich and Mrs. Lizzie McBeth. The parents owned certain farming land in that county, and some lots in the town of Plymouth. The land formerly stood in the name of Peter Labadie. September 16, 1918, he executed and delivered to his wife a deed to three tracts of land, including the two parcels which are involved in this suit to quiet title. That deed was delivered and then placed in the safe deposit box in a bank, jointly held by the spouses. It was recorded January 4, 1933, after the death of the husband.

March 5, 1924, Mr. and Mrs. Peter Labadie went to a notary public by the name of Minnie Provis, at Sutter Creek, who, at their request, prepared three documents which were then executed. One was a duplicate deed of conveyance from Peter Labadie to his wife of the same property described in the previously mentioned deed between the same parties, dated September 16, 1918. The second instrument was a deed from Peter Labadie and his wife to their son, Thomas, conveying to him the two farms in Amador County, included in the former deeds to the plaintiff. These two farms consist of 160 acres and about 480 acres of land, respectively, which are the same tracts of land described in the complaint. The third instrument is in the nature of instructions to their son Thomas, requesting him to make specified payments of money to their daughters and to one other relative. It reads in part:

"Sutter Creek, Calif., March 5th, 1924.

"Mr. Tom W. Labadie, Sacramento, Calif.

"My dear Son:—

"Realizing the uncertainty of life and reposing the most hearty confidence in you, we have this day executed a deed conveying to you all our real estate, consisting of both the Norman and the Butler Ranches, and arrangements will be made so that in the event of our both passing away, what funds we may have in bank may also be drawn by you. Our idea in doing this is that you will, either from the cash we may leave or from your private funds, pay your sisters and niece the following sums of money: * * *"

These three instruments were enclosed in an envelope and were taken by Peter Labadie and his wife to their home and subsequently placed in their safe deposit box in the bank at Plymouth. Miss Provis testified that she had the impression that the deeds "were to be held * * * by Mr. and Mrs. Labadie in some safe place for delivery upon her death." She said that the grantors were to have the rents, issues and profits from the land as long as they lived. The defendant testified that he never saw his deed until he took it from the safe deposit box two weeks before his father's death. The grantors exercised absolute control over the land in question during the lifetime of Peter Labadie. November 27, 1932, he suffered a stroke of paralysis, and was taken to the home of his daughter Mrs. Matulich, who lived near Drytown in Amador County, where he died December 14, 1932. There is evidence that he was not able to transact business affairs during that illness.

The defendant testified that he was present at his sister's home during his father's last illness, which lasted only two weeks; that after his father was stricken he went to the safe deposit box at his father's request, got the papers from the box and brought them home. He stated that he gave them to his mother, and "my mother gave me the deeds, and she also gave me my deed. She said it is a deed from father and her to me; said the instructions, what to do, are in the deeds, or with the deeds"; that he took the deeds and other documents with him and placed them in his own safe deposit box in a bank in Sacramento, in which city he then lived. The defendant recorded the deed from his father to his mother on January 4, 1933. He retained the deed from his parents to himself, covering the property which is involved in this suit, until November, 1940, which he then recorded without the knowledge or consent of his mother. The following day he instituted proceedings in the Superior Court of Sacramento County to have his mother declared incompetent. That petition was denied.

The plaintiff testified that she remained at the home of her daughter, Mrs. Matulich, and cared for her husband during his last illness in 1932; that she did not hear her husband request their son Thomas to get his deed or any of the other documents from the safe deposit box; that she had no knowledge of the fact that Thomas procured the instruments from the bank; that he never discussed those deeds with her. She positively denied that he ever handed her the papers or that she delivered to him the deed from herself and husband at that time or at any other time. The testimony of the plaintiff and the other corroborating evidence is very convincing that the deed from the spouses to their son, Thomas, was never delivered to him with the intention on the part of the grantors to part with the title to the property. It is also apparent that the deed in question was executed with the object of avoiding the necessity of probating the estate in the event of the death of both grantors, and that it was not intended to take effect until after the death of both spouses.

The plaintiff further testified that she continued to exercise absolute control over the property with defendant's knowledge of that fact, after the death of her husband, to the time of the commencement of this action. She leased one of the ranches described in the challenged deed on December 18, 1933, to W. J. Parsons for a term of five years for the annual rental of $300 payable to her in monthly installments. That rent was always paid to the plaintiff and the defendant never claimed a right to any portion of it. November 13, 1933, the plaintiff executed a general power of attorney to her son, Thomas Labadie, authorizing him to lease, sell, mortgage or convey all real property, and to handle all personal property, in her name and for her use and benefit. That power of attorney was recorded at the request of the defendant. August 3, 1935, nearly three years after the death of her husband, the plaintiff sold and conveyed to G. A. Wilds, a dwelling house and lot in the town of Plymouth, also included in the challenged deed which was previously executed by the spouses.

The court adopted findings favorable to the plaintiff in every respect. It was held that the deed dated March 5, 1924, from Peter and Mary Ann Labadie to the defendant is void for the reason that it was never delivered by the grantors with the intention of then conveying title to the land described therein. Judgment was thereupon rendered in favor of the plaintiff, determining that said deed was void for lack of delivery, and that title to the real property described therein be quieted in plaintiff. From that judgment the defendant has appealed.

It is contended the findings and judgment are not supported by the evidence.

[1] The findings and judgment are adequately supported by the evidence, to the effect that the plaintiff acquired title to the real property in question by means of the deed therefor which was duly executed by her husband, Peter Labadie, on September 16, 1918. That deed was recorded at the request of the defendant January 4, 1933, after the death of his father. It was received and read in evidence without objection. The case was tried on the theory, in behalf of both parties to the action, that this deed was valid and that it conveyed title to the plaintiff of the property described therein. After the execution of that deed it was kept in a safe deposit box in a bank in Plymouth, which box was held in joint tenancy by the grantor and the grantee, and to which both had access at all times. In the absence of evidence to the contrary, it is presumed that a deed which is duly executed is actually delivered on the date of the instrument, when it is found in the possession of the grantee, as it was in the present case, even though it was subsequently placed in the joint safe deposit box of the parties thereto. Upon the death of Peter Labadie that safe deposit box and its contents were in the sole control of the plaintiff. In fact, the defendant testified that he secured the documents from the safe deposit box and actually delivered them to his mother who thereupon returned them to him. The plaintiff denied that statement, but the defendant's conduct at least recognized the right of his mother to the custody and control of those deeds. The plaintiff exercised absolute control over the property after her husband's death as previously related. She said that, prior to his death, she sold and conveyed a portion of the Butler ranch, which was included in the deed to her. A duplicate of that deed from Peter Labadie to plaintiff was prepared at his request by the notary public and executed March 5, 1924, in the presence of his wife. The plaintiff and her husband went to the office of the notary public for that express purpose. The notary public testified that it was her impression that the instruments were to be held by them in some safe place, and that the deed to the defendant was to be delivered only upon the death of the plaintiff. It was considered by every member of the family that the land belonged to the plaintiff after the death of her husband.

[2-4] When a deed to real property is found in the possession of the grantee, as was the plaintiff's deed in this case, the presumption is that it was delivered at the time of its execution. Sec. 1055, Civ.Code; Marple v. Jackson, 184 Cal. 411, 415, 193 P. 940; Stewart v. Silva, 192 Cal. 405, 221 P. 191; Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507; 9 Cal.Jur. 185, sec. 74. Possession of a deed by the grantee creates prima facie evidence of title to the land described therein in the holder of the instrument. This is true even though the deed may be thereafter placed in a joint safe deposit box of the parties, and is not recorded until after the death of the grantor who, in the meantime, exercises acts of control over the property by collecting

rent therefrom or mortgaging or conveying the real estate. Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217; In re Estate of Schmidt, 49 Cal.App.2d 86, 121 P.2d 104; Shaver v. Canfield, supra; 141 A.L.R. 312, subd. IV, note. When a deed is actually delivered to the grantee, the fact that, upon request or otherwise, it is not recorded until after the death of the grantor does not impair the validity of the instrument. Lewis v. Burns, 122 Cal. 358, 55 P. 132; Lewis v. Brown, 22 Cal.App. 38, 133 P. 331.

Under the circumstances of this case, there is ample evidence that the deed from Peter Labadie to his wife was actually delivered to her.

[5] In view of the presumption of delivery of the deed from Peter Labadie to his wife in 1918, together with the corroborating circumstances, it would have been erroneous for the court to have held that deed to be void for lack of delivery since the appellant treated that deed as valid throughout the trial, and made no attack upon it on that ground. Thomas v. Fursman, 177 Cal. 550, 171 P. 301; McDougall v. McDougall, 135 Cal. 316, 67 P. 778. See also, People v. Daniels, 25 Cal.App.2d 64, 76 P.2d 556.

[6] Provided delivery of the deed was accomplished, it is immaterial that the deed was not recorded until after the death of the grantor, or even that the purpose of the transfer was to avoid the cost and delay of probating his estate. In 1 Devlin on Deeds, 3rd ed., p. 473, sec. 284, it is said in that record:

"Whether a deed passes a title or not must be determined by its legal effect. If it has been executed and delivered its effect is determined by its language. When so executed and delivered its legal effect as to the passing of the title is not altered by the fact that one object of the transaction was to save the expense and trouble of administration upon the grantor's estate after his death. And where a grantor executed a deed for this purpose to his wife, the fact that she placed the deed after delivery where her husband equally with herself could have access to it, does not change its legal effect as a conveyance."

[7] There is also ample evidence to support the findings and judgment of the court to the effect that the deed from Peter Labadie and his wife to the defendant, dated March 5, 1924, is void for lack of delivery. The appellant asserts that his possession of that deed presumes that it was duly delivered. But this presumption is rebutted by substantial evidence to the contrary. The defendant admitted that he never saw the deed from his mother and father until he took it from the safe deposit box in 1932 just before his father's death. The defendant did not possess a joint tenancy in that box. It was not under his dominion or control. He claimed that he secured the documents at his father's request, but asserted that he brought them home and delivered them to his mother. That fact was denied by the plaintiff. There is evidence that Peter Labadie was then suffering from a severe stroke of paralysis and unable to attend to business transactions. The defendant took the instruments and placed them in his own safe deposit box in a bank in Sacramento, without the knowledge or consent of his mother. She was a co-grantor of the property described in that deed. She testified positively that she never agreed to a delivery of that deed to her son. On the contrary, she said that it was her intention and the intention of her husband that the deed to their son was not to take effect until after her death. For a period of about eight years after the death of Peter Labadie, the plaintiff used the real property described in that deed as though it were her own property, by selling and conveying a portion of it, by executing a five-year lease to one of the ranches to W. J. Parsons, and by collecting and appropriating all of the income from the property to her own use. The written instructions which accompanied the defendant's deed indicates that the title was not to pass except "in the event of our both passing away." The defendant recognized that fact by failing to claim title to the property during that period of time, by failing to record his deed for eight years, and by permitting his mother to handle the property and enjoy the proceeds therefrom as though she owned the title.

[8] The retaining of possession of the property by plaintiff and the exercising of acts of proprietorship over it by her are evidence of ownership and a lack of delivery of the deed. Donahue v. Sweeney, 171 Cal. 388, 391, 153 P. 708; 9 Cal.Jur. 189, sec. 76.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concurred.

57 Cal.App.2d 565

SNODGRASS et al. v. CRANE et al.

Civ. 6833.

District Court of Appeal, Third District, California.

March 8, 1943.

1. Easements 🔑50

Where a grant of an easement is general as to extent of burden to be imposed on servient tenement, an exercise of the right, with acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to particular course or manner in which it has been enjoyed.

2. Easements 🔑42

When an easement is created by deed, but its precise limits and location are not defined, location and use of easement by owner of dominant estate for many years, acquiesced in by owner of servient estate, will be deemed to be that which was intended to be conveyed by the deed.

3. Easements 🔑42

Where easement given grantee to take and use water from grantor's realty for household purposes was a "general easement" and not a "specific easement", in that no particular spring was specified, and in that the grant in no way defined the right so conveyed, and for a number of years grantee used water from a certain spring, grantee's right became fixed by the manner of its use, and he could not enlarge it in order to use water from other springs without consent of parties who might be affected. Civ.Code, § 806.

See Words and Phrases, Permanent Edition, for all other definitions of "General Easement" and "Specific Easement".

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action to quiet title by Benjamin A. Snodgrass and another against Clarence Crane and John Caires. From a judgment in favor of the plaintiffs, John Caires appeals.

Judgment affirmed.

Mahan & Mahan, of Eureka, and Carl L. Christensen, Jr., of Washington, D. C., for appellant.

Hill & Hill, of Eureka, for respondents.

PEEK, Justice.

From a judgment quieting plaintiffs' title to certain real property the defendant John Caires appeals. The plaintiffs' complaint is in the usual form of a suit to quiet title alleging that plaintiffs are the owners and in possession of certain ranch lands described therein. Defendant Caires answered denying the ownership of and possession by plaintiffs, particularly in regard to certain springs and the right to use water therefrom. The defendant Crane failed to answer the complaint, and his default was duly entered.

The record discloses that both of the defendants, Caires and Crane, received their respective deeds from a common grantor, one Sarah Anne Heckman Hansen. The question of priority as between these two deeds is of importance to a proper determination of this appeal, and although the record is vague as regards the date of the Crane deed we are constrained to resolve that point in accordance with the implied finding of the trial court, that as between the two, the Caires deed, dated February 28, 1932, and recorded March 3, 1932, in the office of the County Recorder of Humboldt County, was first in point of time.

The Caires deed conveyed a small parcel of land immediately adjacent to the Crane property but some distance removed from the Snodgrass property, together with the "right to take and use water for household purposes, in common with all other persons who now have or may hereafter acquire the right to take or use water from water springs upon the lands of the grantor, and the right to enter upon said lands and lay water pipes for conducting water to the land herein described."

It should be noted first, that the easement created by the grant was general and not specific, in that no particular spring was specified, nor did the grant in any way define the right so conveyed. The only specific reservation of described springs is found in the deed from the successors in interest of plaintiffs' grantor dated July 2, 1934. The record also discloses that appellant has taken water continually since 1932, the date of his deed, from a spring located on the premises now owned by defendant Crane. The water from this spring was apparently ample for appellant's "household use," for at no time did appellant go on plaintiffs' land for the purpose of obtaining water nor has the appellant so contended. Nowhere in the record do we find that there was a deficiency of water from said spring or that appellant needed more water than said spring supplied.

The sole question for determination then is: Did the easement created in the Caires deed become fixed by use?

It is contended by plaintiffs that even if that question were resolved in the negative yet their complete occupancy of the land to the exclusion of all others, including fencing the property, use of the springs and payment of all taxes, and the complete failure of appellant to assert his right, if any, to the springs, then, nevertheless, such uncontradicted facts result in perfecting their claim in adverse possession. However, our disposition in regard to the first question stated makes unnecessary any determination of such contention by plaintiffs.

Section 806 of the Civil Code provides that "the extent of a servitude is determined by the terms of the grant."

[1] We are entirely in accord with the rule enunciated in the case of Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 192, 5 L.R.A.,N.S., 851, 7 Ann.Cas. 851, 113 Am.St.Rep. 349, wherein we find a somewhat similar situation to what confronts us in the instant case. There, pursuant to a grant to lay "pipes" the city installed and used a "pipe" for a number of years. The reviewing court held that it could not now lay a larger pipe over a different route, and that the grant was indefinite as to number, size and location of the "pipes," and the "city, having elected to lay one, is bound by this election." The court, further amplifying its statement, said: "* * * where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed."

[2] In a case closely parallel to the present controversy, Kesseler v. Bowditch, 223 Mass. 265, 111 N.E. 887, the court therein said: "It is well settled that when an easement is created by deed, but its precise limits and location are not defined, the location and use of the easement by the owner of the dominant estate for many years, acquiesced in by the owner of the servient estate, will be deemed to be that which was intended to be conveyed by the deed. Jennison v. Walker, 11 Gray 423, 426; Bannon v. Angier, 2 Allen 128; Dyer v. Sanford, 9 Metc. 395, 402, 43 Am.Dec. 399."

[3] The appellant exercised the right granted him by deed by electing to take from a particular spring, which spring was at that time located on premises of his grantor. Therefore his right, although not limited by the grant, became fixed by the manner of its use, and he cannot enlarge it now without the consent of all of the parties who may be affected. This qualification he has not met, and therefore he is bound by his original election. Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 429, 90 P. 1053, 13 L.R.A.,N.S., 904; Kern Island Irr. Co. v. City of Bakersfield, 151 Cal. 403, 90 P. 1052; Vestal v. Young, 147 Cal. 715, 718, 82 P. 381.

The judgment is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.

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57 Cal.App.2d 563

BLANKINSHIP v. OAKLEY.

Civ. 13990.

District Court of Appeal, Second District, Division 2, California.

March 8, 1943.

Hearing Denied May 7, 1943.

1. Bankruptcy 🔑425

Where creditor has actual notice of pendency of debtor's bankruptcy proceedings within time to file his claim against bankrupt's estate, and he fails to do so, notwithstanding his claim has not been duly scheduled by debtor, discharge in bankruptcy releases debtor from his obligations. Bankr.Act § 17, sub. a(3), 11 U.S.C.A. § 35(3).

2. Bankruptcy 🔑425

A judgment debtor's discharge in bankruptcy precluded issuance of execution on judgment, notwithstanding that in bankruptcy schedules judgment debtor listed a judgment obtained against him by "J. B.

Blankenship", whereas judgment creditor's name appeared in judgment as "J. D. Blankinship", where judgment creditor had actual notice of pendency of bankruptcy proceedings. Bankr.Act § 17, sub. a(3), 11 U.S.C.A. § 35(3).

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge Assigned.

Action by J. D. Blankinship against E. B. Oakley. From an order directing that a writ of execution issue more than five years after the entry of judgment against defendant, defendant appeals.

Reversed with directions.

M. R. Stansell, of Hollywood, for appellant.

Samuel A. Rosenthal, of Los Angeles, for respondent.

McCOMB, Justice.

From an order directing that a writ of execution issue pursuant to the provisions of section 685 of the Code of Civil Procedure more than five years after the entry of judgment, defendant appeals.

So far as material here, these are the undisputed facts:

March 26, 1928, plaintiff obtained a judgment against defendant for the sum of $3,188. June 3, 1928, plaintiff caused a writ of execution to be issued, which on June 16, 1931, was returned to the county clerk wholly unsatisfied. October 1, 1929, defendant filed a petition and schedules in bankruptcy in the United States District Court, in which schedules he listed a judgment, obtained against him by J. *B.* Blan*ken*ship. In the judgment which plaintiff obtained against defendant, plaintiff's name appeared as J. *D.* Blank*in*ship. Thereafter defendant was duly adjudicated a bankrupt. Subsequently and before the expiration of the time for filing claims against the bankrupt estate had elapsed plaintiff contacted defendant and stated that he would be willing to settle the judgment scheduled in the bankruptcy proceedings for $100. March 3, 1930, defendant was by the bankruptcy court discharged from all debts and claims which were provable against his estate. More than five years after the entry of the original judgment plaintiff made a motion pursuant to the provisions of section 685 of the Code of Civil Procedure for the issuance of a writ of execution, which motion was granted July 15, 1942.

This is the sole question necessary for us to determine:

Did the discharge of defendant in bankruptcy constitute a bar to the present proceeding?

This question must be answered in the affirmative. Section 17, sub. a, of the Federal Bankruptcy Act reads in part thus: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (third) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." 11 U.S.C.A. § 35, subd. (3).

[1, 2] From the foregoing provision in the Bankruptcy Act, it is clear that, where the creditor has actual notice, as in the instant case, of the pendency of bankruptcy proceedings within time to file his claim against the bankrupt's estate, and he fails to do so, even though his claim has not been duly scheduled by the bankrupt, nevertheless the discharge in bankruptcy releases the debtor from his obligation. (See Ray v. Schubach, 10 Cal.App.2d 122, 123, 50 P.2d 1073.)

For the foregoing reasons the order is reversed with directions to the trial court to enter an order denying plaintiff's motion.

MOORE, P. J., concurred.

W. J. WOOD, Justice.

I concur in the judgment. I am not in accord with the implied holding of the majority opinion that, on the facts stated in the opinion, defendant did not list plaintiff's judgment in the bankruptcy proceedings in such manner as to effectuate a release thereon. Since plaintiff had actual notice of the bankruptcy proceedings the point becomes of slight, if any, importance.

57 Cal.App.2d 499

MASTRO v. KENNEDY et al.

Civ. 3018.

District Court of Appeal, Fourth District, California.

March 3, 1943.
Rehearing Denied April 1, 1943.
Hearing Denied April 29, 1943.

1. Trial ⚿165

On motion for nonsuit all evidence favorable to plaintiff's case must be accepted as true and all reasonable inferences from evidence must be drawn in plaintiff's favor, and it is error to grant motion where there is any substantial evidence or reasonable inferences to be drawn from it which would support judgment for plaintiff.

2. Appeal and error ⚿989

In determining whether trial court properly granted defendant's motion for nonsuit, reviewing court summarized evidence favorable to plaintiff and disregarded other conflicting evidence.

3. Physicians and surgeons ⚿15

The failure of dentist to take or recommend that X-ray be taken of aching tooth and jaw and to sterilize gums before inserting hypodermic needle and pulling tooth, as standard of practice of dentistry in the location required rendered dentist liable for gum infection subsequently sustained by patient if dentist's failure was proximate cause of infection.

4. Negligence ⚿134(11)

Negligence of a defendant need not be established as the "proximate cause" of an injury with such absolute certainty as to exclude every other conclusion, and it is sufficient if there is substantial evidence on which reasonably to support the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

5. Evidence ⚿20(1)

The court will take judicial knowledge of necessity to use ordinary care to procure sterilization of needle and flesh into which it is inserted, in administering local anesthetic for purpose of extracting tooth.

6. Physicians and surgeons ⚿18(8)

Where results of negligence on part of dentist are peculiarly within the knowledge of experts, the testimony of experts is a necessary element of plaintiff's case.

7. Evidence ⚿20(1)
Physicians and surgeons ⚿18(9)

The danger of infection from an unsterile instrument or a dirty field of operation is a matter of such common knowledge that a jury is authorized to draw inference that an infection was caused by negligence if an unsterile instrument was used or the operative field was not properly sterilized.

8. Physicians and surgeons ⚿18(9)

Whether dentist's failure to take X-ray of aching tooth and jaw and failure to sterilize gums before inserting hypodermic needle and pulling tooth was the "proximate cause" of jaw infection from which the patient thereafter suffered, was for jury.

◆

Appeal from Superior Court, Fresno County; Frank Lamberson, Judge assigned.

Action by Nettie Mastro against Dr. J. B. Kennedy and another, for malpractice. From an adverse judgment the plaintiff appeals.

Reversed.

Rae B. Carter and John B. Chinello, both of Fresno, for appellant.

Hadsell, Sweet, Ingalls & Carroll, of San Francisco, and W. H. Stammer and Galen McKnight, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment for defendants in a malpractice case, entered after a motion for nonsuit had been granted.

Defendants are duly licensed dentists who were practicing in the city of Fresno. Dr. Marquess was employed by Dr. Kennedy who was absent from his office on the occasions involved here. The services rendered plaintiff were performed by Dr. Marquess within the scope of his employment by Dr. Kennedy. We will hereafter refer to Dr. Marquess as the defendant.

[1, 2] It is well settled that where a motion for nonsuit is made, all evidence favorable to plaintiff's case must be accepted as true; that all reasonable inferences from the evidence must be drawn in favor of plaintiff; that it is error to grant the motion

where there is any substantial evidence or reasonable inferences to be drawn from it which would support a judgment for plaintiff. For this reason we will summarize the evidence favorable to plaintiff and disregard other evidence conflicting with it. Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059.

Plaintiff called at the office of defendant on July 22, 1938. She was then suffering from a toothache. After examination defendant found a deep carious condition in the next to the last molar on the left side of the lower jaw. He cleaned the cavity and put in a temporary filling. He instructed plaintiff to return in four days, or sooner if she suffered any pain.

Plaintiff returned to her home, became feverish and suffered such pain that she was confined to her bed. She was taken to defendant's office on July 25, 1938, when defendant extracted the tooth. He testified there was no infection on the tooth nor in the sockets from which it was extracted. He gave plaintiff two injections of cocaine before the extraction. One was to effect a mandible block, and the other was in the tissues adjoining the tooth. He sutured the gums and instructed plaintiff to wash her mouth with warm salt water and to apply ice packs.

Plaintiff testified that defendant did not apply iodine or any other solution to her gums before injecting the cocaine or extracting the tooth; that he did not take, nor recommend the taking of an X-ray of her teeth.

Plaintiff returned to her home and again had to go to bed. She was taken to defendant's office again on July 26, when she received treatment. Her jaw was swollen and she was suffering much pain. She was returned to her home and put to bed. Her condition became worse and the family physician was called. He found her temperature above normal and her jaw infected. He gave her medicine and treatments which improved her condition so that she was taken to see defendant again on July 30. Defendant advised her to consult a specialist. She was taken to the office of the specialist by Dr. Kennedy's nurse and hospitalization was advised. She remained in the hospital for fourteen days, during the first four of which she was in a semicomatose condition. An abscess formed inside the lower jaw beneath the sockets from which the tooth had been extracted, and another under the chin. These were opened from the outside and drained. The gum was also lanced and drained.

After her discharge from the hospital plaintiff remained under the care of the family physician until the following December. In January, 1939, she was sent to the University of California Hospital in San Francisco. She was found to have chronic osteomyelitis of the left mandible. As no bed was available in the hospital she was sent home. She returned to the hospital on March 23, 1939, and an operation was performed on March 27. The doctor opened up the old incision under the jaw and removed bone and granular substances and also went through the gum, removed bone and curetted the sockets. Plaintiff remained in the hospital until April 6, and was discharged from treatment on April 9. She returned to the Hospital Clinic several times. On December 7, 1939, it was found that another abscess was forming. As no bed was vacant in the hospital she returned home and had treatment in Fresno where the abscess was drained. Her last treatment mentioned in the record was in July, 1940.

Plaintiff produced a witness, a dentist practicing in Fresno, who qualified as an expert. He testified as to the standards of the practice of dentistry prevailing in Fresno. He also testified that according to those standards defendant should have had an X-ray taken before extracting the tooth and should have applied iodine or some other disinfectant to the gums before inserting a hypodermic needle in them and extracting the tooth.

Since we must accept as true any substantial evidence tending to support a judgment for plaintiff, where a motion for nonsuit is granted, we must take the following facts as established in this case: That the standards of practice of dentistry in Fresno required that defendant have an X-ray taken or at least to have recommended that an X-ray be taken of the aching tooth and jaw, and also that he sterilize the gums before inserting the hypodermic needle and pulling the tooth; that he did neither of these things and therefore did not employ the training, care and skill required of dentists of good standing practicing in the community. Patterson v. Marcus, 203 Cal. 550, 265 P. 222; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; McLennan v. Holder, 1 Cal.App.2d 305, 36 P.2d

448; McNamara v. Emmons, 36 Cal.App. 2d 199, 97 P.2d 503. If this failure on the part of defendant was the proximate cause of the infection from which plaintiff suffered the nonsuit was erroneously granted.

We may also accept as established facts, that immediately after the extraction there was no infection on the roots of the tooth nor in the sockets; that a serious infection set in which caused plaintiff much suffering and expense over a period of two years.

[3-5] The case of Barham v. Widing, 210 Cal. 206, 291 P. 173, 177, has features quite similar to those of the instant case. There, a dentist was accused of malpractice because he failed to sterilize the hypodermic needle used in injecting an anesthetic, and to sterilize the gums before extracting a tooth. In that case the Supreme Court said:

"Under the circumstances of this case there is a remote possibility that the infection developed from some cause other than the defendant's failure to sterilize the needle or the gum into which it was inserted, but the evidence is sufficient upon which to warrant the jury in finding that it was caused by his negligence in failing to follow these reasonable precautions in spite of his testimony to the contrary. The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary. After the verdict of a jury has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof. As the court says in the case of Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312:

"'If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.'

"It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. Ley v. Bishopp, 88 Cal.App. 313, 316, 263 P. 369. * * *

"It was not necessary for any dentist or physician to state that the conduct of the defendant was negligent or in conflict with the usual established practice of the profession in that vicinity to administer a local anesthetic for the purpose of extracting a tooth without sterilizing the needle or the flesh into which it is inserted. The court will take judicial knowledge of the necessity to use ordinary care to procure sterilization under such circumstances." See, also, Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905; Anderson v. Stump, 42 Cal.App.2d 761, 109 P.2d 1027; Pierce v. Paterson, 50 Cal.App. 2d 486, 123 P.2d 544.

Defendants seek to distinguish the instant case from the Barham case, because there, the infection started from the exact spot of the injection, while in this case it was in the general locality but not necessarily in the exact spot of the injections. This distinction is too tenuous to be sound. Here, the infection was in the region where the needle pierced the unsterilized gums, and the reasonable inference might follow, if drawn by the jury, that a germ on the unsterile gums was carried into the tissue on the needle and caused the infection. The result of an unsterile condition is a matter of common knowledge under the cases already cited.

Defendants argue that, assuming the failure to conform to the standards of good practice of dentistry in Fresno, still there is nothing to establish this lack of care as the proximate cause of the infection. The same argument was made and rejected in Barham v. Widing, supra.

A like argument was advanced by the defendant in Dimock v. Miller, 202 Cal. 668, 262 P. 311, where a dentist was accused of malpractice in failing to sterilize his needle before giving a hypodermic injection and in using impure water in the solution injected. It was held that a plaintiff was not required to exclude all factors, other than those mentioned, as causes of the infection.

[6, 7] Where the results of negligence on the part of a physician or dentist are peculiarly within the knowledge of experts, the testimony of those experts is a necessary element of a plaintiff's case. The danger of infection from an unsterile instrument, or a dirty field of operation, is a matter of such common knowledge that a jury is authorized to draw the reasonable inference that an infection was caused by negligence where an unsterile instrument is used, or the operative field is not properly sterilized. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695; Barham v. Widing, supra; Nicholas v. Jacobson, 113 Cal. App. 382, 298 P. 505.

In Roberts v. Parker, 121 Cal.App. 264, 8 P.2d 908, 910, a dentist was sued for malpractice where osteomyelitis of the jaw bone set in after an operation where no X-ray had been taken to determine the condition of the field of operation. Experts testified that under the standards of good practice prevailing in the community an X-ray should have been taken before the tooth was extracted. There was evidence introduced on behalf of the defendant tending to prove that the disease had its source other than in the extraction of a tooth. It was argued that there was nothing to show that the failure to use due care on the part of the dentist was the proximate cause of the osteomyelitis. In disposing of this argument the court said: "Therefore, if in spite of the testimony tending to show a different origin of the disease there be testimony to sustain the opposite conclusion which has been reached by the jury, its verdict must be sustained. In other words after the verdict of the jury has been fairly rendered, all the circumstances of the case, together with any reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Barham v. Widing, supra. Measured by the foregoing rules, the circumstances of the present case are legally sufficient to sustain the jury's verdict. Dimock v. Miller, supra; Barham v. Widing, supra; Ley v. Bishopp, supra." A like rule must be invoked when the trial court grants a motion for nonsuit.

[8] We have reached the conclusion that there is some substantial evidence in the record, and reasonable inferences to be drawn from such evidence, pointing to the lack of due care on the part of defendant being the proximate cause of the disease suffered by plaintiff. It follows that questions of fact were presented for decision by the jury and that the motion for nonsuit was improperly granted.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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57 Cal.App.2d 582

SAWYER v. SAWYER.

Civ. 13953.

District Court of Appeal, Second District, Division 2, California.

March 9, 1943.

1. Divorce 🔑309

In hearing on motion for modification of divorce decree as to support of minor children, court properly received evidence concerning transactions between the parties subsequent to the divorce, whereby husband turned over to wife the custody of their minor children and at the same time deeded to wife the former home of the parties, which wife thereafter sold.

2. Divorce 🔑308

Amount to be ordered to be paid for the support of the minor children of divorced parties was within sound discretion of trial court.

3. Divorce 🔑308

There is no fixed rule for determining amount which should be ordered for the support of minor children of divorced parties, but the varying circumstances of the parties must always be considered in determining the proper order to be made.

4. Divorce 🔑312

Appellate court in reviewing order for the support of minor children of divorced parties is limited to question whether trial court abused its discretion in making the order appealed from.

5. Divorce 🔑309

Where, subsequent to divorce, former husband, who had been granted custody of minor children of the parties, agreed to turn the children over to the wife and had deeded to the wife the former home of the parties which wife thereafter sold for $2250, and combined income of wife and wife's second husband was greater than income of the former husband, refusal to order former husband to pay more than $10 for support of the children, aged 12 and 14 years, was not an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Vivian B. Sawyer against Leo E. Sawyer for divorce, wherein judgment was for plaintiff. From part of a subsequent order by which defendant was ordered to pay plaintiff $10 a month for the support of the two minor children of the parties, plaintiff appeals.

Affirmed.

James V. Brewer, of Los Angeles, for appellant.

James A. Miller, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff has appealed from that part of an order made on July 1, 1942, by which defendant was ordered to pay to her $10 per month for the support of the two minor children of the parties, claiming that the court abused its discretion in not ordering a greater sum.

The parties were divorced in March, 1934, and at that time a court order was made awarding the custody of the minors to defendant. By mutual agreement plaintiff took the custody of the children in January, 1935, and has retained custody since that time. Both of the parties remarried and at the time of the order from which this appeal is taken they were respectively living with their new spouses. At the time of the hearing the two children, both boys, were of the ages of twelve and fourteen years.

The case is before us upon a bill of exceptions wherein the testimony set forth is very meager. It appears therefrom that prior to the divorce defendant had purchased a home, and in the settlement agreement which had been approved by the court it was required that the home be kept for the children; that when plaintiff took custody of the children the home was turned over to her, defendant making all payments thereon until 1939. At that time there was due upon the home the sum of $875, but plaintiff increased the indebtedness in the sum of $500. A few months later defendant gave to plaintiff a deed to the house and she agreed to assume the indebtedness. Soon thereafter plaintiff, without notifying defendant, sold the house for $2,250. She testified that she sold it to liquidate "debts on the house and things of that kind" and that she realized from the sale about $400 in cash. It further appears from the testimony that plaintiff is now earning the sum of $120 per month and that her husband is earning $160 per month. Defendant earns the sum of $237 per month. His wife is not gainfully employed. For some time before the hearing defendant had been paying to plaintiff the sum of $10 per month for the support of the children. The court awarded the custody of the minors to plaintiff and ordered defendant to continue making the same payments as formerly and also ordered him to pay the sum of $15 as attorney's fees.

[1] We cannot sustain plaintiff's contention that the court erred in receiving evidence concerning the transactions between the parties with respect to the home place which was deeded to plaintiff and by her sold. The court was being called upon to modify the decree which had been entered in 1934, and in passing upon the request it was the duty of the court to take into consideration all of the circumstances surrounding the parties which had any bearing upon the custody of the minors or the proper amount to award for their support and especially any new circumstances which had arisen since the entry of the divorce decree. It was proper for the court to consider that the custody of the minors had been changed by mutual consent and that defendant had made provision for them by deeding the home property to plaintiff and by making the payments to her. It was also proper to consider whether plaintiff had sold the property and what she had realized from the sale.

[2-5] It was within the sound discretion of the court to determine the amount which should be ordered for the support of the minor children. Adams v. Adams, 2 Cal.App.2d 173, 37 P.2d 729. No fixed rule can be set by the court to be followed in all cases of this kind but the varying circumstances of the parties must always be given consideration in determining the proper order to be made. In the present case the

court undoubtedly took into consideration the fact that plaintiff had sold the residence which had been deeded to her to assist in the support of the children, that the income of plaintiff and her husband is greater than that of defendant and that the minors are at an age when they soon will be able to earn something toward their own support. It was for the trial court, and not the reviewing court, to exercise its discretion and fix the proper amount to be paid for the support of the minors. The reviewing court is limited to the question whether the trial court abused its discretion in making the order from which the appeal is taken. The circumstances of the present case do not show an abuse of discretion on the part of the trial court.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

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57 Cal.App.2d 214

McKELVEY et al. v. RODRIQUEZ et al.

Civ. 13907.

District Court of Appeal, Second District, Division 1, California.

Feb. 19, 1943.

Rehearing Denied March 20, 1943.

Hearing Denied April 19, 1943.

1. Ejectment 🔑102

An action in ejectment may be the means of trying title, where either party bases his right upon some claim of title.

2. Judgment 🔑747(1)

A judgment in ejectment becomes "res judicata" on question of title to the extent that an adjudication of title as a right to possession was essential to judgment, but not otherwise.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Vendor and purchaser 🔑299(1)

Where plaintiffs in ejectment action against daughter of deceased purchaser of realty under land contract and daughter's husband had, in effect, waived strict performance of contract and were basing action on defendants' failure either to pay balance due or to give up possession of the property, interest of defendants was separable from that of purchaser's other heirs, and such heirs were not "indispensable parties" to the action.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Party".

4. Parties 🔑18, 29

Where plaintiff seeks some type of affirmative relief which, if granted, would injure or affect interests of a third person not joined, that third person is an "indispensable party", but persons who might possibly be affected by decision, or whose interests are such that it cannot be finally and completely settled without them, although decree may be rendered between parties before court without affecting them, may be "necessary parties" to complete settlement, but are not "indispensable" to judgment in particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

5. Parties 🔑78, 82

To constitute defense to action on ground of nonjoinder of parties, such parties must be "indispensable parties".

6. Parties 🔑84(3)

Where persons whom defendants claimed should have been joined as parties defendant were not indispensable parties, and it did not appear that any motion was made to bring them before court as necessary and proper parties, demurrer to defense of nonjoinder was properly sustained and court's discretion was not invoked.

7. Limitation of actions 🔑19(1)

Where neither purchaser nor her daughter and husband, who occupied property after purchaser's death had complied with all terms of land contract, vendor's successors in interest were entitled to maintain ejectment action, since they were "seised" of property within codal provision that no action for recovery of real property could be maintained unless plaintiff was seised or possessed of property within preceding five years. Code Civ.Proc. §§ 318, 321.

See Words and Phrases, Permanent Edition, for all other definitions of "Seise".

8. Adverse possession ⚷86

Where vendor's successors in interest appeared to have paid all taxes subsequent to purchaser's death, that fact alone was sufficient to defeat claim of adverse possession set up by purchaser's daughter and her husband who had occupied property subsequent to purchaser's death. Code Civ.Proc. § 325.

9. Limitation of actions ⚷195(1)

Where land contract had not been complied with, vendor's successors in interest, as owners of legal title, were entitled to presumption of possession within codal provision that in action for recovery of realty or possession thereof person establishing legal title would be presumed to have been possessed thereof within time required by law. Code Civ. Proc. § 321.

10. Appeal and error ⚷1071(6), 1122(2)

Where trial court in ejectment action found that defendants had refused to pay balance due on land contract and that an estate was owner and entitled to possession of property, contention that court refused to make proper finding of possession on the part of executors of estate was without merit, since, if findings were defective or incomplete, reviewing court would be justified in making additional findings. Code Civ.Proc. § 956a.

11. Ejectment ⚷111(4)

In ejectment action against daughter of deceased purchaser and daughter's husband who were in possession of property, court was not required to make any finding as to interest of purchaser's other heirs, since their interest was not directly involved.

12. Vendor and purchaser ⚷299(4)

In ejectment action against daughter of purchaser of property and daughter's husband, findings were not subject to objection that there was no finding of when default occurred, where there was at least an implied finding that it occurred when defendants failed to pay balance due under land contract or give up possession of property.

13. Ejectment ⚷132

$337.50 damages in ejectment for withholding property having reasonable rental value of $15 per month was proper where defendants were found to have wrongfully withheld property from June 1, 1940, and findings and conclusions were dated April 24, 1942. Civil Code, §§ 3283, 3334.

14. Ejectment ⚷132

Damages in ejectment run from time of ouster, if not prior to accrual of plaintiff's right, through period of withholding, and up to time of rendition of judgment, except during any period when defendant's possession was by permission of plaintiff, and not exceeding five years next preceding commencement of action. Civ.Code, §§ 3283, 3334.

15. Vendor and purchaser ⚷299(3)

In ejectment action by vendor's successors in interest, conflicting evidence warranted finding that there was still a balance due on land contract and furnished no basis for objection to findings on subject of taxes, special assessments, and insurance based upon assumption that nothing was due under contract after purchaser's death.

16. Vendor and purchaser ⚷299(1)

The daughter of purchaser of property and daughter's husband who were defendants in ejectment action could not defeat the action on ground that they were strangers to land contract and that effort was being made to forfeit contract because of breach committed by strangers, where they admitted they entered into possession of property as successors in interest to purchaser.

◆

Appeal from Superior Court, Los Angeles County; H. C. Shepherd, Judge pro tem.

Suit by D. Paul McKelvey and others, as executors of the estate of Etta Goss McKelvey, deceased, against John Rodriquez and others, to recover in ejectment the possession of property. Judgment for the plaintiffs, and the defendants appeal.

Judgment affirmed.

Edwin J. Miller, of Los Angeles, for appellants.

Merriam, Rinehart & Merriam and Harvey M. Parker, all of Pasadena, for respondents.

DORAN, Justice.

This appeal is taken from a judgment awarding respondents recovery from appellants of immediate possession of a certain piece of real property in the city and county of Los Angeles, together with damages for the withholding thereof and costs of suit. Appellant Henrietta Rodriquez is one of twelve children of Merced Castaneda, deceased, who in her lifetime and on January 2, 1923, entered into a written contract for the purchase of the real property in question with Berry McKelvey as seller, owner of the property and predecessor in interest of respondents. The contract for the purchase of the real property provided for a total purchase price of $1,700, payable $100 down, with monthly payments of $15 thereafter until the principal sum was fully paid with interest thereon at the rate of seven per cent per annum, which interest was payable monthly. Taxes, assessments and other such charges were to be paid by the purchaser and the purchaser was to keep the property insured in the interest of the seller. The contract was to be forfeited by the purchaser upon failure to comply with the terms thereof. No provision was made for the delivery of a deed to the purchaser until all payments had been made under the contract. Merced Castaneda died about the year 1935. There has been no administration of her estate. At the time of the present action the property was occupied by Henrietta Rodriquez as her residence with her husband John Rodriquez.

The present action is the third suit brought against appellants by respondents seeking possession of the real property in question. It does not appear that respondents in any of these actions have attempted to join the other children and heirs of Merced Castaneda, deceased. About June 13, 1940, respondents instituted an action in unlawful detainer against appellants in the Municipal Court of the City of Los Angeles. The action resulted in a judgment for appellants. On February 7, 1941, respondents filed in the Superior Court of Los Angeles County a complaint to quiet title to the property against appellants. This action resulted in a nonsuit.

The complaint in the present action is denominated one in ejectment and the prayer is for restitution of the real property and for the sum of $215 damages for the withholding thereof. The complaint alleges that the plaintiffs (respondents) are the duly appointed, qualified and acting executors of the will and estate of Etta Goss McKelvey, deceased. That the said Etta Goss McKelvey died on or about the 26th day of November, 1935; and that her estate is the owner and entitled to possession of that certain real property here in question. The complaint then alleges the execution of the contract for the sale of the said property, between Berry McKelvey and Merced Castaneda, the terms of which have been outlined above. A copy of the contract is annexed to the complaint as an exhibit. The occupancy and possession of the property by appellant Henrietta Rodriquez, daughter of Merced Castaneda, and of said appellant's husband, claiming as successors in interest of Merced Castaneda under said agreement of sale, after the death of Merced Castaneda, is set forth in the complaint. It is then alleged that the entire balance of the purchase price of said real property is, by the terms of said agreement now due and payable, but that defendants (appellants) and each of them has failed and refused, and still fail and refuse to comply with said agreement in that they have failed and refused to pay the balance of the purchase price in amount of $1,581.99, together with interest thereon at the rate of seven per cent per annum from November 1, 1940. It is alleged that no part of said balance has been paid. The complaint also alleges appellants' failure and refusal to pay principal and interest on a street bond assessment levied after the making of said agreement of sale, in the amount of $95.78 and the failure and refusal of appellants to maintain fire insurance on the property, as required by the terms of the contract of sale. It is also alleged that appellants received a notice in writing of the restoration of the right of forfeiture under the contract of sale, a copy of which notice is also annexed to the complaint as an exhibit. The notice bears date of November 15, 1940, and recites that appellants are required thereby, within sixty days from the date of the service upon them of said notice, to pay all sums of principal and interest due and payable under the terms of the contract, together with the sum of $279.91 paid out by respondents for taxes, assessments and insurance on said real property during the years 1935 to 1940 inclusive, under penalty of a declaration of forfeiture of appellants' rights under said contract. The complaint in the present action was filed August 13, 1941. Respondents also allege that they demanded of appellants possession of said real property in the month of May, 1940, and again on August 4, 1941, but that appellants have failed and refused to allow respondents to enter into possession of the property.

Appellants by their answer deny that the estate of which respondents are executors is the owner and entitled to possession of the real property in question; and while appellants do not claim full performance of the terms of the contract on the part of the purchaser or her successors in interest, appellants set up the defense of the statute of limitations as embodied in section 318 of the Code of Civil Procedure, also invoke the provisions of section 337 of the Code of Civil Procedure, and claim title in themselves by adverse possession, as well as by virtue of the right of succession of appellant Henrietta Rodriquez as an heir of her mother, Merced Castaneda, and as assignees of a one-half interest of one of the other heirs. One of appellants' separate defenses is the nonjoinder of the other surviving children of Merced Castaneda as necessary parties. A demurrer to this latter defense was sustained without leave to amend. A demurrer to a separate defense based on the bar of the judgment in the unlawful detainer action, mentioned above, was also sustained without leave to amend. The judgment of nonsuit in the action to quiet title is also pleaded as a bar to the present action. Appellants point out in their answer that no administrator of the estate of Merced Castaneda has been appointed and claim a nonjoinder of necessary parties for failure to name the administrator of said estate as a defendant. After a trial without a jury the court found for respondents and awarded them judgment as already mentioned.

Appellants' principal contention on appeal is concerned with the asserted nonjoinder of necessary parties and is based upon the claim that the other heirs of Merced Castaneda were indispensable parties to the action. Appellants argue that the present suit, though in the form of an action in ejectment, in reality is one to try the question of title based on the contract of purchase, and the judgment of the court, deciding in effect that the contract was in default, necessarily affected the claim of all the heirs to the property.

[1-3] It is true that an action in ejectment may be the means of trying title, where either party bases his right upon some claim of title. Craviotto v. All Persons, 93 Cal.App. 346, 352, 269 P. 760. It must be borne in mind, however, that in such case "the judgment becomes res judicata to the extent that an adjudication of it [title as a right to possession] was essential to the judgment, but not otherwise." See Craviotto v. All Persons, supra, 93 Cal.App. at page 352, 269 P. at page 762. It is apparent therefore that unless adjudication of the title or claim of the other children of Merced Castaneda was essential to the judgment in the present action, that judgment could not constitute a bar to any subsequent claim to the property asserted by the heirs who were not parties to the present suit. An analysis of the situation here presented demonstrates that the question of appellants' claim to the property is separate and distinct from that of the claim of the other heirs, and that an adjudication of appellants' claim to possession of the property under the present action in no way affects the claim of any of the other heirs.

The complaint herein is one to recover possession of the real property because of the failure of appellants to complete the performance of the contract for the purchase of the property, as successors in interest of the purchaser. The complaint is predicated upon a demand made upon appellants for performance and the refusal of appellants to comply with that demand. By serving upon appellants a written notice of "restoration of forfeiture" respondents virtually admitted that strict performance of the terms of the contract had theretofore been waived. However, it was respondents' contention that the contract had not been fully performed, that there was still a balance due thereunder; and since appellants were occupying the property as successors in interest of the purchaser, and the time for full performance under the terms of the contract had expired, respondents notified appellants that they would require appellants to pay the balance due under the contract or forfeit appellants' rights under the said contract. In simpler language, if appellants desired to continue occupation of the premises and enjoy possession thereof, they would have to pay the balance due therefor under the terms of sale. Respondents allege in their complaint that appellants failed and refused to pay the balance or to give up possession of the property. The default upon which this action is based is necessarily that of appellants in failing to pay the balance due upon demand therefor. This default was not related to any past defaults under the terms of the contract, which respondents or their predecessors may have waived. Appellants had been asked to pay up the balance due on the property or give up possession thereof, and their failure and refusal to comply had nothing to do with the interest or rights of any of the other successors in interest of Merced Castaneda. As heirs at law the children of Merced Castaneda held their interest as tenants in common, not jointly; and the notice given could only bind those who received it. The adjudication in the present case was not in effect an adjudication that the contract was in default for failure of the purchaser or her successors to perform the terms thereof, but was merely an adjudication of appellants' default in refusing to pay the balance claimed to be due, upon demand therefor. The other heirs and successors are not precluded thereby from taking advantage of any waiver of performance of the terms of the contract. It is thus demonstrated that the interest of appellants is separable in this respect from that of the other heirs.

[4] Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, at page 522, 106 P.2d 879, at page 883, makes clear the distinction between "necessary" and "indispensable" parties. "Where * * * the plaintiff seeks some * * * type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined that third person is an indispensable party. Thus, in an action by a lessor against a sublessee to forfeit a parent lease because of acts of the sublessee, the sublessors (original lessees) were indispensable parties, since a decree of forfeiture would deprive them of their lease. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 262, 73 P.2d 1163. And in a suit to cancel illegal registration of voters, all voters whose registration was challenged were indispensable parties. Ash v. Superior Court, 33 Cal.App. 800, 166 P. 841. * * *

"All of these persons are, of course, 'necessary' parties, but the decisions show that they come within a special classification of necessary parties, to which the term 'indispensable' seems appropriate. An attempt to adjudicate their rights without joinder is futile. * * *

"The other classification includes persons who are interested in the sense that they might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before the court without affecting those others. These latter may perhaps be 'necessary' parties to a complete settlement of the entire controversy or transaction, but are not 'indispensable' to any valid judgment in the particular case."

Such is the situation presented here. The entire controversy existing between respondents and the heirs at law of Merced Castaneda is not settled by the suit in ejectment against appellants. It has merely been determined that if appellants desire to occupy and enjoy the premises they must pay the balance due on the purchase thereof. The status of the contract and any waiver of strict performance of its terms, with relation to the other heirs, remains undetermined and unaffected by the judgment in the present action. The facts in Bank of California, Nat. Ass'n v. Superior Court, supra, are analogous to those presented here. In that case an action was brought to enforce the provisions of an alleged contract by which decedent agreed to leave her entire estate to the plaintiff. The complaint named as parties defendant the executor and all of the beneficiaries under the will, and prayed for a decree adjudging that plaintiff was, by virtue of the agreement, the owner of the entire estate of the decedent after payment of debts and expenses. However, all of the defendants were not served and only those served appeared. At the opening of the trial a motion was made under section 389 of the Code of Civil Procedure for an order to bring in the other defendants, and to have summons issued and served upon them. The motion was made on the ground that all the other defendants were "necessary and indispensable parties" to the action, and that the court could not proceed without them. The motion was denied by the court and an application was then made for a writ of prohibition to restrain the trial until these other parties should be brought in. The matter came before the Supreme Court upon the application for the writ. It was there held that the action in such a case is against the distributee personally and not against the estate and that each distributee is individually held as a constructive trustee solely of the property which came to him, and none is interested in the granting or denial of similar relief as to any other. It was accordingly decided that the defendants not served were not indispensable to a disposition of the case against the parties before the court, though these other defendants were necessary parties in the sense that the main issue, the validity of the testamentary disposition of the property of decedent, affects their property interests, and the entire matter, the disposition of all of the decedent's property, cannot be finally settled without a binding adjudication for or against every legatee or devisee. It should also be pointed out that the Supreme Court arrived at its decision through a holding that the action by the promisee under the alleged agreement was in effect one to impose a constructive trust upon any particular property in the hands of the individual distributee. Since the case was before the Supreme Court on an application for a writ of prohibition the court expressly refrained from discussing the question whether the lower court's denial of the motion to bring in the absent defendants was, under the circumstances, an abuse of discretion.

[5, 6] The question of an abuse of discretion upon the part of the trial court is likewise not presented in the case at bar. The nonjoinder of parties defendant was raised by affirmative defense in the answer to the complaint. To constitute a defense to the action the parties not joined must be indispensable parties. Tregear v. Etiwanda Water Co., 76 Cal. 537, 18 P. 658, 9 Am.St.Rep. 245; De Leonis v. Hammel, 1 Cal.App. 390, 82 P. 349; 20 Cal.Jur. 576, Parties, sec. 56. Upon the pleadings as drawn it follows, therefore, that the demurrer to this defense was properly sustained. The record does not reveal that any motion was thereafter made to bring the other heirs before the court as necessary and proper parties and the discretion of the court in this regard was hence not invoked.

[7-9] Appellants contend that respondents' action is barred by the provisions of section 318 of the Code of Civil Procedure, which reads: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action." Appellants state that according to the complaint respondents had not been seised of the property since 1923. However, respondents as the owners of the legal title to the property met the requirement of seisin or possession as section 318, supra, is construed. "The requirement of seisin or possession is met when it is established that the plaintiff was possessed of legal title, and this seisin can be destroyed only by establishing the fact that a title by adverse possession was acquired by the defendant." 16 Cal.Jur. 434, sec. 43; Westphal v. Arnoux, 51 Cal.App. 532, 534, 197 P. 395; sec. 321, Code Civ.Proc. The authorities cited by appellants in this connection are not applicable to a situation where legal title in the plaintiff was indisputably established. Appellants contend that equitable title to the property was in Mrs. Castaneda at the time of her death, citing Forst v. Carr, 48 Cal.App.2d 718, 120 P.2d 119. That case is distinguishable on the facts. In the Forst case the property in question was given to a real estate agent as compensation for his services rendered. The agent went into possession, fenced the land and paid the taxes. The agent had done all that was necessary to entitle him to the property. No claim was ever made by the grantor or his immediate successors to the land in question, and it was held that ejectment could not have been maintained by any of them in view of their concession of the agent's rights. Such a situation is quite distinct from that of a purchaser or his successors under an executory contract of sale. The record fails to establish that the terms of the contract were fully performed at Mrs. Castaneda's death or at any time thereafter. Such equity as Mrs. Castaneda had in the property at her death was subject to defeat upon failure to perform the terms of the contract of purchase. Furthermore, appellants clearly failed to establish adverse possession upon their part and that of their predecessor in interest. It was definitely established that appellants and their predecessor did not pay all the taxes which had been levied and assessed upon the land in question. Respondents at least appear to have paid all the taxes since the date of Mrs. Castaneda's death. This fact alone was sufficient to defeat appellants' claim of adverse possession. Sec. 325, Code Civ. Proc. Respondents were entitled to the presumption of possession within the required five years under section 321 of the Code of Civil Procedure.

[10] There is no merit in appellants' contention that the court refused to make a proper finding of possession on the part of respondents. The trial court found that there was an unpaid balance due on the agreement, that appellants had refused and failed to pay the same and that the estate of Etta Goss McKelvey was the owner and entitled to possession of the property. If the findings in this respect were in any degree defective or incomplete, this court upon the evidence adduced below would be justified in making additional findings in respondents' favor upon the question, pursuant to the provisions of section 956a of the Code of Civil Procedure.

[11, 12] Appellants complain that the court made no finding as to the interest of the other heirs of Mrs. Castaneda. As already pointed out above, no such finding was necessary as the interest of these heirs was not directly involved in the present action. It is also contended that there is no finding of when the default occurred; but even if there were no express finding on this point, there is at least an implied finding that the default occurred when appellants failed and refused to pay the balance due under the contract or give up possession of the property.

[13, 14] A simple mathematical computation is sufficient to refute appellants' contention that the court erred in finding the sum of $337.50 damages for withholding the property in question. $15 per month was established as the reasonable rental value of the property and the court so found. The court also found that appellants had wrongfully withheld the property from June 1, 1940. From all that appears in the record the property continued to be withheld through the date of judgment and would appear to be still occupied by appellants. The findings and conclusions were dated April 24, 1942. Damages in ejectment "run from the time of the ouster if not prior to the accrual of plaintiff's right, through the period of the withholding, and up to the time of the rendition of the judgment, except during any period when the defendant's possession was by permission of the plaintiff, and not exceeding five years next preceding the commencement of the action." 9 Cal.Jur. 1029, Ejectment, sec. 40. In this connection also see sec. 3334 and sec. 3283, Civ.Code. If there was any error in computation it was in favor of appellants. The period for which damages are properly assessed does not end with the commencement of the trial, as appellants appear to contend.

[15, 16] Appellants' contention with regard to findings on the subject of taxes, special assessments and insurance are based upon an assumption that there was nothing further due under the contract after Mrs. Castaneda's death. Such an assumption is not warranted by the evidence. Although the evidence as to payments under the contract was conflicting it amply supported a finding that there was still a balance due; and, as already pointed out, appellants did not contend at the trial that the contract was fully performed on the part of the purchaser and her successors in interest. Appellants are not warranted in taking a position that they are strangers to the contract and that it is thus sought to forfeit the contract because strangers thereto committed a supposed breach of the same. Appellants admittedly entered into possession of the property as successors in interest to the purchaser under the contract. As already indicated, if there was any failure to find on material issues this court would be justified, upon the evidence presented, in remedying that defect through additional findings in favor of respondents. Appellants' contention that the complaint fails to state a cause of action has already been answered by what has already been said herein. A contention that the money judgment was excessive merely constitutes a repetition of the point regarding the error claimed to have been committed in computing the damages for withholding the property.

The evidence supports the findings and the findings support the judgment; and for the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

57 Cal.App.2d 489

PEOPLE v. CARDOZA.

Cr. 1820.

District Court of Appeal, Third District, California.

March 3, 1943.

Hearing Denied April 1, 1943.

1. Homicide ⚷22(1)

Malice essential to establish murder in the first degree may be express or implied. Pen.Code, §§ 187–189.

2. Homicide ⚷22(2)

Homicide, to be "murder in first degree", must be "premeditated" except when done in the perpetration of certain felonies, that is, the unlawful killing must be accompanied with a deliberate and clear intent to take life. Pen.Code, §§ 187–189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in First Degree" and "Premeditate".

3. Homicide ⚷22(1)

If unlawful killing is preceded by, and is the result of, a concurrence of will, deliberation, and intent, the crime is "murder in the first degree". Pen.Code, §§ 187–189.

4. Homicide ⚷23(1), 146

Where killing is proved to have been committed by defendant and nothing further is shown, the presumption is that it was malicious and an act of murder, but in such a case verdict should be murder of second degree and not murder of first degree. Pen.Code, §§ 187–189.

5. Homicide ⚷241, 250

Where commission of homicide by defendant is proved, and evidence of prosecution does not tend to prove the offense manslaughter or that homicide was excusable or justifiable, defendant must prove by preponderance of evidence that crime was only manslaughter or that it was excusable or justified.

6. Homicide ⚷253(3)

Where defendant admitted beating his wife and evidence disclosed that he sought no medical or other assistance for her until after she had become unconscious, though with prompt medical attention she might have recovered, and there was no suggestion of any attack by wife upon defendant or that he acted in any way in self-defense, evidence was sufficient to sustain conviction for murder in first degree, notwithstanding defendant's contention that he beat his wife while he was incapable of forming a premeditated intent. Pen.Code. §§ 187–189, 1105.

7. Homicide ⚷22(1)

Defendant's beating of his wife and his subsequent neglect to do anything to relieve wife until she had become unconscious constituted "torture" within statute providing that homicide perpetrated by torture is murder in first degree. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Torture".

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Aldino Cardoza was convicted of murder in the first degree, and he appeals.

Affirmed.

Stephen P. Galvin, of Merced, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appellant was charged with murder. He pleaded not guilty and not guilty by reason of insanity. The jury found him guilty of murder in the first degree with a recommendation of life imprisonment; and upon the trial of the issue of not guilty by reason of insanity, found that he was sane at the time of the commission of the homicide. Thereafter, a motion for a new trial was denied, and from the judgment of conviction and order denying a new trial the defendant has appealed solely upon the ground that the verdict is contrary to the evidence and is contrary to law.

The victim of the homicide was defendant's wife. She was 23 years old and he was 45. They had been married about six years and had a boy child aged 5. She died as the result of a beating administered by her husband with an ax handle. The autopsy revealed extensive abrasions over her head, shoulders and back where portions or layers of the skin had been mashed off. These areas extended down to the buttocks, and there were similar areas, smaller in scope, on both arms and hands, and some small spots on the face. On the outside of the right arm there were two complete imprints of what evidently were bites. On the back of the head there was a very large hematoma covering a good portion of the top and back of the head, which was fluctuating, in other words, contained a fluid. The cause of death was given as shock and hemorrhage, possibly severe cerebral concussion.

There were no witnesses to the beating, but it was admitted by defendant. Death occurred some five hours afterward, but deceased was unable to make any statement when third persons arrived upon the scene. The first to arrive was a neighbor, Joe Lemos, who was called by defendant about 1:10 a. m. and requested to come immediately. Lemos testified that on his arrival Cardoza stated, "I think I have killed my wife"; that he entered the house, found Mrs. Cardoza in bed, went immediately for a doctor, and also advised the sheriff. The doctor arrived first but was unable to arouse the victim under emergency treatment, and she died at 2:50 a. m. He described the hematoma as a sort of delayed hemorrhage at the base of the skull, which had been produced by the heart's pumping blood through a small rent in the blood vessel in that particular vicinity; that the size of the hematoma indicated that its formation was a matter of hours, and that the pressure caused by same, in an area where the respiratory and other centers which control vital processes are located, was the cause of death in this particular instance; that if decedent had had medical attention earlier her chances of recovery would have been very good.

On arrival of the sheriff Cardoza met him, and being asked what was the trouble said it was "man trouble." He was taken into custody, and when asked with what he had struck his wife, took the sheriff into the yard and showed him the ax handle in two pieces near a small wood pile in the rear of the house. The sheriff examined the premises with a flashlight, found marks and handprints on the ground indicating a struggle, a wisp of hair, a pair of overalls, a little ornamental pin, and a shoe. Pictures of the premises, articles and conditions were taken after daylight. The sheriff testified that at the time of his arrival Mrs. Cardoza was lying on the bed and the doctor was giving her artificial respiration; that she did not speak, and died shortly thereafter; that Cardoza told him that an argument had been going on over this "man trouble" for several days and that the teeth marks on his wife's body had been made by him several days before when he had her up against the wall, choking her; that that evening after dinner Mrs. Cardoza had gone out to the toilet in the rear of the house, and that she was coming out of it with one leg out of the overalls worn over her dress "and it was at that time he picked up the ax handle and started after her."

At the trial of the case the child of the parties was called as a witness, and after examination by the court was permitted to testify. Asked if he remembered the night his mother died he stated that he did; and when asked what his father did to his mother said, "He took an ax handle and hit her"; and on being asked what happened after his father hit his mother, answered, "He drug her in, see."

At the trial Cardoza testified in his own behalf that about three or four days prior to the homicide his wife had told him of various and many indiscretions committed by her prior to and subsequent to their marriage and up to the date of the conversation; that she had also told him that she had practiced, almost habitually, unnatural sexual acts of the vilest nature; that on the following Saturday night she had told him of other such acts of misconduct. He said that after she had divulged these facts to him he intended to leave her and that he asked her to write out the things she had told him so that he could give the statement to her mother, to show why he was leaving her, as he testified her mother had told him that although Mrs. Cardoza had been wayward as a young girl she had reformed since her marriage; that on Tuesday evening after he had returned from a trip to town with his wife and his partner, and after supper, Mrs. Cardoza had put the child to bed and he had lain down beside the baby until it went to sleep; that he then went outdoors to feed the dog; that as he came out of the house his wife was coming out of the toilet; that he asked her some further questions regarding her intimacy with different men, and in the course of the conversation asked if she had been intimate or had anything to do with the son of his partner who was thirteen years old; that she admitted that she had, and told him the number of times and occasions and what she had done; that they were standing together in the back yard about ten or twelve feet from the house near the woodpile, and when she made her statement regarding the boy he pushed her from him and she fell down; that when she got up he asked her if she had practiced any unnatural acts on anybody younger than this thirteen-year-old boy and she answered "yes, one"; that he then said, "not the baby," meaning his own child, and she answered, "yes"; that he then went off his head and knew nothing until he came to a few minutes or seconds later with the broken ax handle in his hand; that he must have hit her, and that she told him he had done so; that they then went into the house and talked for a considerable time, maybe an hour or two hours; that she then lay down on the bed and later commenced to complain of pains; that he suggested a doctor but she said there was no need of a doctor unless she got worse; that he called Lemos about 1:10 a. m. and that when the latter arrived he went for a doctor.

According to the testimony of the sheriff a note in Mrs. Cardoza's handwriting, reading "I, Pauline Cardoza was marr——," was on the kitchen table and was picked up by Cardoza as they passed through on their way out into the yard where he was shown the broken ax handle.

On this appeal it is not urged that defendant is not guilty of any offense, but that under the evidence the only verdict that properly could be returned is manslaughter; that there is no evidence that the killing was willful, deliberate, premeditated and with malice aforethought, and that in the absence of proof of all of those elements, a conviction of first degree murder cannot stand; that the case is proven solely by the admissions of defendant, and that as defendant stated that he did not remember hitting deceased, did not know that he hit her, and did not intend to kill her, the evidence is not sufficient to sustain a verdict of murder in the first degree.

Great reliance is had upon People v. Kelley, 208 Cal. 387, 281 P. 609, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, and it is argued that in this case, as in those cases, the killing was in the heat of passion aroused by the admissions of deceased as to her conduct, and that this fact necessarily excludes the possibility that the killing was premeditated, willful or with malice aforethought; that in view of the testimony of defendant that he acted in the heat of passion it was incumbent upon the prosecution to contradict this by evidence, which it had failed to do.

In the Kelley case the Supreme Court said that there was ample evidence that the killing was done by the defendant, but that there was nothing in the record from which it might with reason be argued that the injuries were inflicted with that intent or that malice aforethought which is a necessary ingredient of the crime of murder, nor could the court bring itself to believe that there was a willful, deliberate and premeditated killing. But the facts in that case are not like the facts in the case before us. There the injuries from which the victim died were inflicted during a drunken sexual orgy in which the parties were engaged and in which the victim was a willing participant.

[1-4] In the Howard case the victim of the homicide was engaged in the automobile rental business and defendant was employed by him. They were on friendly terms and lived together in an apartment. Decedent died from the effects of a blow on the head inflicted with a hammer, but the only evidence that said blow had been struck by defendant was his own admission, which was that he had struck decedent during a struggle that ensued when decedent upbraided him for absenting himself from the garage. Defendant contended that the evidence did not warrant a verdict of first degree murder because of the absence of a showing of express malice. The court said, 211 Cal. at pages 328, 329, 295 P. at page 336, 71 A.L.R. 1385:

"Murder is defined as the unlawful killing of a human being with malice aforethought. Section 187, Pen.Code. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Section 188, Pen.Code. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree; and all other kinds of murders are of the second degree. Section 189, Pen.Code. To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with a deliberate and clear intent to take life. If the act be preceded by, and be the result of, a concurrence of will, deliberation and intent, the crime of first-degree murder is proved. People v. Bellon, 180 Cal. 706, 182 P. 420. When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree. People v. Knapp, 71 Cal. 1, 6, 11 P. 793; People v. Ford, 85 Cal.App. 258, 263, 258 P. 1111."

But it also said that if defendant's confession were disregarded, there was nothing in the record to establish the circumstances of the striking of the fatal blow, and if the jury had rejected defendant's testimony that decedent was the aggressor in a quarrel which led to the homicide, there was no evidence that it was the result of a willful, deliberate and premeditated intent to kill. It said, however, that even if the jury accepted defendant's confession in toto the offense was still second degree murder as defendant did not establish such provocation as would excuse the homicide or reduce it to manslaughter; that the commission of the crime by defendant being proved, the burden of proving circumstances of mitigation, or that justified or excused it, devolved upon defendant unless proof by the prosecution relieved him of the burden. Sec. 1105, Pen.Code.

Respondent, however, points out that the facts in the Howard case are entirely different from those in the instant case, and relies, instead, upon People v. Murphy, 1 Cal.2d 37, 32 P.2d 635, and People v. Smith, 14 Cal.2d 541, 95 P.2d 453. In the Murphy case defendant, by the use of a belt with a buckle upon it, and his fists, bruised and battered his wife's body and broke her jaws, as a result of which injuries she died some days later. Defendant testified that he was intoxicated at the time these injuries were inflicted upon deceased and that he had no recollection of inflicting them; that he remembered being in the apartment with her, then nothing further until he found himself wandering along the ocean pier. It was there contended that the evidence was insufficient to establish murder in the first degree; that defendant had inflicted the injuries while in a drunken and sexual frenzy, and while incapable of forming a clear, willful, deliberate and premeditated intent to kill. Reliance was there had upon the Kelley case, but the Supreme Court said that in the latter case the injuries inflicted appeared to be the natural result of the orgy engaged in by the parties, and the circumstances tended to show an accidental or unpremeditated killing, but that in the case before it the fatal injuries were deliberately and intentionally inflicted while the defendant was engaged in subjecting decedent to a severe and unjustified beating. It said, 1 Cal.2d at pages 40, 41, 32 P.2d at page 637: "Of course, whenever the existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the trier of the facts, in determining whether such purpose, motive, or intent actuated the accused in the perpetration of the offense, may properly take into consideration the fact that he was intoxicated at the time. Authorities supra. However, the weight to be accorded to evidence of intoxication, and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder of the first degree, are matters essentially for the determination of the trier of the facts. People v. Yeager, 194 Cal. 452, 474, 229 P. 40; People v. Sainz, 162 Cal. 242, 245, 121 P. 922. From an examination of the entire record we cannot say that defendant, by reason of the use of intoxicants, was so disordered mentally at the time of the attack on the decedent as to preclude the resultant killing from being of that 'wilful, deliberate and premeditated' character designated in section 189 of the Penal Code as murder in the first degree. It is significant that defendant when on the stand testified in detail as to what transpired immediately before and immediately subsequent to the wrongful assault on the decedent. As to these events his recollection was reasonably vivid. His memory was faulty only as to the period during which the fatal injuries were being inflicted. In view of this, the trial court might very properly discount or reject defendant's testimony as to the extent of his intoxication and conclude that defendant was not so inebriated as to be unable to appreciate the character and gravity of his deliberate and wrongful acts."

The court further said that an affirmance of the judgment need not rest solely on the foregoing reasoning because:

"There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the Legislature has enumerated in the statute (section 189, Pen.Code), and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder in the first degree. These cases are of two classes. When the killing is perpetrated by means of poison, lying in wait, or *torture,* the means used is held to be conclusive evidence of premeditation. When the killing is done in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, the occasion is made conclusive evidence of premeditation. People v. Sanchez, 24 Cal. 17, 29, 30; People v. Milton, 145 Cal. 169, 170, 78 P. 549. If a case falls within either of these classes the statute determines that the killing is willful, deliberate, and premeditated and the trier of the facts has no alternative but to find the offender guilty of murder in the first degree.

"*In our opinion the brutal and shocking treatment to which the decedent was subjected, and as a result of which she died, constituted torture of an aggravated character within the meaning of the statute.* The statute therefore conclusively designates the resulting homicide as murder in the first degree." (Italics ours.)

In People v. Smith, supra, defendant admitted the killing but contended that he was so intoxicated at the time that he did not have the requisite intent to commit the crime of murder in the first degree. The court said that while the evidence of defendant's intoxication was properly presented to the jury for consideration in determining whether he had the requisite intent, that the jury's verdict showed that the jurors did not believe that defendant was so intoxicated as to prevent him from having the specific intent to kill.

[5] In People v. Bellon, 180 Cal. 706, 182 P. 420, 422, the court said that it is not necessary that there should be express evidence of a deliberate purpose to kill, but that such purpose may be inferred from such facts and circumstances in the case as would reasonably warrant an inference of its existence, and that the deliberation which must precede a killing in order to make the murder one of the first degree need not have existed for any given length of time. And it was further said, "It is difficult to attribute any other design than that of killing to one who knowingly strikes at the throat of another with a sharp razor with such force and strength as to cause death." And in People v. Knapp, 71 Cal. 1, 11 P. 793, the court said that in a prosecution for murder, when no considerable provocation for the killing appears, malice is implied; and if the killing is with malice, it is unlawful. Also that where the commission of the homicide by the defendant is proved on the part of the people, and the evidence of the prosecution does not tend to prove the offense manslaughter, or that the homicide was excusable or justifiable, the defendant must prove by a preponderance of evidence that the crime was only manslaughter, or that it was excusable or justifiable.

[6] There is in the case before us no suggestion of any attack by decedent upon defendant or that he acted in any way in self defense. According to his own statement he knocked his wife down when she was standing with the overalls worn over her dress down to her knees. That he thereafter beat her unmercifully, inflicting severe injuries from her head to her knees and on her arms and hands, is obvious; that he sought no medical or other assistance for her until after she had become unconscious is also apparent, though with prompt medical attention she might have recovered. He had previously told the witness Mooney: "I have a good woman, she is contented. If she would trifle on me, and I would catch her with another man, I would kill her and kill him too. When she don't do to suit me I just give her a damned good beating then she is all right. I take a club." That he had previously inflicted injuries upon her by biting her arms when he had her up against a wall choking her was admitted by him to the sheriff after his arrest.

The foregoing was sufficient, we believe, to justify the verdict of the jury, in view of the decisions in the Murphy and Smith cases, supra. To be sure defendant contends, as did the defendants Murphy and Smith, that he had no recollection of inflicting the beating upon his wife, and that said beating was done in the heat of passion aroused by the admissions of his wife as to her treatment of their child. But the jury were not compelled to believe defendant's statement of the alleged admissions of decedent, which, indeed, is such as to tax human credulity. It does not seem possible that had decedent been the dissolute and abandoned person he now pictures her to have been, he could have lived with her for six years without having previously had evidence of her depravity. Nor does the testimony show that defendant's sensibilities were such that he would be readily shocked into a state of insensibility. That there had been any intimacy between decedent and the Lemos boy was denied by the latter, and the mother of decedent denied that she had ever told Cardoza anything about her daughter's past, or that the girl had been "loose" or had had any trouble. She said that, on the contrary, defendant himself was given to filthy and vulgar talk when she and her husband were present, and in the presence of the Cardoza child. Also, as in the Murphy case, defendant's clear recollection of events up to and immediately after the beating belies his testimony that he did not remember the beating itself.

[7] We are of the opinion that the jury was justified in disregarding defendant's claim that he beat decedent while in a state of mind which rendered him incapable of forming a clear, willful, deliberate and premeditated intent to kill her. We are also of the opinion that the beating by defendant and his subsequent neglect to do anything to relieve his victim constituted torture within the meaning of section 189 of the Penal Code and within the holding in the Murphy case. The judgment and the order denying a new trial are, and each of them is, affirmed.

PEEK and THOMPSON, JJ., concurred.

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57 Cal.App.2d 574

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA v. ADAMS et al.

Civ. 3212.

District Court of Appeal, Fourth District, California.

March 8, 1943.

Hearing Denied May 7, 1943.

1. Account stated 🔑1

An "account stated" is an agreed balance of accounts, or an account which has been examined and accepted by the parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Account Stated".

2. Account stated 🔑5

An "account stated" presupposes not only an acknowledgment or an admission of a certain sum due on adjustment of accounts between the parties, but the striking of a balance or an assent, express or implied, to the correctness of the balance.

3. Account stated 🔑1

Generally, it is essential to an "account stated" that the amount due be specified and agreed to, but it is sufficient if such amount can be definitely ascertained from the totals of figures then in existence and agreed to.

4. Interest 🔑18(3)

Where two of the property owners represented by certain attorneys in a condemnation proceeding contracted with the attorneys as to the reasonable value of the services of the attorneys to such owners and to the other property owners represented by the same attorneys, and contracted to pay the amount remaining of such sum after the sum was reduced by crediting on the sum any fees collected by the attorneys from the other property owners whom the attorneys represented, the contract did not establish an "account stated," so as to permit interest to accrue from the date of the contract on the amount found to be due to the attorneys under the contract.

5. Pleading 🔑35, 312

Where a pleader sets forth what he either admits or alleges to be the substance or legal effect of a written instrument, and in the same pleading sets forth in haec verba the written instrument itself, if the written instrument is unambiguous, the matter in the pleading inconsistent with the text of the written instrument will be treated as "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

6. Appeal and error 🔑1039(2), 1071(5)

Where contract for payment of fees to attorneys was attached to petition of attorneys for allowance of fees with interest from date of contract, as on an account stated, and contract was held not to establish an account stated, appellate court would disregard as "surplusage" allegation of petition that amount on which interest was claimed was due on date of contract and would also disregard finding that all the allegations of the petition were true.

7. Stipulations ⚷14(1)

Where, in condemnation proceeding, two of the property owners received a sum which was withdrawn by stipulation from the funds deposited by the condemnor, and the attorneys in the proceeding agreed to waive immediate payment of balance due the attorneys under a contract for fees, and to accept a part of such balance on account, attorneys could not thereafter claim that at the time of the stipulation they were entitled to payment in full so that interest started to accrue at such time.

◆

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Consolidated actions in eminent domain by the Metropolitan Water District of Southern California against E. Bennett Adams and others, and against Lawrence Holmes and others. From a portion of a judgment directing that the assignees of F. E. Davis and another be paid specified sums of money, without interest, out of money held by the county treasurer of the County of Riverside, for attorney's fees rendered in connection with the preparation for the condemnation actions and other matters, and from an order refusing to vacate the judgment, Charles F. Davis and others appeal.

Affirmed.

See, also, 19 Cal.2d 463, 122 P.2d 257.

Herbert Cutler Brown, of Los Angeles, for appellants.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a portion of a judgment directing that petitioners be paid specified sums of money, without interest, out of money held by the County Treasurer of the county of Riverside, and from an order refusing to vacate that judgment. The money had its source in that paid by the Metropolitan Water District of Southern California for condemnation of various parcels of land for a reservoir in Riverside County.

The parties agree that the various amounts ordered paid to petitioners are correct as to the principal. The only question before us is whether or not petitioners are entitled to interest at the rate of seven per cent per annum from September 1936, which the trial court refused to allow.

Under date of September 1, 1936, Lawrence Holmes, acting for himself and Gertrude E. Holmes, his wife, entered into a contract settling the claim of F. E. Davis and Herbert Cutler Brown against them for attorneys fees rendered in connection with preparation for the condemnation suit and other matters. Petitioners have succeeded to the claims of Davis and Brown under this contract by virtue of various assignments.

The value of the attorneys fees was fixed at $12,500. Davis and Brown represented other specified landowners in the condemnation proceedings. The contract, a copy of which was attached to the petition and made a part of it by reference, contained the following stipulation: "Provided, however, that the said sum of Twelve Thousand Five Hundred Dollars ($12,500.00) shall be reduced by the aggregate amount which the said Davis and the said Brown shall receive as attorneys of record in the aforesaid proceeding in court for the certain defendants [naming them]."

The contract also provided that the $12,500, less any amounts paid by others, thereby reducing the liability of Mr. and Mrs. Holmes, be paid "out of the moneys which the said Lawrence Holmes and Gertrude E. Holmes shall receive from the said Metropolitan Water District of Southern California, or otherwise, for the taking by the said District of the lands described in the complaint filed in said proceedings aforesaid and therein sought to be condemned and taken for use as a reservoir. * * *"

It is admitted that attorneys' fees in the sum of $626.80 were collected from the other parties and that the liability of Mr. and Mrs. Holmes was reduced by that amount. It is also admitted that Mr. and Mrs. Holmes paid $1,000 on account of their obligation, leaving an unpaid balance of $10,873.20, which the trial court ordered paid without interest.

[1, 2] Petitioners base their claim to interest upon the theory that, by the agreement of September 1, 1936, an account stated was created between Mr. and Mrs. Holmes and the two attorneys; that by operation of law an account stated draws interest from its date. In Ough v. Ansonia Oil Co., 99 Cal.App. 769, 279 P. 481, 482, the court said: "The law as to how an account stated may be created is plain and

not subject to controversy under the authorities. A general statement of this law is found in 1 Cal.Jur. 189: 'An account stated has been defined by Bouvier as "an agreed balance of accounts; an account which has been examined and accepted by the parties," [1 Bouv.Law Dict., Rawle's Third Revision, p. 109] and this definition is generally accepted as a correct one.' An account stated presupposes not only an acknowledgment or admission of a certain sum due on adjustment of accounts between the parties, but the striking of a balance, or an assent, express or implied, to the correctness of the balance. Beltaire v. Rosenberg, 129 Cal. 164, 61 P. 916." See, also, MacLaren v. Gilbert, 111 Cal. App. 198, 295 P. 349; Petrosino v. Wakefield, 138 Cal.App. 336, 31 P.2d 1056; Bennett v. Potter, 180 Cal. 736, 183 P. 156.

[3] It is also true that while generally the amount due must be specified and agreed to if that amount may definitely be ascertained from the totals of figures then in existence and agreed to it is sufficient. Kimball Motor Truck Corp. v. Fickett, 114 Cal.App. 65, 299 P. 566.

[4] We have no such state of facts here. Mr. and Mrs. Holmes, in effect, agreed with the attorneys that the reasonable value of the services of the attorneys representing them and other property owners was $12,500; that Mr. and Mrs. Holmes would pay the amount remaining of that sum after it was "reduced" by crediting on it any fees collected by the attorneys from other named property owners. Thus it is clear that the contract lacked an essential element of an account stated by failing to definitely ascertain the amount to be paid the attorneys by Mr. and Mrs. Holmes. That amount was not and could not be ascertained at that time nor until the total several amounts subsequently collected from the property owners was ascertained. For this reason, as well as others not necessary to mention, the contract failed to establish an account stated.

Petitioners seek to escape the results of the foregoing conclusion by pointing out that the petition contained this allegation:

"That on the said 1st day of September, 1936, the said Lawrence Holmes, acting for himself and his said wife, agreed with F. E. Davis and Herbert Cutler Brown that the said legal services so theretofore rendered were of the reasonable value of Twelve Thousand Five Hundred Dollars ($12,500); that said amount was due and payable, one-half thereof, to-wit: Six Thousand Two Hundred and Fifty Dollars ($6,250) to each the said F. E. Davis and Herbert Cutler Brown who thereupon demanded the payment to them respectively of the aforesaid amounts"; and that the court made the following finding:

"First: That all of the allegations of the said Petition and Demand as filed in the above entitled court and cause are true; save and excepting that there is nothing in the said contract or agreement of September 1st, 1936, stating that the $12,500 shall bear interest, and it appears therefrom that it was not contemplated therein that the $12,500 should be paid until the money was received by the Holmes in the eminent domain cause."

[5] They argue that since it was found that it was agreed that $12,500 was due and payable to the two attorneys for their services, it cannot now be successfully argued that there was no account stated. This argument lacks convincing force. A copy of the contract was attached to and made a part of the pleading by reference. It did not create an account stated between the parties. In Peak v. Republic Truck Sales Corp., 194 Cal. 782, 230 P. 948, 950, it was said: "It may be said in this connection that when a pleader sets forth in his pleading what he either admits or alleges to be the substance or legal effect of an instrument in writing and in the same pleading sets forth in hæc verba the written instrument itself, if the latter is unambiguous (Silvers v. Grossman, 183 Cal. [696], 701, 192 P. 534), the matter in the pleading inconsistent with the text of the writing will be treated as surplusage. Stoddard v. Treadwell, 26 Cal. 294."

[6] As the quoted portion of the petition conflicts with the unambiguous terms of the contract we must treat the allegation as surplusage. As it was surplusage, the finding that it was true can give it no vitality.

[7] Petitioners urge that under any construction of the contract they were entitled to interest from October 31, 1938. At about that date Mr. and Mrs. Holmes received $14,131.31 which was withdrawn from the funds deposited by the Metropolitan Water District in the condemnation proceeding. This was done under stipulation. The petition refers to this stipulation as follows: "That petitioners were urged by the attorneys of said

Lawrence Holmes and Gertrude E. Holmes to approve and consent to said Stipulation, who represented to them and/or their attorneys that the larger portions of the amount to be withdrawn for said Lawrence Holmes and Gertrude E. Holmes and their assigns were required by them for court and other necessary expenses; that upon such representations petitioners and/or their immediate assignors agreed to waive immediate payment of the balance of said $12,500 and interest and to accept at that time the sum of One Thousand Dollars ($1,000) on account. * * *"

As petitioners waived the right to receive any part of the money withdrawn, except $1,000 which they or their predecessors in interest received, it is difficult to understand how they can now claim that they were entitled to payment in full at that time so that interest then started to accrue.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

57 Cal.App.2d 465

BAIRD v. MADSEN.

Civ. 12235.

District Court of Appeal, First District, Division 1, California.

March 3, 1943.

1. Appeal and error 🔑931(1)

All conflicts in the evidence must be resolved against the appellant.

2. Pleading 🔑236(4, 5, 7)

Where action was submitted to court on complaint seeking recovery of real estate commissions and attorney's fees allegedly due under agreement giving plaintiff agency to sell 260 acres of land, court did not abuse its discretion in refusing to permit plaintiff thereafter to file amended complaint to conform to the proof seeking recovery of larger commissions under a subsequent agreement pertaining to sale of entire 360-acre ranch of which 260 acres were a part.

3. Pleading 🔑237(8)

Though great liberality should be allowed in permitting amendment to conform to the proof, plaintiff may not amend so as to change the cause of action or to set up a new cause of action not contained in original complaint.

4. Brokers 🔑54

A real estate broker may recover his commissions under contract of employment when he procures a buyer who is ready, willing, and financially able to purchase property described in agency contract pursuant to conditions specified therein.

5. Brokers 🔑86(1)

Evidence did not entitle broker to commissions under agency agreement providing for payment of commission upon sale within three months after expiration of exclusive agency to any person to whom broker had previously offered land for sale where broker failed to prove that he had performed the agreement.

6. Brokers 🔑82(4)

In action to recover commissions allegedly due under sales agency agreement covering 260 acres of 360-acre ranch, broker could not rely on subsequent agency agreement covering entire ranch as an extension or modification of original agreement in absence of pleading of facts showing such extension or modification by subsequent agreement.

7. Contracts 🔑346(10)

Plaintiff must plead the particular contract which he claims he has performed, and cannot recover on proof of another contract or of a contract substituted for or constituting a modification of the contract declared on.

8. Brokers 🔑82(4)

In action to recover real estate broker's commissions allegedly due under sales agency agreement covering 260 acres of 360-acre ranch, that special defense pleaded in answer set out circumstances attending alleged extension of agreement by subsequent agency agreement covering entire ranch did not enable broker to rely on later agreement as an extension of original agreement without pleading facts showing such extension, where facts alleged in answer were such as negatived the right to maintain the action set forth in complaint.

9. Brokers ⚷45

Where broker, after introducing prospective customer to employer to no purpose, abandons employment, or, after procuring a person who proves unwilling to accept terms offered, ceases further efforts to negotiate deal with such person and terminates all negotiations, he will not be entitled to commissions on sale to such person resulting from subsequent negotiations by employer or another agent without further effort by broker first employed.

10. Brokers ⚷65(1)

Real estate broker must act in good faith in discharge of duties as agent, and misconduct, breach of contract, or willful disregard in a material respect of obligation imposed upon him by law of agency may forfeit right to compensation.

11. Brokers ⚷65(1)

Under rule applicable to trustees generally which governs relationship between real estate broker and principal, broker is bound to disclose to principal any facts known to him that are material to transaction, and, if broker takes part in negotiations, he must exercise his skill for benefit of principal.

12. Brokers ⚷65(1)

Broker was not entitled to commissions on sale of land by owner to purchaser to whom broker first offered land for sale, where broker meantime had abandoned and dismissed such prospect as a purchaser contrary to owner's wishes and without disclosing material facts to owner had negotiated a sale of the land to another purchaser.

13. Brokers ⚷86(1, 7)

In real estate broker's action to recover commissions, conflicting evidence sustained findings that broker had abandoned and dismissed as a prospective purchaser the person to whom owner himself subsequently sold land and that broker had not faithfully discharged duties as such, but had acted adversely to owner's interest.

14. Appeal and error ⚷1011(1)

Trial court's findings of fact based on conflicting evidence and having evidence to support them are controlling on appeal.

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by Bruce E. Baird against M. C. Madsen to recover real estate commissions and attorney's fees allegedly due under a sales agency agreement. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellant.

Rosendale, Thomas & Muller, of Salinas, for respondent.

KNIGHT, Justice.

Plaintiff sued to recover $2,925 as real estate commissions and $750 attorney's fees alleged to be due under a sales agency agreement dated June 20, 1939. The cause went to trial on the third amended complaint, and was tried before the court sitting without a jury. Several days after the cause was submitted for decision plaintiff moved for leave to file a fourth amended complaint whereunder he based his claim to commissions on a later agreement, dated July 26, 1939, which covered a greater quantity of land and called for the payment of a larger commission. The ground of the motion was that there was a variance between the allegations of the third amended complaint and the proof, and that the allegations of the fourth amended complaint conformed to the proof. The motion was denied; and thereafter findings and judgment were entered in favor of the defendant; and from said judgment plaintiff appeals. The major points urged for reversal are that the judgment is contrary to law; that the controlling findings upon which it is based are unsupported by the evidence, and that the trial court abused its discretion in denying permission to file the fourth amended complaint.

The property covered by the agreement sued upon consisted of 260 acres of land situate about ten miles south of Salinas; and by the terms of the agreement plaintiff was authorized to sell the same for $225 an acre. The provisions relating to plaintiff's employment and the payment to him of commissions were as follows: "In consideration of your listing the property described on the reverse side of this contract, and to use your efforts to find a purchaser therefor, I hereby grant you for the period of 30 days from date hereof, the exclusive right to sell or exchange said property or any part thereof, at the price and terms stated hereon, or at such other price, terms or exchange to which I may agree. *During the life of this contract,* if you find a buyer who is ready, able and willing to buy said property or any part thereof at said price and terms, or any other price or terms to which I may agree in writing, or if I agree to an exchange of said property or any part thereof is sold or exchanged during said term by myself or any other person, firm or corporation, I agree to pay you the California Real Estate Board commission on such sale or exchange, *or if it is sold or exchanged within three months after such expiration to any person to whom you or any member of your firm have previously offered it,* I agree to pay you the commission above stated and in case of the employment of an attorney to enforce any of the terms of this agreement, I agree to pay a reasonable attorney's fee and all cost of collection." (Italics ours.)

Soon after the property was listed with plaintiff he showed it to Ralph E. Myers and his father. It formed part of a 360 acre ranch, which was divided by an irrigation ditch. The portion covered by the agreement was on one side of the ditch, and consisted of upland. The remaining 100-acre portion was on the other side of the ditch, and was bottom land. It bordered on Highway 101, and according to some of the testimony was worth approximately $400 an acre more than the upland. After looking over the property the Myers stated they were not interested in buying the 260 acres, but would be interested in purchasing the entire ranch. Thereafter and on July 25, 1939, which it will be noted was after plaintiff's 30 day exclusive agency had expired, plaintiff obtained a written offer from Ralph E. Myers to purchase the entire 360 acres for $65,000, and Myers gave plaintiff a check for $500 as a deposit on that offer. Defendant rejected the offer and on the next day, July 26, 1939, plaintiff secured from defendant another written agreement whereby defendant agreed to sell the entire 360 acres for $80,000, and to pay a commission of $4,000; but Myers refused to accept this offer. That same day, July 26, 1939, plaintiff obtained from defendant a third written agreement, whereby defendant agreed to sell the entire property to Myers for $72,500 and to pay a commission of $3,625. This third agreement was in the form of a "Deposit Receipt." It was so denominated, and signed by plaintiff. After acknowledging receipt from Ralph E. Myers of the $500 he had theretofore paid to plaintiff on Myers' original $65,000 offer, there was set forth a description of the property, the amount of the purchase price and other conditions of the proposed sale, and it was signed by plaintiff. Following plaintiff's signature the document read: "I agree to purchase the above described property on the terms and conditions herein stated"; and a line was left blank for the purchaser's signature. Then followed the agreement of the owner to sell under the terms and conditions therein specified and to pay the commission, and this was signed by defendant. Plaintiff immediately delivered this third agreement to Ralph E. Myers, but Myers did not sign the same because his father was then in Alaska and he said they wanted to make some soil tests of the property. In this connection Myers testified that at the time of the delivery of the agreement to him it was agreed that the $500 deposit paid by him on the previous offer of $65,000 should be retained by plaintiff as a deposit on the new offer of $72,500, and that he understood the making of such deposit gave them a 30-day option within which the soil tests could be made; that such was the custom.

Meanwhile plaintiff found another prospective buyer, named E. E. Harden, and within a day or two after the delivery of the third agreement to Myers, plaintiff again called on Myers and asked whether they wanted the ranch. Myers replied that they did, but that they had not yet received reports on the soil tests, and that he could not give a definite answer until such tests had been made. Plaintiff then asked Myers for the return of the third agreement, saying he wanted it for his files, and Myers gave it to him. As stated, this agreement had been signed by both plaintiff and defendant, and acknowledged the receipt of the $500 deposit on the purchase price. Shortly after plaintiff obtained possession of the agreement, and on July 31, 1939, a salesman from plaintiff's office called on Myers and tried to induce Myers to take back the $500 deposit, which Myers refused to accept; and on that same day, July 31, 1939, plaintiff went to defendant, and without informing him that he had obtained possession of the third agreement, or that he had attempted to return the $500 deposit and Myers had refused to accept it he laid before defendant a fourth agreement which he asked him to sign. It was identical in form with the third agreement except that the name of the purchaser and the amount of the deposit were left blank. Defendant testified that when plaintiff presented the fourth agreement to him to sign he told plaintiff he would sign it "providing Myers was not going to be the buyer," that he would be willing to sell to someone else if he got his price, "but only if Myers were to give up his intention to buy." Immediately after obtaining defendant's signature to the fourth agreement and on that same day, July 31, 1939, plaintiff closed the sale of the entire ranch with Harden, by securing Harden's signature, as purchaser, to the fourth agreement, and accepting from him a deposit of $1,000 on the purchase price. To this end plaintiff inserted Harden's name as purchaser, and the amount of the deposit he had paid, in the blank places in the fourth agreement. Three days later, and on August 3, 1939, plaintiff telegraphed defendant, who was in Oakland, that his property had been sold to Harden; and on the same day he wrote Myers to that effect and sent him enclosed the $500 deposit. In that letter he stated: "I regret to report that Mr. Madsen would not accept your offer, and that subsequently I obtained from E. E. Harden an offer of $72,500.00, which was accepted by Mr. Madsen." Upon the receipt of the telegram from plaintiff, defendant returned to Salinas, and dealing directly with Myers consummated a sale with him of the entire 360 acres for $72,500. Plaintiff afterwards demanded a commission of $2,925, which he claimed was due him under the original, June 20, 1939, sales agency agreement, that is, 5 per cent of the selling price of 260 acres at $225 an acre. Defendant refused to pay the same, and thereupon plaintiff brought this action.

[1] There was some conflict in the evidence. For example plaintiff's testimony regarding the conversation had with Myers when he took back the third agreement, varied with that given by Myers; and he also gave a different version as to what took place between him and defendant when he secured defendant's signature to the fourth agreement. But under well settled rules governing appeals, all such conflicts must be resolved against an appellant.

[2, 3] We are of the opinion that the trial court's refusal to grant leave to file the proposed fourth amended complaint did not constitute an abuse of discretion. While it is true that great liberality should be allowed in granting permission to amend to conform to the proof, it is well settled that a plaintiff may not amend so as to change the cause of action or to set up a new and distinct cause of action not contained in the original complaint (21 Cal. Jur. 209); and obviously such would have been the effect of the filing of the proposed fourth amended complaint herein.

As already pointed out, the cause of action set forth in the third amended complaint, and upon which the cause was tried, was for the alleged breach of the sales agency agreement executed on June 20, 1939. No reference whatever was made therein, directly or indirectly, to any other agreement. The tract of land authorized to be sold thereunder was definitely described as containing 260 acres, and the selling price was fixed at $225 an acre, or a total price of $58,500. Accordingly the amount of commissions plaintiff was entitled to receive for the services to be performed under said sales agency agreement, and for which he sued, was $2,925; whereas the cause of action set forth in the proposed fourth amended complaint was based on the alleged breach of an entirely different form of agreement, executed on July 26, 1939, the subject matter of which was the sale of 360 acres of land for the gross sum of $72,500; and the amount of commissions to be paid thereunder was $3,625. It is apparent, therefore, that the proposed fourth amended complaint not only set up a new and distinct cause of action, not included in the third amended complaint, but that had plaintiff been granted leave to file the same, it would have necessitated the reopening of the case so as to permit defendant to answer the allegations of the fourth amended complaint, and then required a trial of the new issues raised thereby. In other words, the defendant, answering the third amended complaint, denied that plaintiff was entitled to any commissions under the contract therein sued upon, and several special defenses were interposed against the enforcement of that contract; but it cannot be said as a matter of law that defendant would have relied on these same defenses as against the enforcement of the later agreement upon which plaintiff based his proposed fourth amended complaint. The original and the first and second amended complaints are not embodied in the record on this appeal, and in the absence of anything appearing to the contrary it may be assumed that they also, like the third amended complaint, were based exclusively on the sales agency agreement of

June 20, 1939. Since, therefore, in all four of the complaints filed by plaintiff he chose to base his claim to commissions exclusively on the sales agency agreement of June 20, 1939, it cannot reasonably be held that the denial of plaintiff's motion, presented several days after the cause had been under submission, for leave to file a fourth amended complaint, setting up a cause of action based on a different agreement, constituted an abuse of discretion.

The appeal narrows down, therefore, to the issue of whether plaintiff was entitled to recover the commissions provided for by the terms of the June 20, 1939, sales agency contract, upon which the third amended complaint was based; and it is our opinion that the negative conclusion reached by the trial court on that issue is not contrary to law or to the evidence

[4, 5] The general rule governing in cases of this kind is that a real estate broker may recover his commissions under his contract of employment when he procures a buyer who is ready, willing and financially able to purchase the particular property described in the agency contract pursuant to the terms and conditions specified therein. Therefore, in the present case plaintiff was entitled to the commissions provided for in his June 20, 1939, sales agency contract of employment only if and when he found a buyer ready, willing and able to purchase the 260 acres of land described therein, at $225 an acre; and the cause of action set forth in his third amended complaint is based upon the claim that he performed that contract. In this regard he alleged that "shortly after the execution of said agreement * * * and within thirty days from the date thereof, plaintiff did, in fact, find and obtain a buyer who was ready, willing and able to buy the said property from defendant for the price authorized by said defendant, to wit: one Ralph E. Myers; that plaintiff offered said property to said Ralph E. Myers within thirty days from the date of said agreement * * * and the said Ralph E. Myers did thereafter, and on or about the 8th day of August, 1939, purchase the said property from said M. C. Madsen * * * for and in consideration of the sum of $225.00 per acre." The evidence shows, however, without conflict, that Myers, the prospective buyer, was never ready or willing to purchase said 260 acres under the terms and conditions specified in plaintiff's contract of employment. To the contrary, it is conceded by all parties that after Myers inspected the property he stated definitely that he was "not interested." Nor was any portion of the 260 acres thereafter sold to Myers at $225 an acre. Obviously, therefore, plaintiff failed to prove he had performed the contract of employment upon which his cause of action was based.

Plaintiff contends, however, that since following the refusal of Myers to purchase said property under the terms specified in the June 20, 1939, contract of employment, negotiations were opened and carried on between plaintiff and Myers with the consent of the defendant, for the purchase of the entire ranch, which eventually resulted in the execution of the July 26, 1939, "deposit receipt" agreement and the sale on August 8, 1939, of the entire 360 acres to Myers for $72,500, there was an extension of the terms of the June 20, 1939, sales agency contract which brought the case within the provisions thereof that if said property was sold or exchanged within three months after the expiration of that contract to any person to whom plaintiff had previously offered it, plaintiff was entitled to the commission provided for in said contract. Plaintiff argues, therefore, that even though he was not entitled to receive the full commission of $3,625 under the $72,500 July 26, 1939, agreement, he was entitled to the commission of $2,625 provided for by the June 20, 1939, sales agency contract.

[6, 7] The theory thus advanced is not sustainable for several reasons. In the first place, in order to invoke the doctrines of extension or modification of contracts, the essential facts relied upon to bring the situation within the operation of those doctrines must be pleaded; and here no such facts were pleaded. The theories of extension or modification are not even suggested. On the contrary, the cause of action sued upon is based entirely upon the June 20, 1939, sales agency contract as executed. The rule in this regard is that a plaintiff must plead the particular contract which he claims he has performed; he cannot recover on proof of another contract, or of a contract substituted for, or constituting a modification of the contract declared on. 9 C.J., p. 639, 640; 12 C.J.S., Brokers, § 110, p. 254, 255; Daley v. Russ, 86 Cal. 114, 24 P. 867; Leuschner v. Patrick, Tex.Civ.App., 103 S.W. 664; Whitelock v. Beach, 174 Mo. 428, 160 S.W.

815. As shown, plaintiff herein did not prove performance of the contract pleaded. The sale of the 260 acres was not made within 30 days; nor was any portion of the 260 acres sold thereafter at the price demanded in the contract, to-wit, $225 an acre. Therefore, if plaintiff sought recovery under the contract of July 26, 1939, as an extension of the June 20, 1939, contract, he should have based his complaint on that contract or pleaded it as an extension of the June contract, instead of pleading full performance of the June contract. As said in Daley v. Russ, supra [86 Cal. 114, 24 P. 868], "The evidence, therefore, did not show performance of the contract set forth in the complaint. And if the conduct of the defendants amounted to a modification of the contract, it should have been declared on as modified." The cases cited by plaintiff in support of his contention do hold that due to the conduct of the parties there involved there was a waiver of the time limit; but no question of pleading was raised in any of them, and therefore they are not determinative of the point presented here.

[8] Plaintiff contends that the absence of allegations in the complaint of facts showing on extension is unimportant for the reason that the circumstances attending the execution of the July 26, 1939, agreement were set forth in one of the special defenses pleaded in defendant's answer. There is no merit in the contention. The rule contended for by plaintiff does not apply where as here the facts alleged in the answer are such as negative the right to maintain the action set forth in the complaint. 21 Cal.Jur., p. 279.

[9] Secondly and in any event plaintiff's contention that he was entitled to recover commissions under the theory that the terms of the June 20, 1939, contract were extended, cannot be sustained for the reason that the trial court's adverse decision is based largely on two material findings which are legally supported. One is to the effect that plaintiff "by his own act [did] dismiss said Ralph E. Myers as a prospective purchaser of said property and did acquit said Ralph E. Myers from any connection with the purchase of said property and did abandon said Ralph E. Myers as a purchaser of said property." This finding is based upon the evidence showing that within a day or two after having delivered the July 26, 1939, deposit receipt agreement to Myers he obtained the surrender thereof from Myers, returned Myers' $500 deposit, and after securing the fourth sales agreement from defendant on July 31, 1939, plaintiff sold the ranch to Harden and accepted from him a deposit of $1,000. The governing rule in such cases is stated in 8 American Jurisprudence, p. 1069, as follows: "If a broker, after introducing a prospective customer to his employer to no purpose, abandons his employment entirely, or if, after procuring a person who proves to be unwilling to accept the terms of his principal, he merely ceases to make further endeavors to negotiate a deal with that particular individual and all negotiations in that direction are completely broken off and terminated, he will not be entitled to a commission if his employer subsequently renews negotiations with the same person, either directly or through the medium of another agent, and thus effects a sale without further effort on the part of the broker first employed." In view of the facts above stated, the foregoing rule is doubtless here controlling.

The other determinative finding is based on the second affirmative defense set up in the answer, the allegations of which are to the following effect: that "plaintiff did not faithfully discharge his duties as a real estate broker" under the June 20, 1939, sales agency contract "in that he acted adversely to defendant's interest in the following respects," that defendant signed the July 26, 1939, agreement to sell the property to Myers for $72,500 and that plaintiff accepted from Myers a deposit of $500 on the purchase price, acknowledged the receipt thereof in writing and delivered the agreement and receipt to Myers; that defendant was desirous of selling the property to Myers, all of which plaintiff "then and there and at all times thereafter well and truly knew"; that thereafter and on or about August 2, 1939, plaintiff, "without defendant's knowledge or consent and by trick and subterfuge practiced upon" Myers secured said agreement and receipt from Myers and on August 3, 1939, returned said deposit to Myers without the knowledge or consent of defendant and without the consent of Myers, "and did then and thereby discharge and abandon" Myers as a purchaser of said property; that prior to August 3, 1939, defendant did not know of anything concerning any sale of the property to Harden, and that plaintiff did not prior to August 3, 1939, notify or advise defendant concerning Harden or any sale to him or any dealings with him; "that plaintiff was in the foregoing respects and matters secretive, unfaithful and deceptive, and did act contrary to defendant's best interests, wishes and welfare. * * *" The trial court found the foregoing allegations to be true, but further found that it was not true as alleged by defendant "that plaintiff committed the acts therein alleged for the secret purpose of aiding another, to-wit, E. E. Harden, and advancing plaintiff's own welfare and interest at the expense of defendant."

[10-12] It is doubtless true, as pointed out by defendant, that a real estate broker must act in good faith in the discharge of his duties as agent; that by misconduct, breach of conduct or wilful disregard, in a material respect, of an obligation imposed upon him by the law of agency he may forfeit his right to compensation. Mitchell v. Gould, 90 Cal.App. 647, 266 P. 565; 12 C.J.S., Brokers, § 69, p. 158; 8 Am. Jur. 1067. To this end it is held that the rule which applies to trustees generally governs the relationship between a real estate broker and his principal. The broker is bound to disclose to the principal any facts known to him which are material to the transaction, and if he takes part in the negotiations he is bound to exercise his skill for the benefit of his principal; and any concealment from the principal of material facts known to the agent, or any collusion by the latter with a purchaser may operate to forfeit the right of the agent to compensation for his services (12 C.J.S., Brokers, § 69, p. 158; 8 Am.Jur. 1067; Mitchell v. Gould, supra; Carter v. Owens, 58 Fla. 204, 50 So. 641, 25 L.R.A.,N.S., 736; Young v. Hughes, 32 N.J.Eq. 372), and it matters not that there was no fraud meditated and no injury done. The rule is not intended to be remedial of actual wrong, but preventative of the possibility of it. Young v. Hughes, supra. Applying the foregoing legal principles to the findings on this issue, it would seem that the trial court was not unwarranted in giving judgment for the defendant.

[13, 14] Plaintiff assails the entire finding upon the ground that material portions thereof are wanting in evidentiary support, and in this respect it may be conceded that such findings are based on conflicting evidence. However, there is evidence supporting them, and that being so, the finding is here controlling.

In view of the conclusion reached in determining the matters already discussed, it becomes unnecessary to inquire into the remaining points urged for reversal, including those relating to the sufficiency of the evidence to support other findings.

Inferentially it appears from the record herein that other litigation has grown out of the sale of this ranch, and it should be understood that nothing that has been said here is intended to have any bearing thereon.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

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57 Cal.App.2d 406

VERTEX INV. CO. v. SCHWABACHER.

Civ. 12159.

District Court of Appeal, First District, Division 1, California.

March 1, 1943.

Rehearing Denied March 31, 1943.

Hearing Denied April 29, 1943.

1. Pleading 🔑218(5)

Judge who originally overruled demurrer to complaint had jurisdiction to change his decision, even though at time of changed ruling he was no longer judge of the law and motion department.

2. Pleading 🔑218(5)

A ruling on demurrer, unlike many other types of judicial determinations, may be changed for no other reason than that the judge is of the view that his first ruling was erroneous.

3. Pleading 🔑218(5)

Proceedings had in court, pursuant to notice given or waived, when demurrer was first argued, are the basis for changed ruling on demurrer as for the original decision, and an additional motion and notice are not required.

4. Limitation of actions 🔑100(11)

When failure to discover fraud is due to lack of diligence, the statute of limitations commences to run from the time that the fraud should have been discovered.

5. Limitation of actions 🔑179(2)

The mere allegation in complaint of discovery of fraud within three-year limitation period for actions for relief on ground of fraud is not sufficient, and it must affirmatively appear that failure to make discovery was not due to lack of diligence. Code Civ.Proc. § 338, subd. 4.

6. Limitation of actions ⚷100(12)

"Discovery", within meaning of statute providing that action for fraud is not deemed to have accrued until discovery, by the aggrieved party, of the facts constituting the fraud, is deemed to take place when the plaintiff, in the exercise of due diligence, should have learned the facts. Code Civ.Proc. § 338, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Discovery".

7. Limitation of actions ⚷179(2)

A plaintiff, who claims that fraud was not discovered until within three-year period for actions for relief on ground of fraud, should set forth circumstances under which he learned the facts, and the reasons for failing to learn them sooner, in order that court may determine whether he has been negligent in not acquiring knowledge of them at an earlier date. Code Civ.Proc. § 338, subd. 4.

8. Limitation of actions ⚷100(13)

Where plaintiff knows facts which place him under a duty of inquiry, he is charged with "knowledge" of such facts as an investigation would have revealed concerning fraud which he claimed to have discovered within three-year period for actions for relief on ground of fraud. Code Civ.Proc. § 338, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Knowledge".

9. Limitation of actions ⚷100(13)

In determining whether discovery of fraud was made within three-year period for actions for relief on ground of fraud, the rule that means of knowledge are the equivalent of knowledge is subject to the qualification that the position of plaintiff must be such that he is under a duty to make use of such means. Code Civ.Proc. § 338, subd. 4.

10. Limitation of actions ⚷100(11)

Where corporation contended that the action was not barred by three-year limitations because alleged fraud was not discovered until less than three years before action was instituted, in considering question whether there was lack of diligence on part of corporation in failing to discover facts before deceased's death, it was immaterial whether all stockholders, or less than all, were originally elected directors. Code Civ.Proc. § 338, subd. 4.

11. Limitation of actions ⚷195(5)

Where corporation contended that the action was not barred by three-year limitations because alleged fraud was not discovered until less than three years before action was instituted, court should not indulge in presumptions in favor of corporation, in absence of specific factual allegations of fraud on part of deceased. Code Civ.Proc. § 338, subd. 4.

12. Limitation of actions ⚷100(13)

Where stockholders and directors of corporation which was exclusively controlled by president knew that no directors' meetings were held by president, and received no financial statements, and made no attempt to see corporation's books, but continued to accept dividends paid by personal checks of president for a number of years, they had means of "knowledge" of alleged misappropriation of corporation's property by president, which was equivalent to knowledge, and hence there was "discovery" by corporation of alleged fraud within meaning of statute providing that cause of action for fraud, which must be brought within three years, is not deemed to have accrued until discovery of fraud. Code Civ.Proc. § 338, subd. 4.

13. Limitation of actions ⚷100(11)

Delay in discovering fraud is sometimes excusable in cases involving a confidential relationship, and statute providing that a cause of action for fraud is not deemed to have accrued until discovery, by aggrieved party, of facts constituting fraud, may be applicable despite the delay. Code Civ.Proc. § 338, subd. 4.

14. Corporations ⚷312(7)

If, over a long period of time, president of corporation, who had exclusive control of corporation, adopted policy of placing corporation's funds in his personal bank account, and corporation, through indolence and neglect, or by want of ordinary care on part of directors, permitted such practice, president was entitled to assume that he had authority and approval to so act. Civ.Code, § 2316.

15. Evidence 🔑65

A corporation has the duty to know its own books.

16. Corporations 🔑181(1)

Stockholders had the right to inspect corporation's books.

17. Limitation of actions 🔑100(11)

If stockholders in corporation unduly delayed in making a charge of fraud against their brother who had exclusive control of the corporation, the existence of relationship of brothers and sisters would not prevent three-year statute of limitations from becoming effective as against corporation's right to recover alleged misappropriation of corporation's property by president. Code Civ.Proc. § 338, subd. 4.

18. Appeal and error 🔑1178(8)

Where it is clear that a complaint may be amended to state a proper cause of action, a reviewing court, though no request to amend is presented, may reverse the order sustaining demurrer to complaint and direct an amendment. Code Civ.Proc. § 472c.

19. Appeal and error 🔑888(1)

Where complaint, to which demurrer was sustained, alleged knowledge of commingling of corporation's funds by corporation, and showed that corporation's action to recover allegedly misappropriated funds was barred by three year limitations because of such knowledge, no amendment was available to corporation on appeal to deny the knowledge, since it must be assumed that corporation stated its cause as favorably and completely as possible. Code Civ.Proc. § 338, subd. 4; § 472c.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by the Vertex Investment Company against Norma B. Schwabacher, individually and as executrix of the last will of Louis A. Schwabacher, deceased, and another for an accounting of alleged misappropriations by Louis A. Schwabacher of cash and property of the plaintiff, for a judgment for amount found due, and to have a trust in plaintiff's favor impressed on all moneys and properties received by Norma B. Schwabacher from the estate of Louis A. Schwabacher, and on proceeds of life policies. From a judgment entered after demurrer was sustained to amended complaint without leave to amend, the plaintiff appeals.

Judgment affirmed.

Philip S. Ehrlich, Albert A. Axelrod, and Julien R. Bauer, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison, Maurice E. Harrison, and Moses Lasky, all of San Francisco, for respondent.

WARD, Justice.

Plaintiff appeals from a judgment entered after demurrer sustained to the amended complaint without leave to amend. The gravamen of the action is that Louis A. Schwabacher, while a director and officer of plaintiff, Vertex Investment Company, embezzled, misappropriated and converted cash and property of plaintiff to his own use. The defendant, Norma B. Schwabacher, was sued individually and as executrix of the last will of Louis A. Schwabacher. Norma Schwabacher is the widow of Louis Schwabacher and legatee and devisee of his entire estate except as to some small specific bequests. The decree of final distribution has been entered in the estate proceeding. Samuel Schwabacher, brother of Louis, was co-executor of his will, and in that capacity was named as a defendant. The disposition of the action as to him does not appear from the record herein. This appeal involves only the demurrer of Norma Schwabacher individually and as executrix of the will of Louis.

Plaintiff prays that an accounting of the alleged misappropriations be had, that it have judgment for the amount found due and that a trust in its favor be impressed on all moneys and properties received by Norma from the estate of Louis, and on the proceeds of policies of insurance on the life of Louis received by Norma Schwabacher.

The grounds of demurrer are that the complaint does not state a cause of action; that it is barred by the statute of limitations, subdivision 4 of sec. 338, Code of Civil Procedure, and sec. 353, Code of Civil Procedure, and by laches; that plaintiff is estopped by the decree of distribution to maintain the action; that several causes of action have been united, but not separately stated, and that several causes of action have been improperly united.

The demurrer to the amended complaint was first overruled on February 19, 1941, but on April 10, 1941, the order was vacated and the demurrer was sustained without leave to amend. Judgment was entered for defendant on the following day.

Plaintiff contends that even though the order sustaining the demurrer would have been proper had it been the original decision of the court, the judge was without jurisdiction in the circumstances here to change his first ruling. The order overruling the demurrer was made on February 19, 1941. On March 3, 1941, counsel for defendant wrote a letter to the judge making a "request that the previous order overruling our demurrer be vacated and the matter reopened for further consideration." The letter called the court's attention to a decision in another state, which had appeared in the reports after the argument and filing of briefs in this case. Counsel urged that this decision was strong authority in defendant's favor. A copy of the letter was sent to plaintiff's counsel. On March 6, 1941, counsel for the plaintiff wrote a letter to the judge in answer to defendant's letter. Counsel for each side thereafter wrote two further letters to the judge, sending copies to opposing counsel. The last letter was written by plaintiff's counsel on March 14, 1941. On April 10, 1941, the judge made the order sustaining the demurrer without leave to amend and rendered judgment on the following day. No motion for reconsideration was made in open court and no formal notice of motion given.

Plaintiff contends that the court was without jurisdiction to change its ruling except pursuant to a motion made in court, and that it was required that notice of motion be given or waived. Plaintiff further contends that after the order overruling the demurrer had been made by the judge of the law and motion department, the case automatically passed to the jurisdiction of the presiding judge by force of the court rules, and the order changing the ruling on demurrer was beyond the jurisdiction of the judge of the law and motion department unless reassigned by the presiding judge, which was not done here. It is further contended that since the judge who made the original ruling ceased to be the judge of the law and motion department on March 31, 1941, he was without right on April 10, 1941, to make the order sustaining the demurrer, such matters being within the sole jurisdiction of the law and motion judge.

[1-3] We are of the view that the judge who originally ruled upon the demurrer had jurisdiction to change his decision by reason of the fact that it was he who originally ruled on the demurrer, even though at the time of the changed ruling he was no longer judge of the law and motion department. A ruling on demurrer, unlike many other types of judicial determinations, may be changed for no other reason than that the judge is of the view that his first ruling was erroneous. De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717; Kelly v. Liddicoat, 35 Cal.App.2d 559, 96 P.2d 186; Howe v. Board of Supervisors, 118 Cal.App. 306, 5 P.2d 28; 21 Cal.Jur. 124. Proceedings had in court, pursuant to notice given or waived, when the demurrer was first argued are the basis for the changed ruling as for the original decision, and an additional motion and notice are not required.

In the case herein the record does not show that the right of the judge who made the original ruling had ceased by reason of further proceedings had in the case before another judge of the court. The point raised by plaintiff is without merit.

In determining the applicability of the statute of limitations herein, two distinct periods may be considered; that, from the date of the organization of the corporation to the date of the death of Louis A. Schwabacher (about twenty-four years); and that from his death to the filing of the complaint (approximately five years). If the statute of limitations is applicable to either period, the demurrer to the amended complaint should be sustained. We will proceed to consider the demurrer as directed to the statute of limitations for the first twenty-four year period.

The complaint alleges that Louis A. Schwabacher died on or about the 1st day of August, 1935; that his wife Norma and Samuel Schwabacher, a brother, who were named in his will as such, qualified and were appointed as executors of his last will and testament; that Sarah Schwabacher, whose husband predeceased her, was the mother of Louis A., Samuel I. and Edgar B. Schwabacher, Mina A. Eckstein and Jennie S. Rosenbaum; that in the year 1911 plaintiff corporation was formed, the mother transferring to it certain stocks, bonds and other securities, which at that time constituted its sole assets; that the corporation issued 5,000 shares of capital stock equally to her five children, from whom officers and directors were selected; that Louis, as president, treasurer and general manager "exclusively controlled, dominated, directed and managed the properties, business and affairs of plaintiff, and at no time or at all consulted with or received any advice from the other directors, officers, or stockholders of said plaintiff, and in all respects said Louis A. Schwabacher managed and controlled said properties, business and affairs of plaintiff corporation as though the same were his individual properties, business and affairs"; that his brothers and sisters "looked upon said Louis A. Schwabacher as the head of their family; that said Sarah Schwabacher was 64 years of age in the year 1911; and had the greatest love and affection for said Louis A. Schwabacher and the greatest respect for the integrity, honesty, character and business ability of said Louis A. Schwabacher; that said Louis A. Schwabacher was very prominent in business affairs, being a director of several large corporations and being experienced in the management of corporate and business affairs; * * * that sometime after the organization of the plaintiff corporation said Samuel I. Schwabacher objected to the manner in which said Louis A. Schwabacher handled some routine matters for the plaintiff corpotion; that said Sarah Schwabacher informed said Samuel I. Schwabacher that if he objected to the manner in which said Louis A. Schwabacher managed the business and affairs of the plaintiff corporation, or if said Samuel I. Schwabacher opposed said Louis A. Schwabacher in the management of the business and affairs of the plaintiff corporation she, said Sarah Schwabacher would disinherit said Samuel I. Schwabacher; that said Samuel I. Schwabacher thereupon withdrew said objections and agreed to abide by the wishes of his mother. That * * * very close family ties and relations existed between said Louis A. Schwabacher and his brothers and sisters, the other stockholders and directors of the plaintiff corporation; that all of said stockholders and directors had full and complete confidence in the honesty, integrity and ability of Louis A. Schwabacher and relied implicitly upon him in the management and direction of the business and affairs of the plaintiff corporation. * * * That from time to time said Louis A. Schwabacher, without consulting the other directors or stockholders of plaintiff corporation, caused dividends to be paid to the stockholders of plaintiff corporation from the assets of plaintiff corporation; that from the date of the organization of the plaintiff corporation to the date of the death of said Louis A. Schwabacher the stockholders of the plaintiff corporation never held any meetings whatever; that though the minute book of plaintiff corporation records directors' meetings of the plaintiff corporation purportedly held from time to time up to the date of Louis A. Schwabacher's death, none of the other stockholders or directors of the plaintiff corporation had notice or knowledge thereof and never attended any such meetings; that said minutes were dictated or drafted by said Louis A. Schwabacher and none of said meetings were ever actually held. * * * That at no time during the period hereinabove mentioned did Louis A. Schwabacher establish or cause to be established on behalf of plaintiff corporation any bank account or depositary for its funds, and said plaintiff corporation at no time during the lifetime of said Louis A. Schwabacher had any bank account or depositary for its funds; that during all of said period of time said Louis A. Schwabacher either deposited said funds of plaintiff corporation in his personal bank account or otherwise commingled said funds of plaintiff corporation with his own personal funds; that during said period of time said Louis A. Schwabacher disbursed from said commingled funds such funds as he purportedly disbursed on behalf of plaintiff, and also such funds as he disbursed for his own use and benefit. * * * That plaintiff is further informed and believes, and upon such information and belief alleges, that various purchases purportedly made by said Louis A. Schwabacher for and on behalf of the plaintiff corporation resulted in the realization of profits therefrom; that such purchases purportedly made for and on behalf of the plaintiff which resulted in profits were transferred by the said Louis A. Schwabacher from the plaintiff corporation to said Louis A. Schwabacher at the actual cost thereof to plaintiff corporation, and the profits resulting therefrom were converted by said Louis A. Schwabacher to his own use and benefit." It is also alleged upon information and belief that the purported purchases resulted in losses which were "transferred from the said Louis A. Schwabacher to the plaintiff at the actual cost thereof to the said Louis A. Schwabacher, and the losses resulting therefrom were charged by Louis A. Schwabacher, to plaintiff corporation."

Upon the foregoing allegations based upon information and belief it is alleged "that plaintiff is informed and believes, and based upon such information and belief alleges that said books of account did not contain true and correct entries of all the financial and business transactions between plaintiff corporation and said Louis A. Schwabacher; that plaintiff is further informed and believes, and upon such information and belief alleges that said books of account merely contained a transcription of certain entries contained in the personal books of account of said Louis A. Schwabacher, and marked therein 'Vertex Investment Company' * * * That during all of the times herein mentioned the said Louis A. Schwabacher had misappropriated, embezzled and converted to his own use and benefit large sums of money and properties of great value belonging to the plaintiff corporation, the exact amount and character of which said money and properties are unknown to plaintiff at the present time. * * * That plaintiff is further informed and believes, and based upon such information and belief alleges that at the time of the death of Louis A. Schwabacher, there was included among the alleged assets of his estate, cash and properties, which cash and properties were actually the property of the plaintiff corporation, and which said cash resulted from the aforesaid misappropriation, embezzlement and conversion, and which properties had been purchased with the funds of the plaintiff corporation. * * * That plaintiff is informed and believes, and based upon such information and belief alleges that said Louis A. Schwabacher, during his lifetime, purchased various forms of policies of life insurance, and that the defendant, Norma B. Schwabacher was named as sole beneficiary of all said policies of life insurance, other than those in which the estate of Louis A. Schwabacher was named as beneficiary; that plaintiff is further informed and believes, and based upon such information and belief alleges that the premiums upon all of said policies of life insurance, so paid by Louis A. Schwabacher or on his behalf, were paid for with the funds of plaintiff corporation, or with funds of plaintiff corporation which had been commingled with the personal funds of said Louis A. Schwabacher, as hereinabove alleged. * * * That said Louis A. Schwabacher at no time or at all advised any of the stockholders, directors or officers of plaintiff corporation of the matters and things hereinabove alleged; that at no time or at all did said Louis A. Schwabacher furnish a financial statement of the plaintiff corporation to the stockholders of said plaintiff, nor did he cause such a financial statement to be prepared for submission to the stockholders or directors of said plaintiff, nor did the stockholders or directors of said plaintiff ever see a financial statement of said plaintiff, except as hereinafter alleged; that none of the stockholders or directors of said plaintiff, other than Louis A. Schwabacher, ever saw or were permitted by said Louis A. Schwabacher to see the purported books of account of said plaintiff, nor the personal books of account of said Louis A. Schwabacher; that none of the stockholders, directors or officers of said plaintiff had any knowledge of the financial and business transactions between said plaintiff and said Louis A. Schwabacher, as hereinabove set forth until subsequent to the death of said Louis A. Schwabacher, and then only under the circumstances hereinafter alleged; that none of the stockholders, directors or officers of said plaintiff ever consented to or approved of the financial and business transactions between said plaintiff and said Louis A. Schwabacher, nor consented to or approved of the manner in which said Louis A. Schwabacher directed and managed the business and affairs of said plaintiff, as hereinabove set forth; that by reason of the matters and things herein set forth and the confidential and family relations existing between said Louis A. Schwabacher and the other stockholders and directors of said plaintiff, and the trust and reliance placed by them in said Louis A. Schwabacher, as hereinabove alleged, the said stockholders and directors of said plaintiff at no time suspected or had any cause to suspect any of the matters or things herein alleged."

Under the terms of the will, except for certain specific bequests, the entire estate was devised to Norma B. Schwabacher, the widow of Louis, and under a decree of distribution the estate was distributed to her. The complaint herein was filed in May 1940 subsequent to the final distribution in the estate of Louis. The date of the final discovery of the fraud is placed as of September 1937.

In addition to the allegations outlined or quoted herein, the complaint further alleges certain matters subsequent to the death of Louis.

[4] When failure to discover fraud is due to lack of diligence, the statute of limitations commences to run from the time it should have been discovered.

[5-9] A cause of action for fraud is "not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." Sec. 338, subd. 4, Code Civ.Proc. But it is not sufficient for the complaint merely to allege discovery within the three-year period for actions for relief on the ground of fraud. "Discovery," within the meaning of the section, is deemed to take place when the plaintiff in the exercise of due diligence should have learned the facts. Hence it must affirmatively appear that the failure to make discovery was not due to lack of diligence. The plaintiff should set forth the circumstances under which he learned the facts, and the reasons for failing to learn them sooner in order that the court may determine whether he has been negligent in not acquiring knowledge of them at an earlier date. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; West v. Great Western Power Co., 36 Cal.App.2d 403, 97 P.2d 1014. The rule is often expressed in the statement that where plaintiff knows facts which place him under a duty of inquiry, he is charged with knowledge of such facts as an investigation would have revealed. It has also been said that the means of knowledge are the equivalent of knowledge, but this is subject to the qualification that the position of plaintiff must be such that he is under a duty to make use of such means. Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 209 P. 995.

[10] In considering the question whether there was a lack of diligence in failing to discover the facts before the death of Louis, we are of the view that upon the facts alleged it is immaterial whether all, or less than all, were originally elected directors. That is, it is not necessary here to determine whether, if the facts were such as to impose a duty of investigation on directors, but not on persons who were stockholders only, the constructive notice of the directors would be imputed to the corporation to bar an action by it for the benefit of all stockholders. Curtis, Receiver, v. Connly, 257 U.S. 260, 42 S.Ct. 100, 66 L.Ed. 222; Whitten v. Dabney, 171 Cal. 621, 154 P. 312.

It is alleged that from time to time Louis caused dividends to be paid without consulting the other directors, and that plaintiff at no time had any bank account or depositary for its funds. It is further alleged that Louis either deposited funds of plaintiff in his personal bank account or otherwise commingled funds of plaintiff with funds of his own and those of his mother. The conclusion to be drawn from these allegations, in the analysis of defendant, is that the dividends were paid by personal check of Louis. We are of the view that this deduction is a proper one. To have paid dividends in currency would have been such a departure from common business practice that it will not be inferred that they were thus paid in the absence of an allegation to that effect. But it does not follow from the fact that corporate funds were deposited in a bank account in the name of Louis that he also deposited his personal funds in the same account.

To summarize the charge of lack of diligence on the part of the stockholders during the lifetime of Louis, it is that they permitted him to have exclusive management of the corporation without calling him to account for his management. During this period they received no financial statements and never saw the books of the corporation. It is not averred that they ever made any request for such statements, nor that they ever asked to see the corporate books or to have them audited. If they had requested a financial report, an honest statement by Louis should have revealed his indebtedness, if any, to the company. They may not have been in a position themselves to analyze the corporate books kept by Louis, but a professional audit if they had asked for one, would have revealed Louis' indebtedness to the company. If a request for a statement or audit had been made, a failure on the part of Louis to comply would arouse a strong suspicion of irregularity.

If Louis were alive he could not rely on the other directors having abrogated their functions in his favor to defeat liability, since it was with the consent of all. Their lack of diligence, if any, consists in their failing to call Louis to account for his exclusive management over a long period of years.

An inference may be drawn from the complaint that the action was not commenced earlier because of the reluctance of the stockholders to distress their mother who was living during the greater period between the organization of the corporation and the filing of the complaint. It is sufficient to say that the complaint was filed prior to the death of the mother and approximately five years after the death of Louis. Primarily, the allegations of fraud are based upon the commingling of the funds of the corporation with the personal funds of Louis and those of his mother. It appears from the amended complaint that the lips of Louis and the lips of the mother have been sealed by death.

[11] The charges of embezzlement, etc., are directed against a man long since dead. In the absence of specific factual allegations of fraud, the law should not indulge in presumptions in favor of the plaintiff corporation. The amended complaint does not allege any direct acts of concealment on the part of Louis or any misrepresentation or deceit by him. The closest approach is the allegation that the other directors and stockholders were not permitted to examine the books; it is not alleged that a request therefor was ever presented to Louis.

As stated before, all the allegations of fraud up to 1935, based upon information and belief or otherwise, rest upon the fact that there was a commingling of funds. The fact was not concealed. The corporation, its directors and stockholders knew of this apparent irregularity covering an approximate period of twenty-four years. According to the complaint, also, the stockholders and directors knew that no directors' meetings were held, nevertheless they continued to accept dividends paid by Louis' personal checks. These facts, standing alone, are sufficient to establish the stockholders were put on notice of an apparent irregularity. Respondent quotes from Vertex Investment Co. v. Commissioner of Internal Revenue, 47 U.S. Board of Tax Appeal ——, which is not challenged by appellant, as follows: "The fact that he [Louis] kept the funds of petitioner [appellant] in his own account should have been known to the other stockholders, since they were paid dividends from time to time by checks drawn on his personal account."

[12] The means of knowledge which was clearly available to plaintiff and the stockholders thereof is equivalent to knowledge. Consolidated R. & P. Co. v. Scarborough, supra; Bainbridge v. Stoner, 16 Cal.2d 423, 106 P.2d 423; Nighbert v. First Nat. Bk. of Bakersfield, 26 Cal.App.2d 624, 79 P.2d 1105; Haley v. Santa Fe Land Imp. Co., 5 Cal.App.2d 415, 42 P.2d 1078; Daily Tel. Co. v. Long Beach Press Pub. Co., 133 Cal.App. 140, 23 P.2d 833; Turman v. Holmes, 29 Cal.App.2d 198, 84 P.2d 225; Myers v. Metropolitan Tr. Co. of Cal., 22 Cal.App.2d 284, 70 P.2d 992.

[13, 14] Delay in discovering a fraud is sometimes excusable in cases involving a confidential relationship. It should be noted that this is not an action by the individual stockholders or directors against Louis, as trustee, but by the corporation against the widow of Louis individually and as executrix of his estate. So far as Louis was concerned, in his capacity as president of the corporation he was the agent thereof. If, over a long period of time, he adopted the policy of placing the funds of the corporation in his personal account, and the corporation, through indolence and neglect, "or by want of ordinary care" on the part of its directors permitted such practice, the agent may assume that he has the authority and approval of the principals to so act. Civ.Code, sec. 2316.

[15, 16] It was the duty of the corporation to know its own books, and the stockholders had a right to inspect them. Wood v. Carpenter, 101 U.S. 135, 25 L.Ed. 807; Curtis, Receiver, v. Connly, supra. In County, etc., Bk. v. Coast D. & L. Co., 46 Cal.App.2d 355, 359, 115 P.2d 988, 990, the following facts are shown: "It appears that all transactions by defendant company, including this, were handled in an altogether informal manner; that no directors' meetings were ever actually held, the resolutions and minutes being prepared by Poletti, and he and Morelli simply counting 'the other directors in.' Between 1921 and 1934 no directors' meetings were ever, in fact, held, although the record shows numerous 'resolutions' including the one above mentioned, 'passed' by defendant company." The majority opinion (petition for hearing denied by the Supreme Court) further states (46 Cal.App.2d at page 367, 115 P.2d at page 994): "As directors and officers of the company, it was their duty to know what was being done by Poletti

and how he was performing his duties as general manager. They cannot be permitted to disregard their duties for thirteen or fourteen years, and then, after receiving the benefits of the transaction, and when the particular transaction does not turn out advantageously, as an afterthought, contend that their agent was unauthorized to perform the questioned act." The precise point in that case is not raised herein, but the statement on the duties of directors is illuminating.

[17] Appellant corporation, according to the complaint, had actual knowledge of circumstances which should have prompted it to examine the books irrespective of any possible personal confidential relationship between the president thereof and the stockholders. In some instances affectionate brothers and sisters may hesitate to make a charge of fraud against one another, but if the delay is unduly prolonged the existence of the relationship should not prevent the statute of limitations from becoming effective Mackall v. Casilear, 137 U.S. 556, 11 S.Ct. 178, 34 L.Ed. 776; Bacon v. Soule, 19 Cal.App. 428, 126 P. 384, particularly if the delay is twenty-four years and in the meantime the accused dies.

The answer to the question involved as regards the first twenty-four years of the existence of the corporation is well set out in Kenton v. Wood, 56 Ariz. 325, 107 P.2d 380, 383, where the court said: "This is an action by a minority stockholder and director to recover for the benefit of the corporation money which he alleges was misapplied by a co-director. While defendant was general manager of the corporation during the time in which it was contended there was a discrepancy in its accounts, plaintiff was also a member of its board of directors, and such board had both the ultimate authority and responsibility for the management of the corporation. It is true that directors are trustees for the benefit of the stockholders of a corporation, but there is no fiduciary relation between two directors as such, and since this was not an individual action between plaintiff and defendant to recover money which it was alleged that defendant, as trustee for the benefit of plaintiff, owed the latter, we think family relationship between them as individuals cannot create a fiduciary relation between them in the present case. * * * Plaintiff did not occupy the position of an ordinary stockholder, who can only have an inspection of the records of the corporation by a special effort and who is under no duty to inspect them. He was a director charged with the duty of guarding the interests of the corporation and, therefore, of examining all of the acts of its officers and its records. We think under these circumstances that a delay of approximately eight years by the plaintiff before he brought his action was laches, if, indeed, the statute of limitations had not actually run. Guerin v. American S. & R. Co., 28 Ariz. 160, 236 P. 684; Pourroy v. Gardner, 122 Cal.App. 521, 10 P.2d 815." On the question involved on this appeal, namely, that the corporation had actual knowledge of its own affairs and of circumstances that should have led to an investigation, see Consolidated R. & P. Co. v. Scarborough, supra; Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 312, 28 P. 1049; Lady Washington C. Co. v. Wood, supra; Daily Telegraph Co. v. Long Beach Press Pub. Co., supra; Pourroy v. Gardner, supra.

The statute of limitations started to run long before the death of Louis. The allegations of subsequent occurrences are not relevant to the case. Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049. For that reason the further contentions of respondent—that appellant was chargeable with knowledge of the true facts upon the election of Samuel, brother of Louis, as president of the corporation following the death of the latter in 1935; that there is no excuse for the delay after the alleged discovery of fraud in September 1937; that the action is barred by laches; that appellant is barred either by the doctrine of election of remedies or the doctrine of res judicata—need not be considered. The last point is based upon the fact that appellant in February 1936 elected to file a claim as a general creditor of Louis in the amount of $134,479.78, plus interest. In March of 1937 the corporation and each of its stockholders and directors accepted assets valued at $173,650 in settlement of all claims against the estate of Louis, and the "discovery" by Edgar B. Schwabacher in September of the alleged fraud was prior to a ratable and subsequently a final distribution of the remainder of the estate of Louis. The merits of these contentions by respondent, or the allegations of the complaint covering the period from 1935 to 1940 need not be considered in view of our conclusion that the statute of limitations started to run within the previous, twenty-four-year, period.

The cases cited by appellant, covering the twenty-four-year period, are not in point. They involved actions by stockholders, and not by the corporations, or were suits to reform conveyances, or it was determined that there were no circumstances to arouse suspicion, or that allegations of concealment appeared in the complaint, or they do not involve the statute of limitations.

[18, 19] When it is "clear" that a complaint may be amended to state a proper cause of action (Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522), a reviewing court, though no request to amend is presented, may reverse the order sustaining the demurrer and direct an amendment. Code Civ.Proc., sec. 472c. The complaint alleges knowledge of the commingling of funds. It must be assumed that plaintiff stated its cause as favorably and completely as possible. No amendment would be available to deny knowledge that should have been possessed by appellant.

The judgment appealed from is affirmed.

KNIGHT, J., concurred.

PETERS, Presiding Justice (dissenting).

I dissent. I am of the view that the majority opinion is predicated upon several basic misconceptions of the nature of the cause of action pleaded, and upon a misunderstanding of the legal principles applicable to such an action.

That the majority opinion is predicated upon basic misconceptions of the allegations of the complaint can be readily shown. That opinion correctly summarizes some of the allegations, and then, in my opinion, misinterprets them. Thus, after summarizing sufficient of the allegations to indicate beyond doubt that the basic charge in the complaint is that Louis misappropriated over $500,000 of corporate assets, the majority opinion proceeds to discuss those allegations as if they charged a mere commingling of personal with corporate assets that could easily have been discovered by a cursory examination of the corporate books. Thus, the majority opinion interprets the complaint as follows: "Primarily, the allegations of fraud are based upon the commingling of the funds of the corporation with the personal funds of Louis and those of his mother * * *. As stated before, all the allegations of fraud up to 1935, based upon information or belief or otherwise, rest upon the fact that there was a commingling of funds." Based upon this major premise, the majority opinion then holds that, as a matter of law, the other stockholders should have discovered the commingling years before Louis died. This conception that Louis was a simple debtor of the company who had commingled personal with corporate assets permeates the majority opinion. It is true that the corporate books did show that Louis was indebted to the corporation for over $134,000, but the present action is not to recover that sum. That debt was discovered shortly after Louis died, and his estate settled that obligation. Then in 1937 the other stockholders discovered that, in addition to that sum, Louis had embezzled large sums of money and property not shown by the corporate books. The present action was brought against the distributee of Louis' estate to impose a trust upon the property that can be traced as stolen property. Stripped of non-essential allegations, the cause of action pleaded is that Louis, who had the full confidence and trust of his brothers and sisters, over a period of twenty-four years was false to that trust; that during that period he "misappropriated, embezzled, and converted to his own use and benefit" over $500,000 of corporate assets; that in order to ascertain the exact amount it will be necessary to have an accounting not only of the corporate books, but of the personal books of Louis and of the books of other persons and companies with whom Louis dealt; that the fraud of Louis was discovered in September, 1937, under circumstances later to be discussed. Thus it will be seen the action is not one based on a simple commingling easily ascertainable from the corporate books.

There is another factual matter that should be mentioned. The majority opinion, apparently in justification of applying a strict and technical interpretation to the allegations of the complaint, several times emphasizes that "the lips of Louis * * * have been sealed by death," and that the charges "are directed against a man long since dead." The opinion then goes on to hold, however, that the cause of action was barred before Louis died. If that is so, the fact that he is now dead has no relevance to the discussion.

That the majority opinion is predicated upon a misunderstanding of the legal principles applicable to such a case, is also readily apparent. It holds that, as between the trusted managing officer who embezzles corporate funds and the corporation that he defrauds, the officers and stockholders are chargeable, as a matter of law, with knowledge that the officer they implicitly trusted is an embezzler, because, forsooth, they should not have trusted him—and this in a case where the corporation is a family corporation, managed by mutual consent by one brother who had the complete faith of his brothers and sisters, and who, so the complaint charges, was false to that trust. This startling result is reached by applying, incorrectly I believe, the rule applicable to the rights between corporations and third persons who deal with the managing officer. Obviously, when the board of directors permits one of its members to manage a company and to deal with third persons, it cannot later avoid a transaction entered into by the managing officer with such third person on the claim that the other members of the board did not know the managing director was exercising the challenged power. Of course, in such a situation, the other directors are chargeable with such knowledge as a matter of law. The reasons for such a rule are obvious. That is all that was held in County, etc., Bk. v. Coast D. & L. Co., 46 Cal.App.2d 355, 115 P.2d 988 (of which I was the author), from which several quotations are contained in the majority opinion. But that rule has not, and should not have, any application when the rights of third persons are not involved, and where the corporation is seeking to recover its stolen assets.

The opinion as written holds that the cause of action pleaded was barred before Louis died in 1935. Stated another way, were Louis alive today and in possession of the stolen property, or the proceeds of transmutations of the stolen property, the action of the corporation to impose a trust on that stolen property would be barred, as a matter of law, although the corporation brought the action within three years of the date of the discovery of the fraud, because the other stockholders should have discovered the thefts sooner. Before discussing the propriety of such holding at length, some reference should be made to the nature of the relief sought in this action. Plaintiff prays that an accounting be had in order to ascertain the amount of the misappropriations, and that a trust be impressed on property now in the hands of the distributee of the estate of Louis. The accounting is requested not only of the corporate books, but also the books of Louis, and also the books, records and entries of various other persons, firms and corporations with whom Louis had dealings.

With these preliminary remarks, consideration should now be given to the exact allegations of the complaint. It alleges at some length the background of the present controversy. It alleges that the plaintiff corporation was organized with 5,000 shares of stock held equally by Louis A. Schwabacher and each of his four brothers and sisters, Mina A. Eckstein, Jennie S. Rosenbaum, Samuel E. Schwabacher and Edgar B. Schwabacher. Sarah Schwabacher, mother of the stockholders, transferred stocks, bonds and securities to the corporation upon its formation, which were its sole assets, and which, with their accretions, continue to be its sole assets. The business of plaintiff consists of dealing in securities and commodities for its own account, investing its assets and receiving interest and dividends. It is further alleged that the company was organized in 1911. Louis Schwabacher died August 1, 1935. The decree of final distribution in his estate was entered on May 2, 1938. This action was filed May 3, 1940, almost five years after the death of Louis. The misappropriations are alleged to have commenced upon formation of the plaintiff and to have continued until the death of Louis, almost twenty-four years later. The theory of plaintiff is that the alleged defalcations of Louis were not discovered until September, 1937, that the action is, therefore, within the three-year-period after discovery limited for commencement of action based on fraud. Sec. 338, subd. 4, Code Civ.Proc.

Defendant contends that the plaintiff is charged with notice of the alleged misappropriations as of a much earlier date than September, 1937; that in any event the delay from discovery in September, 1937, as alleged, to May 3, 1940, when suit was filed, constitutes laches as a matter of law.

The complaint alleges that Louis Schwabacher, the oldest of the brothers and sisters, at all times had exclusive management of the corporate affairs, without consultation with or advice from the others. He managed and controlled plaintiff corporation as if it were his individual property. In the period of almost twenty-four years before the death of Louis, no directors' or stockholders' meetings were held, and no financial statements were rendered the other stockholders. It is alleged that no separate bank account was maintained for the company, and that Louis deposited plaintiff's funds in his personal bank account, or otherwise commingled plaintiff's funds with his personal funds. Dividends were paid from time to time.

On the death of Louis in 1935, one of the brothers, Samuel Schwabacher, co-executor of the estate of Louis, was elected president of plaintiff at a directors' meeting. The law firm which at all times had been the attorney for plaintiff company, and which continued to be its attorney until January 1938, was also attorney for Samuel Schwabacher and Norma Schwabacher as executors of the estate of Louis, and for Norma Schwabacher individually. A member of that firm is a nephew of Norma Schwabacher.

In March, 1937, a settlement of the liability of Louis Schwabacher to the plaintiff corporation was entered into. On the theory that the corporate books showed that Louis was indebted to the plaintiff in the amount of $134,479.78, plaintiff's claim for that sum, with interest, was filed and approved. A resolution was adopted by the directors in March, 1937, that the corporation accept certain stock in the estate of Louis, including his 1,000 shares of stock in plaintiff corporation, in discharge of the claim. In addition, the four brothers and sisters of Louis executed their written consents to this settlement and it was carried out.

By the complaint herein plaintiff seeks to avoid the settlement insofar as it fixes the amount of Louis' indebtedness on the ground that it was entered into without knowledge of the fact that the indebtedness of Louis arising from his misappropriation of corporate property was in amount exceeding the settlement. It is averred on information and belief that the value of the moneys and properties converted exceeds the sum of $500,000, that the exact amount is unknown to plaintiff and cannot be ascertained until after an audit and account is made not only of the corporate books and the books of Louis, but also the books, records and entries of various other persons, firms and corporations with which Louis had business dealings. It is alleged that the member of the law firm, referred to above, who was a nephew of Norma Schwabacher, was active in arranging the settlement and by his representations and advice prevented plaintiff from acquiring knowledge of the facts. The four brothers and sisters discovered the facts in September, 1937, under circumstances later set forth. Suit was filed in May, 1940.

Defendant contends that the other stockholders and directors must be deemed to have discovered the alleged misappropriations before the death of Louis Schwabacher; that the facts as alleged as a matter of law placed on them a duty of inquiry into the corporate management and records, which, if pursued, would have led to discovery. Since this action was brought almost five years after the death of Louis, it was barred in its entirety if the stockholders and directors were charged with knowledge before his death.

In considering the question whether there was a lack of diligence in failing to discover the facts before the death of Louis, I am of the view that upon the facts alleged it is immaterial whether all, or less than all, were orginally elected directors. That is, it is not necessary here to determine whether, if the facts were such as to impose a duty of investigation on directors, but not on those who were stockholders only, the constructive notice of the directors would be imputed to the corporation to bar an action by it for the benefit of all stockholders. See 39 Columb.L.Rev. 842; 41 Columb.L.Rev. 686; 54 Harv.L.Rev. 1040. Under the facts alleged the "directors," other than Louis, were mere stockholders and should be so treated.

It appears that the sole control of the corporation by Louis was with the knowledge and consent of all concerned. For a long period of years the corporation was administered as if he were the sole director. Under such circumstances, Louis could not in his lifetime, nor those who succeeded to his estate after his death, contend in avoidance of liability for his fraud that the directors were under a duty to themselves and to those stockholders, if any, who may not have been directors, to discharge actively the functions of director. The obligation of the directors implied in the corporate form of organization had been altered by long continued practice to which all consented. No question is here involved as to the liability of the inactive directors to third persons for malfeasance of the sole active director.

The rule is well settled that where all members of the board of directors in control of a corporation are implicated in a fraud against it, their knowledge is not the knowledge of the corporation to bar an action by it or a derivative suit by its stockholders on its behalf. San Leandro Canning Co. v. Perillo, 211 Cal. 482, 295 P. 1026; Whitten v. Dabney, 171 Cal. 621, 154 P. 312; 6a Cal.Jur. p. 1232, sec. 704. Here, with the consent of all, Louis was, in effect, the sole director in exclusive management of the corporation. His knowledge in the circumstances alleged is not the knowledge of the corporation, and the question is, whether the four brothers and sisters as stockholders of plaintiff should have discovered the misappropriations of Louis. If all stockholders were charged with notice more than three years before action brought, the plaintiff corporation cannot maintain this action.

The failure of the stockholders other than Louis to take "any active or any other interest" in the company is attributed to the confidential relations existing between Louis and the others, to their full confidence in his integrity and ability, and to the express "wish and direction" of their mother that Louis assume control. The mother was a widow, sixty-four years of age when the corporation was formed. Louis was the oldest of the five stockholders and a man of wide business experience. He was forty-one years old. Samuel was twenty-seven, and Edgar, twenty-one. Neither they nor the two sisters had any business experience, the complaint alleges. Louis was looked upon as the head of the family.

It is further alleged that on one occasion, the date of which is not set forth, Samuel objected to the manner in which Louis handled a routine matter. His mother informed him that if he objected to the way in which Louis managed the corporation, or opposed him, she would disinherit him. He then withdrew his objection.

It is averred that Louis kept a minute book of purported directors' meetings, but that none in fact were held. None of the stockholders "ever saw or were permitted by said Louis A. Schwabacher to see" the books of account of plaintiff kept by Louis. It is alleged that Louis kept books of account of plaintiff, which, it is alleged on information and belief, did not contain true and correct entries of the transactions between plaintiff and Louis.

It is defendant's theory, sustained by the majority opinion, that the stockholders were guilty of lack of diligence as a matter of law. This charge of lack of diligence on their part during the lifetime of Louis, is based on the theory that they permitted him to have exclusive management of the corporation without calling him to account for his management. That this does not constitute lack of diligence as a matter of law is readily demonstrated.

I have heretofore said that Louis, were he alive, obviously could not rely on the other directors having abrogated their functions in his favor to defeat liability, since it was with the consent of all. Their lack of diligence, if any, consists in their failing either to call Louis to account for his exclusive management over a long period of years, or to examine the books or cause an audit to be made. The majority opinion holds that the failure of Louis to render such financial statements, when considered alone, or in connection with the fact that dividends were paid by his personal check, as a matter of law should have aroused the suspicion of the other stockholders and dictated inquiry into his management.

I am of the view that it cannot be held on the facts alleged in the complaint that as a matter of law the four brothers and sisters of Louis Schwabacher were chargeable with a want of diligence in failing to demand a report and account of Louis or to procure an audit to be made of the corporate books. A fundamental factor in this case, as alleged, is the trust and confidence which the younger members of this family, inexperienced in business, placed in their eldest brother as the head of the family and a man of wide business experience. Dividends were paid from time to time, which doubtless lulled the stockholders into a sense of security. That Louis should have exclusive control was the express wish of the mother, who had provided the securities which constituted the assets of the company. It has been held, under some circumstances, that directors and stockholders are chargeable with what the books show. Turman v. Holmes, 29 Cal.App.2d 198, 84 P.2d 225; Daily Tel. Co. v. Long Beach Press Pub. Co., 133 Cal.App. 140, 23 P.2d 833; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. In other cases it has been held that in the absence of special facts which dictate inquiry, stockholders and even directors are not under a duty to know the corporate books. West v. Great Western Power Co., 36 Cal.App.2d 403, 97 P.2d 1014; Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 209 P. 995; Reid v. Robinson, 64 Cal.App. 46, 220 P. 676. In West v. Great Western Power Co., supra, the rule in Lady Washington C. Co. v. Wood is described as "radically curtailed" in Prewitt v. Sunnymead Orchard Co., supra.

If, as alleged in the complaint, Louis Schwabacher, has misappropriated corporate property in a large amount, I am of the view that the corporation, of which his brothers and sisters are stockholders, should not be held to have lost its remedy because Louis was trusted to the extent shown. I am of the view that this case is one where the following quotation is apposite: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part." Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243, 249. It cannot be said that the conduct of the other stockholders in trusting their brother Louis to the extent that they did not ask for an accounting of his stewardship or familiarize themselves with the contents of the corporate books is "inexcusable."

Defendant relies strongly on Kenton v. Wood, 56 Ariz. 325, 107 P.2d 380, 381 for the proposition that the other four brothers and sisters as stockholders and directors were under a duty to know the corporate books. The majority opinion quotes from that case at length. There are statements in that opinion that support defendant. They are contrary to the weight of authority and should not be followed here. Moreover, the case is distinguishable on several grounds. There the action was brought as a stockholder's derivative suit on behalf of the corporation. The defendant, charged with diverting corporate property to his own use, was the son-in-law of the plaintiff, who up to a certain date was a stockholder as well as a director. The court said that it was the duty of the plaintiff as a director to examine the corporate books and records. Since the court also said that the defendant managed the corporation "as though it were his own private business," and that he "remained in entire control of the affairs of the corporation," defendant contends that the facts are analogous to those in the instant case. However, it does not appear that defendant thus conducted the business while plaintiff was a director. Plaintiff was employed by the corporation until December, 1934, when defendant discharged him. At the election of directors held in February, 1935, plaintiff was not elected a director. The opinion is not entirely clear, but the court's statement as to defendant's exclusive control would seem to relate to the period after plaintiff had ceased to be an employee and director of the company. In the case herein I have held that the duty of the four brothers and sisters of Louis was that of stockholders only by reason of the manner in which the corporation was managed with the consent of all.

There is a further distinction between the cited case and the one before this court. The opinion states that the plaintiff delayed approximately eight years before bringing suit. The date of bringing suit does not appear from the opinion, but the eight-year-period must have included time after the discharge of plaintiff. The situation, unlike that in the present case, was not one where harmony prevailed. The discord and friction between the plaintiff and his son-in-law in that case might well have required inquiry on the part of plaintiff.

In certain cases there are statements that there must be affirmative acts of concealment which prevent discovery of the fraud, that mere silence is not enough. Daily Tel. Co. v. Long Beach Press Pub. Co., 133 Cal.App. 140, 23 P.2d 833; West v. Great Western Power Co., 36 Cal.App.2d 403, 97 P.2d 1014. The true rule is that if the facts are such that the plaintiff is not chargeable with lack of diligence in failing to make discovery of the fraud, the statute of limitations does not commence to run, although the defendant has not made further representations to conceal it. Mere silence, where there is a duty to speak, and where it is known that those to whom the duty is owing are unaware, may as effectively prevent discovery as positive misrepresentations made to that end.

On this branch of the case I think that no other conclusion is reasonably possible but that the stockholders were not under a duty to know that the corporate books showed that Louis had appropriated to his own use money and property of the corporation of a value of more than $134,000, and hence they were not bound to investigate, by reason of knowledge of what the books showed, in order to discover the full extent of his peculations.

This is as far as the majority opinion goes. Inasmuch as it holds that the complaint was barred, as a matter of law, before Louis died in 1935, the majority did not find it necessary to consider other contentions of defendant. These will be considered seriatim.

The next question is whether the stockholders were charged with notice upon the death of Louis in August, 1935, or within such time thereafter that an action brought in May, 1940, was barred by the three-year-period of limitations. It is alleged that immediately after Louis' death, the brother Samuel was elected president of plaintiff and continued to be president until April 30, 1940, three days before the present suit was filed. Samuel was coexecutor of the estate of Louis with Norma Schwabacher, widow of Louis. The firm of attorneys which had represented the plaintiff corporation from its formation was also attorney for the executors and for Norma as legatee and devisee of Louis.

It is conceded by the complaint that Samuel knew on or about August 1, 1935, which is the date of the death of Louis, that the books of account of plaintiff showed a balance owing to plaintiff from Louis in the sum of $134,479.78, but it is alleged that the other stockholders did not know this until March 15, 1937, which is the date of the settlement agreement. Neither Samuel nor the others knew that the indebtedness of Louis shown by the books of the plaintiff corporation arose from a misappropriation of corporate property, nor that there were further misappropriations, until September, 1937.

The defendant argues that Samuel, as executor of the estate of Louis and president of plaintiff, represented adverse interests. However, as executor his obligation was to act for creditors of Louis, including plaintiff, as well as for the devisees and legatees of his estate. Samuel's personal financial interest would lie on the side of plaintiff, since he was a stockholder, rather than with Norma as legatee of the estate of Louis.

The firm of attorneys referred to above clearly represented adverse interests, although it is not contended that this was not with the knowledge and consent of all. The interests of plaintiff corporation, and of Norma Schwabacher as legatee and devisee of the estate of Louis, were conflicting. It is not alleged that any stockholder of plaintiff was represented by independent counsel.

In explanation of the failure of Samuel or the other stockholders to seek an audit or to discover the facts with reference to the nature and amount of the indebtedness of Louis, the complaint sets forth conduct and representations of that member of the legal firm referred to above who was a nephew of Norma Schwabacher, an attorney both for her and for plaintiff. It is alleged that the attorney was endeavoring to preserve for the benefit of Norma as large a portion of the assets of Louis as possible.

In paragraph XXXII it is alleged that between August 1, 1935, to and including January, 1938, Samuel, as president of plaintiff corporation, and as an executor of the last will of Louis, continuously consulted and advised with this attorney with respect to the indebtedness of Louis to plaintiff "as shown upon the books of account of plaintiff." It is alleged that the attorney falsely advised Samuel that the books of account "were true and correct and have been examined and certified to by certified public accountants" (paragraph XXXIII); that Louis had not embezzled, misappropriated or converted to his own use any funds of plaintiff; that the books of account merely showed a balance due upon a book account, and any claim or action by plaintiff would have to be based upon such account and for the amount shown to be owing on such books; that the balance shown to be due from Louis to plaintiff was not "moneys of plaintiff corporation used by said Louis A. Schwabacher without authorization from said plaintiff corporation for his own purposes."

The attorney is not a party to this action, which seeks to hold Norma Schwabacher by reason of her receipt of property of plaintiff misappropriated by Louis.

The attorney prepared a creditor's claim on behalf of plaintiff, which is attached to the complaint as an exhibit, and which was presented on February 18, 1936, after numerous conferences between the attorney and Samuel. The claim was signed and verified by one Helen M. Crowley as secretary of plaintiff. The claim recites that the books of plaintiff, kept by Louis, were "from time to time" examined and certified by certified public accountants; that starting with the year 1911, and until the death of Louis, dividend, coupon, rental and other payments to plaintiff were received by Louis and by him deposited in a bank account in which were also deposited funds of Louis Schwabacher, and Sarah Schwabacher, the mother; that true and correct books were kept for said account, which "correctly and accurately showed and now show each receipt thereof and disbursement therefrom and the credits of and charges against all persons whose funds were deposited in said account and who made withdrawals therefrom." It is further recited in the claim that separate records and accounts were kept for each person, including Louis Schwabacher, whose funds were received in the account and who were charged with disbursements therefrom. At the time of the death of Louis the balance shown to be owing from him, without interest, was $134,479.78. The amount owing from Louis varied from time to time, the claim recites, as credits for payments made by Louis in the account reduced the balance owing from him, and on other occasions charges against Louis on the account increased the amount owing from him. The claim is for $134,479.78, plus interest at the rate of 5 per cent from the respective dates of the advances, amounting to $26,895.80 to the date of the claim, and for accruing interest.

In paragraph XXXIV of the complaint it is alleged that the attorney finally advised Samuel that he would recommend to the executors that they settle the claim of plaintiff by transfer to plaintiff of eighty-six shares of Schwabacher Bros. & Co., Inc., at an agreed valuation of $500 per share, and 1,000 shares of stock in plaintiff corporation at an agreed valuation of $120 per share, and also by waiving the estate's claim to dividends on the stock in plaintiff corporation, which dividends had been declared in the amount of $10,650, but had not been paid. This 1,000 shares of plaintiff corporation constituted the total interest of the estate of Louis in plaintiff corporation.

The attorney further advised "plaintiff corporation and Samuel as president thereof" that plaintiff should accept the offer, that acceptance would best serve plaintiff's interests. Acting upon the advice of the attorney, "plaintiff corporation and Samuel I. Schwabacher, as president of said plaintiff corporation" agreed to and did accept the offer. The attorney prepared resolutions to be adopted at a directors' meeting for settlement of plaintiff's claim. Acting upon the representation and advice of the attorney and Samuel "to the effect that plaintiff corporation was receiving all that it was entitled to" from the estate of Louis, and that the settlement was for its best interests, the directors of plaintiff adopted the resolutions. Paragraph XXXV.

At the same time the four brothers and sisters of Louis also executed a form of consent to the settlement prepared by the attorney.

Paragraph XXXVI contains further allegations concerning the attorney. It is averred that "in his capacity as attorney for and advisor of plaintiff corporation" he did not advise Samuel as president of plaintiff to make or cause to be made an examination or investigation of transactions between Louis and plaintiff corporation; that he did not advise Samuel to make or cause to be made an examination or audit of the purported books of account of plaintiff, but advised him that the books of account had been certified by certified public accountants; that the attorney did not advise Samuel that Louis had misappropriated and embezzled large sums of money belonging to plaintiff, but represented that the claim of plaintiff was based "only upon a book account representing an alleged authorized indebtedness of said Louis A. Schwabacher to the plaintiff corporation in the sum of $134,479.78"; that the transactions between plaintiff and Louis were "in the nature of a loan," and plaintiff was not entitled to damages. It is also alleged on information and belief that the attorney "knew that the said Louis A. Schwabacher had misappropriated, embezzled and converted to his own use assets of said plaintiff."

The allegations with reference to the discovery that the indebtedness of Louis to the corporation arose from his misappropriation of corporate property, and that it exceeded the sum of $134,479.78, are set forth in paragraph XXXIX. In 1937 the brother Edgar experienced financial difficulties and sought a loan from plaintiff. He informed his attorney of the settlement and requested him to determine the fairness of the valuation placed upon the stocks accepted by plaintiff. Edgar's attorney was informed of the manner in which Louis had conducted the business of plaintiff. "Further investigation" disclosed some of the misappropriations, embezzlements and conversions of plaintiff's funds by Louis. The investigation was concluded during the month of September, 1937, at which time the stockholders, officers and directors of plaintiff first ascertained the facts concerning the transactions between Louis and plaintiff.

The purpose of the following paragraph of the complaint (XL) is to set forth the reason why plaintiff delayed filing suit from discovery in September, 1937, to May 3, 1940. It is averred that the stockholders of plaintiff sought to conceal Louis' misappropriations from their mother, who was ninety years of age when Louis died in 1937 and was deeply grieved by his death. She was still alive when suit was filed in 1940 to prevent the running of the statute of limitations, but has since died.

Under the facts alleged, I am of the opinion that the directors, other than Samuel, who had actual notice, should be deemed charged with constructive notice of the indebtedness of Louis shown by the corporate books as of a date soon after the death of Louis; that upon his death it was their duty to ascertain at least in a general way the corporate financial status, and that any inquiry with such purpose would have revealed to them that the books showed such indebtedness. This conclusion follows from the fact that, although, after the death of Louis, Samuel assumed the management of the company, there are no allegations that the other stockholders and directors allowed him to manage the company without supervision or control. In the absence of allegations to the contrary, it must be assumed that the board of directors was active and functioning. Such a board, in the exercise of due diligence, taking over after Louis' death, would be required to ascertain the financial status of the company. Had they done so, they would have discovered the indebtedness of Louis to the company of $134,479.78. As to that fact, the board must be charged with constructive notice in 1935. But knowledge of that fact does not, as a matter of law, bar the present action. The present action does not involve the admitted indebtedness of Louis. It is an action to recover an amount in excess of that indebtedness as shown by the books to be owing from Louis to the corporation. The amounts here involved were not discovered, so it is alleged, until the attorney for Edgar Schwabacher caused an investigation to be made in 1937. As an excuse for failure to undertake at an earlier date the investigation which led to discovery, the plaintiff relies on the representations and advice of the attorney who was the nephew of Norma Schwabacher and also her attorney and attorney for plaintiff. The representations of the attorney preliminary to the settlement of 1937 were alleged to have been made to Samuel only. However, I am of the view that if director Samuel, who had actual notice of what the books showed, is excused from his failure to institute an investigation at an earlier date, the other directors, who had only constructive notice of what the books showed, cannot be charged, as a matter of law, with constructive notice of the additional misappropriations because of their failure to investigate. The attorney represented the corporation. When the directors, other than Samuel, learned in March, 1937, what the books showed, they relied on the attorney's advice, and it will be presumed that had they sooner acquired actual knowledge of the contents of the books they would have relied on the advice of the attorney, as Samuel had done and as they did later when they received actual notice of what the books showed in March, 1937.

I am of the view that, upon the facts alleged, Samuel (and therefore the other stockholders) cannot be charged with lack of due diligence as a matter of law. Plaintiff relied on the representations of its attorney. According to the allegations, that attorney, who was also representing the adverse interests of the defendant as legatee of Louis, falsely represented the very facts that the board of directors, in the exercise of due diligence, should have investigated. Samuel, as managing officer, did not cause the investigation to be made because he was told by the attorney that an audit had been made, and that the books showed transactions in the nature of a loan by Louis—not a misappropriation. Under the circumstances, the corporation, or its officers or stockholders, cannot, as a matter of law, be charged with lack of due diligence in failing to ascertain facts that they were prevented from investigating by the false representations of the attorney for defendant.

On the facts alleged, plaintiff was justified in relying on the representations of its counsel. While it is true that both principals are bound by the acts of a dual agent appointed with their consent, this rule has no application where the principals would not have consented to such dual agency had the facts known to the agent been known to them. The complaint alleges (par. XLI) that, had the plaintiff known the facts, it would not have filed the claim in the form in which it was filed, would not have consented to the settlement, and would not have consented to the dual agency, but would have secured independent counsel. The rule as to dual agents certainly has no application where the agent acts fraudulently on behalf of one of his principals and against the interests of his other principal. (See cases collected 2 Am.Jur. p. 214, sec. 266, et seq.; Restatement, Agency, sec. 392.) Defendant is in no position to claim that the stockholders should have discovered the facts in 1935, when the complaint alleges that her attorney, by false representations, prevented the very investigation that would have disclosed those facts. Bluntly stated, defendant contends that the statute of limitations has run because the stockholders should have discovered in 1935 the misappropriations of her husband, when the complaint alleges that such fact was not discovered because her attorney, by false representations, successfully prevented the discovery of those facts. The statute of limitations was never intended to act as a shield in such a case.

Defendant next contends that plaintiff was guilty of laches as a matter of law in delaying action from discovery in September, 1937, to May, 1940. It is the law that delay for less than the period of limitations will not bar an action unless it has resulted in prejudice to the opposing party. Fry v. Board of Education, 17 Cal.2d 753, 761, 112 P.2d 229; Burns v. Ross, 190 Cal. 269, 212 P. 17; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; 5 Cal.Jur.Supp., p. 503, sec. 62, p. 505, sec. 68. It has been said that where the action is one for rescission it will be dismissed unless brought promptly without necessity for a showing of damage to the defendant. Victor Oil Co. v. Drum, supra; Stevens v. Bryson, 135 Cal.App. 684, 27 P.2d 932. The suit herein is not one for rescission of the settlement as made. The plaintiff does not offer to restore the property received, but seeks to retain it. The action is one to secure a remedy for additional appropriations to those for which satisfaction has been given by the settlement. Plaintiff seeks to avoid the settlement only insofar as it fixes the extent of the indebtedness of Louis. In such a case the rule applied in suits for rescission does not control.

I cannot agree with defendant's contention that the complaint herein shows prejudice to defendant from the delay, as a matter of law. It does not appear, as a matter of law, that defendant will be in a worse position if plaintiff establishes a right of recovery in the suit brought in May, 1940, than she would have been if suit had been filed in September, 1937. Any facts that will show such damage are a matter of defense and may be pleaded in the answer, and determined at the trial. Plaintiff contends that evidence has been lost and the recollection of witnesses has become dim. She further contends that since the decree of final distribution has been entered in the estate, this court may take judicial notice that inheritance taxes and attorneys' fees have been paid on the basis of the property here claimed being part of the estate, which would not have been paid had the suit been brought before distribution in 1938. On the other hand, if plaintiff is able to prove on trial herein that the "estate" of Louis as probated consisted of property which can be traced to his misappropriations from the corporation, then plaintiff, and not defendant, has lost by such payment. The argument as to prejudice suffered by defendant is based, in part, on the erroneous premise that plaintiff must restore to defendant the securities received in the settlement of 1937, which, she argues, may have declined in value between 1937 and 1940. I am of the view that on the facts alleged the question of laches should be determined after trial, rather than on demurrer.

Defendant also contends that the complaint is insufficient for the reason that some of the charges of fraud against Louis are made on information and belief, and the facts which give rise to the belief are not stated, relying on such cases as Dowling v. Spring Valley Water Co., 174 Cal. 218, 162 P. 894; Mason v. San-Val Oil & Water Co., Ltd., 1 Cal.2d 670, 36 P.2d 616; North v. Union Savings & Loan Association, 59 Or. 483, 117 P. 822. The rule of these cases is not here applicable. It is averred in paragraph XX "that during all of the times herein mentioned the said Louis A. Schwabacher had misappropriated, embezzled and converted to his own use and benefit large sums of money and properties of great value belonging to the plaintiff corporation, the exact amount and character of which said money and properties are unknown to plaintiff at the present time. * * *" This is the basic charge of the complaint, and it is not on information and belief.

It is true that the paragraph proceeds to allege on information and belief that the value of said moneys and properties exceeds the sum of $500,000, the exact amount of which can be ascertained only after an audit and accounting is made. It further alleges, on information and belief, that the sum of $134,479.78, which Louis' books of account acknowledge that he owed the company, is far less than the actual sum converted by him to his own use. Plaintiff's estimation of the amount of the loss, made on information and belief, does not qualify the above positive allegation as to the fact of misappropriations. Whatever inconsistencies and ambiguities there may be between the positive allegation above quoted and other provisions of the complaint have not been made the subject of special demurrer. The complaint is good as against general demurrer. The trial court may, in its discretion, require the clarification of uncertainties or ambiguities in the complaint. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1.

The next contention of defendant is that the remedy sought—imposing a trust on the property in the hands of defendant—under the facts here alleged, is not available to plaintiff. Where a trustee has misappropriated trust property, the cestui after death of the trustee may either recover a money judgment for the value of the property, with incidental damages, on the theory that the decedent was personally liable therefor, or he may reclaim the trust property, tracing it where it has changed form. Mix v. Yoakum, 200 Cal. 681, 254 P. 557; In re Estate of Dutard, 147 Cal. 253, 81 P. 519; Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861; Lathrop v. Bampton, 31 Cal. 17, 89 Am.Dec. 141. If the latter course be pursued, a claim need not be filed in the estate, for the theory is, that trust property and its proceeds are not part of the estate. In the case herein plaintiff filed a claim for $134,479.78, the amount of the indebtedness of Louis as shown on plaintiff's books, and for interest. The claim was not drawn on the theory of tracing trust property, and the settlement was not had on that basis. In the settlement plaintiff received the one thousand shares of plaintiff's capital stock which Louis had owned from the formation of plaintiff, and which could not be property of plaintiff which Louis had converted to his own use, or the proceeds of such property. Thus the settlement was of a personal liability of Louis.

Defendant correctly contends that plaintiff is without right to recover a judgment for the alleged additional misappropriations based on personal liability of Louis for the reason that such recovery should have been sought in the probate proceeding before distribution. Defendant further contends that plaintiff's retention of the property received in the settlement of 1937 constitutes an election of remedies which bars its right to follow the trust property into the hands of Norma Schwabacher, to whom the estate of Louis was distributed in 1938. This last contention is unsound.

I agree with defendant's position that plaintiff may not now, after distribution, recover a money judgment against Norma Schwabacher, distributee of the estate of Louis, based on a theory of personal liability of Louis. When plaintiff learned that more had been taken than shown on the books, the time for filing claims had expired. Defendant suggests that the claim as filed might have been then amended to demand a larger sum, or that the misappropriations might have been treated as sounding in tort, in which event an action for a money judgment may be brought without the necessity for filing a claim, the money judgment to be paid in due course of administration. It is not necessary to decide what remedy, if any, is available to reach assets of an estate in satisfaction of a personal liability of the decedent based on fraud, or which has been fraudulently concealed, and not discovered until after the time for filing claims has passed. At any rate, where the facts are discovered before distribution, as in the present case, whatever proceedings may be available to reach assets of the estate should be set in motion before distribution, in order that the closing of the estate may be postponed to await the outcome. In default of such proceedings prior to distribution, the creditor should not be permitted to hold the estate in the hands of distributees liable to the satisfaction of a claim based on personal liability of the decedent. This matter is of importance in the present case since the complaint contains reference to items which could be recovered only on a basis of personal liability of the alleged wrongdoer. For example, the complaint alleges damages suffered by reason of the misappropriations of Louis in addition to loss of the property. Such damages may not be recovered in the circumstances alleged in this case after distribution of the estate, which took place after knowledge that damages had been suffered. Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861; Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235.

The remedy of following trust property, on the other hand, is not based on a theory of reaching assets of the estate as such, but, rather, as pointed out above, is predicated on the premise that such property in its original or changed form constitutes no part of the estate of the decedent. The failure of the cestui to institute action to recover the property before distribution should not have the same effect as a failure to commence proceedings which have for their purpose reaching property of the estate in satisfaction of a personal liability of the decedent. For these reasons, it seems quite clear that the action to reach trust property that has been misappropriated is not barred as a matter of law because distribution has taken place and the cestui had knowledge prior to distribution of the alleged misappropriations.

The contention that the remedy of reclaiming trust property is not available by reason of the doctrine of election of remedies is also unsound. The settlement of the indebtedness of Louis to plaintiff as shown on the books was based on the theory of a satisfaction of a personal liability of Louis. Upon the facts alleged this settlement was entered into without knowledge, actual or constructive, of misappropriations in a larger amount. Choice of a remedy without full knowledge of the facts does not constitute an election. (10 Cal. Jur., p. 6, citing cases.) Defendant contends, however, that when plaintiff acquired knowledge in September, 1937, it was required then to elect, and if it wished to follow the misappropriated property it should have rescinded the settlement promptly and restored the property received under it. This plaintiff did not do. In the complaint herein plaintiff alleges that the settlement is null and void, but it is apparent that it means only that it is of no effect as a determination of the amount of the misappropriations, since it does not offer to restore the property, part of which, as noted above, appears not to have been trust property or the proceeds of trust property. Plaintiff does offer to credit the property received, at a valuation of $173,329.02, on what may be found due. I am of the view that the settlement for a portion of the misappropriations, the only portion known to exist at the time of the settlement, and on the basis of the personal liability of the wrongdoer, does not bar a suit to reclaim when it is thereafter discovered that there are further misappropriations. Recovery must, of course, be adjusted in a manner which will not result in a double relief. That plaintiff does not seek double relief is demonstrated by its offer to credit the $173,329.02 already received by it.

This court recently had occasion to consider the doctrine of election of remedies in Perkins v. Benguet Cons. Min. Co., 55 Cal.App.2d 720, 132 P.2d 70. It is there said that in some states harsh application of the doctrine of election of remedies is avoided through viewing it as an aspect of the law of res judicata, merger, waiver, estoppel and allied doctrines, and that in California it has been declared repeatedly that the doctrine is a phase of the law of estoppel. 55 Cal.App.2d 757, 132 P.2d 93. It does not appear from the complaint that it is inequitable to permit plaintiff to obtain relief for part of the misappropriations on the basis of adjustment of a personal liability (the settlement), and for the balance through following trust property. If there are circumstances of estoppel in this case, that is a matter of defense which does not arise on demurrer to the complaint, but should be raised by answer.

The allegations of the complaint and prayer seem to have been drawn without full realization of the theory on which plaintiff may recover. Plaintiff seems to be of the view that the court should determine the amount of money appropriated and the value of the property taken, and that it may have judgment for the amount thereof, and for damages in addition, payable from all property distributed to Norma Schwabacher and from the life insurance proceeds received by her. Plaintiff even includes in the complaint an allegation that the properties of plaintiff have been so commingled with the properties of Louis Schwabacher as to be impossible of segregation.

In support of its prayer for relief plaintiff cites Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235, as standing for the proposition that where the estate is solvent and it is impossible to trace trust property, the cestui has a lien on the entire estate for the value of the property converted. The decision is not so broad. In that case it was held that the cestui was without right to a judgment based on a personal liability of the deceased trustee for the reason that no claim had been presented. Any recovery, therefore, had to be based on a theory of following trust property. The court did not hold that the cestui was entitled to judgment for the original value of the trust res payable from the entire estate of the trustee. The trust property originally consisted of a parcel of real property of the value of $7,500. This was exchanged for other real property, which later was sold for $3,681.14 net, deposited in the trustee's personal bank account. At his death this account was reduced to $1,430.47. There was also $462.22 in another bank account, bonds of the value of $26,112.12 and real estate of the value of $5,500. There were no creditors. The trial court gave judgment for plaintiff for $7,500, the value of the original trust res, less advances of $1,416.43 made by the trustee. On appeal the court held that plaintiff was entitled to judgment for $3,684.14, without further tracing than noted above, but not to judgment for a larger amount based on value of the original trust property. The court in effect held that the trust funds should be deemed to have been traced to the estate left by the trustee. In Mitchell v. Dunn, 211 Cal. 129, 294 P. 386, the Noble case is cited for the point that where the trustee, or his estate, is solvent, the degree of identification required is "far less" than where the trustee is insolvent and the rights of creditors are involved. See, also, Kobida v. Hinkelmann, 53 Cal.App. 2d 186, 127 P.2d 657. The court further held in the Noble case that the personal liability of the trustee for negligent handling of the trust property, resulting in loss in value, could not be taken into consideration in the action to trace trust property.

As applied to the instant case the effect of the decision in Noble v. Noble is that plaintiff cannot recover damages arising from the alleged misappropriations. But if plaintiff can establish the allegations of its complaint it should be entitled to relief upon tracing the trust property as required by the liberal rule heretofore noted. I am of the view that plaintiff should not be deemed to have abandoned the remedy to which it may be entitled on the facts alleged because of the averment that the properties of plaintiff are impossible of segregation. That averment should not be construed as negating the possibility of tracing within the liberal rules laid down in such cases as Noble v. Noble, supra.

If the trust property is sufficiently traced to the estate of decedent, and to a distributee, circumstances may arise thereafter which would permit a judgment based on a personal liability of the distributee, as where the property had passed from a distributee with knowledge of the trust claim to a bona fide purchaser. But this would be something different from enforcing after distribution a personal liability of the decedent through making all property distributed liable to the extent of such personal liability, without any tracing at all.

The fact that plaintiff may pray for relief to which it is not entitled does not mean, at least in the absence of a special demurrer on that ground, that the complaint is insufficient to state a cause of action, where, upon the facts alleged, plaintiff is entitled to other relief. Such uncertainties may be clarified by the trial court.

I have thus considered the allegations of this complaint at some length. I believe the complaint, though far from a model of pleading, states a good cause of action that is not barred as a matter of law. If the allegations of that complaint are true (which must be conclusively presumed on this appeal) Louis stole large sums from plaintiff, he successfully hid that fact from the corporation, and the ill gotten gains so secured are now in the hands of defendant. Under the liberal rule applied in interpreting pleadings in this state, and in view of the nature of the controversy, a court should not, by a strict and technical construction, seek an interpretation to prevent the controversy from being tried. For that reason I believe the judgment should be reversed.

Rehearing denied; PETERS, P. J., dissenting.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

57 Cal.App.2d 568

DOUGLASS v. CRABTREE (two cases).

Civ. Nos. 3044, 3045.

District Court of Appeal, Fourth District, California.

March 8, 1943.

Rehearing Denied April 6, 1943.

Hearing Denied May 7, 1943.

1. Automobiles ⚷245(14, 80)

In action for injuries to plaintiffs whose automobile, to avoid striking defendant's automobile at street intersection, veered off the pavement and plunged into ditch, defendant's negligence and plaintiffs' contributory negligence were for jury.

2. Appeal and error ⚷1002

A jury's finding on conflicting evidence cannot be disturbed on appeal.

3. Appeal and error ⚷1068(1)

Alleged error in instructions on question whether contributory negligence of driver could be imputed to owner of automobile, who was riding with driver at time of accident, was harmless where jury found that driver was not guilty of any contributory negligence. Vehicle Code, § 402, subd. (a), St.1937, p. 2353.

4. Automobiles ⚷246(20)

An instruction that jury might take into consideration, in determining rate of speed defendant motorist was driving, as one of circumstances, the length of any skid marks made by automobile was proper.

5. Damages ⚷132(6)

$12,000 to truck driver 45 or 46 years old, who had been earning $140 per month, who could no longer work, who sustained severe injuries, who was in hospital about six months and was unable to get up before 8 months after accident, and whose leg more than three years after accident was still stiff and about three or four inches shorter than the other, was not excessive.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Actions by Leslie Douglass and by Earl Douglass against J. S. Crabtree for injuries sustained in an automobile accident. From judgments for plaintiffs, defendant appeals.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco, Chester O. Hansen, of Fresno, and A. Dal Thomson, of San Francisco, for appellant.

Glenn M. DeVore and Wm. B. Johnston, both of Fresno, and Mildred Kluckhohn, of Los Angeles, for respondents.

GRIFFIN, Justice.

These are two actions for personal injuries which were consolidated for trial by jury and which, under stipulation of the parties and order of the court, were submitted on appeal on one set of briefs. A verdict was rendered in each case in favor of the plaintiffs. From judgments entered thereon, defendant appeals. The amount of the judgment in the Leslie Douglass case is $1,200. The judgment in the Earl Douglass case is $12,000.

The accident occurred October 15, 1938, between 8:30 and 10 o'clock in the morning. Driving conditions were normal. Leslie Douglass was the driver of a 1929 two-door Oakland sedan automobile in which he and his brother, Earl Douglass, the other plaintiff, was riding. The car belonged to Earl Douglass. They were on a duck hunting trip. Accompanying the two plaintiffs were A. S. Hawks and Leslie L. Douglass, Jr. No appeals were taken from judgments entered in favor of the last two mentioned guests.

The accident occurred at the intersection of Elm Avenue and Central Avenue, at a point about four miles south of Fresno. Elm Avenue runs north and south, and has a paved center strip 16 feet wide. A white line divides the 16-foot center strip. The whole width of the right of way is approximately 60 feet. Elm Avenue is known as part of California State Highway No. 41. Central Avenue runs east and west and has an oiled surface center road about 13 feet wide with a seven-foot graded shoulder on each edge thereof. Immediately to the south of Central Avenue, within a distance of a few feet and running east and west and parallel to Central Avenue and crossing Elm Avenue is a large irrigation canal known as Central Canal. It is approximately 9 feet deep and 18 feet wide. A bridge on Elm Avenue crosses the large canal but at the time of the accident it was only slightly wider than the paved part of the highway. On the east side of Elm Avenue at the property line is a row of large elm trees spaced approximately 20 feet apart. There is a stop sign on the northeast corner of the intersection regulating traffic traveling westerly on Central Avenue. There is no stop sign at that intersection regulating traffic traveling on Elm Avenue. On the day of the accident the Douglass car was traveling in a southerly direction on Elm Avenue at about 20 or 25 miles per hour. The appellant Crabtree, accompanied by his wife, was driving a Chevrolet coupé westerly on Central Avenue in the immediate vicinity of Elm Avenue. As Douglass approached the intersection and when he was approximately 15 or 20 feet from the intersection, the appellant Crabtree drove into the intersection and stopped. Douglas immediately started to veer to his right off the pavement to avoid striking the defendant's car, and being unable again to return to the highway at the bridge, the car which he was driving plunged into the ditch near the west end of the bridge approximately 60 feet from the spot where he started to veer, causing severe injuries to himself and his brother. There were skid marks in the intersection, extending parallel with Central Avenue and, according to the testimony of one witness, the appellant admitted they were the skid marks of his car. These marks extended across the painted center line of Elm Avenue a distance of 8 to 10 inches and were 4 paces long. There were marks of the tires of a car on Elm Avenue commencing at a point north of the intersection, which point was approximately 60 to 65 feet from the edge of the ditch into which the car plunged. These marks extended to the place where the car stopped. According to the testimony of a traffic officer, they were not brake marks but were made by a car swerving. The cars did not come in contact with each other at the time. It is respondents' contention that the appellant did not stop at the stop sign.

Leslie Douglass testified that as he approached the intersection he saw two cars, one to his right and one to his left adjacent to the intersection when he was 150 feet back from the intersection; that the car on his right was 150 to 200 feet back and the car on his left was 115 feet back from the intersection; that there was a eucalyptus thicket to his left about 115 feet from the intersection; that when appellant came from behind that, he saw him for the first time; that he kept watching both cars; that when he saw the car on the right was stopped he noticed that Crabtree's car was still traveling; that when he (Douglass) got within 10 or 15 feet of the intersection Crabtree's car shot out into the highway and that he cut sharply to the right to avoid hitting appellant; and that he (Douglass) did not apply his brakes at any time during the incident.

Appellant Crabtree testified that as he approached the intersection he saw the other car coming about 50 or 60 yards away; that he stopped with his right front wheel even with the stop sign; that he could not see more than 100 feet north on Elm Avenue; that he then proceeded out into Elm Avenue about the length of his car and stopped again to look, which stop took him approximately to the edge of the pavement, at which time the Douglass car swerved past him and went into the ditch; that he then proceeded across the middle of the road and stopped again, where the brake marks of his car showed; that from there he proceeded across Elm Avenue and stopped on the north side of Central Avenue.

One witness for appellant testified that about 30 days after the accident he examined the brakes of the Douglass car at a garage where it had been towed due to its demolished condition; that he found the "brake lining was worn down very thin; that the rivets holding the lining to the brake shoes were scoring the drums on all four wheels; that the brake and mechanism was rusty and not working freely; that there was no braking power on the two rear wheels; that the effect was to cause the car to pull to the right when the brakes were applied.

In reply, Leslie Douglass testified that he had used the brakes at intersections before he came to the scene of the accident and that at the scene of the accident he did not use his brakes; that on occasions where he stopped before the accident the brakes "stopped even." Earl Douglass testified that the "brakes were in good condition" before the accident; that he had the brakes "taken up a few days before this trip" at a garage. A brake expert, called by respondents, testified that about the first part of October he serviced the Douglass car, tuned the motor and "adjusted the brakes and lubricated and changed the oil"; that at that time they were in "good, serviceable condition" and the brake bands were not then in need of change but that he did not take the wheels off; that he drove it a short distance and they were adjusted properly and were "O.K."; that from the condition of the car after the accident, neither he nor anyone else could have told at that time what effect the rods or cables would have had on the brakes or how the brakes were working or whether the car would pull to the left or right on application of the brakes, due to its demolished condition.

[1, 2] Leslie Douglass further testified that right after the accident he asked appellant why he came through the stop sign and that appellant replied: "I didn't see you." On cross-examination appellant was asked if he did not tell certain witnesses that he had run through the stop sign, to which question he replied: "I don't remember." Appellant told a deputy sheriff, after the accident, that "he didn't see the man coming." One witness testified that appellant signed a written statement reciting that "he didn't see the car at all until the car was right up to him." It is appellant's contention that the evidence conclusively shows that respondents were guilty of contributory negligence as a matter of law. We see no merit to this contention. The testimony was in some instances conflicting. However, the jury resolved the conflict in favor of the respondents on that issue and under proper instructions. Under such circumstances we cannot disturb its finding on the question. Fischer v. Davis Standard Bread Co., 134 Cal.App. 1, 24 P.2d 538; Bennett v. Hardy, 108 Cal.App. 473, 291 P. 903. The negligence of appellant has been fully demonstrated.

[3] The next point raised involves a confusion in the wording of two instructions given on the question whether the contributory negligence of the driver of the Douglass car would or could be imputed to the owner where the owner was riding with the driver at the time. Sec. 402, subd. (a), Vehicle Code, St.1935, p. 153, as amended by St.1937, p. 2353. In view of the finding of the jury that the driver was not guilty of any contributory negligence and the fact that that finding has been here sustained, the point is of no consequence because there was no contributory negligence to impute to the owner.

[4] There is no merit to appellant's complaint that the court erroneously instructed the jury that it might take into consideration, in determining the rate of speed the defendant was driving, as one of the circumstances, the length of any skid marks made by his car. This instruction was proper. Carrisosa v. Southern Service Co., 128 Cal.App. 160, 16 P.2d 1032; Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 275 P. 980.

[5] The last question raised involves the sufficiency of the evidence to support the judgment against appellant in the sum of $12,000 and in favor of respondent Earl Douglass. The evidence on this subject, as described by him, is that he was thrown through the top of the car and had a broken leg above the knee, a broken right hand, a place gouged out of his forehead across his temple and across his cheek; also, that he had a cut running into his left eyebrow which required eleven stitches, a cut on the right side of his chin, and a puncture on the back of his head; that at the time of trial, November 17, 1941, more than three years after the accident, his leg was still stiff and about three or four inches shorter than the other; and that he could bend it only about 85 degrees; that he was unconscious for three days after going to the hospital. He testified that he was "put in traction"; that he was in the hospital about six months and that it was eight months before he was able to get up; that he was then on crutches for one year; that he was a truck driver, employed at $140 per month at the time; that he could no longer work as such, due to his permanently impaired leg conditions.

The main argument advanced by counsel for appellant before this court on the question whether the verdict was excessive was to the effect that because the injured person was drawing so near to the end of life, the impairment of his usefulness will be short and the amount of damage allowed is over-compensation. When inquiry was made as to his age, counsel announced that it was approximately 45 or 46 years. Such a conclusion does not very forcefully appeal to those of us who have reached the age suggested, and who are unwilling to admit that we are more or less "living on borrowed time." This contention is without merit, and the judgment cannot be held to be excessive. Bennett v. Hardy, supra.

Judgments affirmed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 393

GWINN v. GOLDMAN.

Civ. 6756.

District Court of Appeal, Third District, California.

Feb. 27, 1943.

1. Landlord and tenant 🔑291(13)

In unlawful detainer action for holding over of a store after expiration of lease evidence supported findings and judgment for treble damages. Code Civ.Proc. §§ 735, 1161, 1174.

2. Landlord and tenant 🔑216

Statutes authorizing imposition of treble damages for willful and intentional withholding of real property after termination of a lease are "penal" in their nature and must receive strict construction. Code Civ.Proc. § 735, 1161, 1174.

See Words and Phrases, Permanent Edition, for all other definitions of "Penal Statute".

3. Landlord and tenant 🔑291(14)

In unlawful detainer action willfulness and intent of lessee in holding over after expiration of lease so as to authorize treble damages should be determined from lessee's conduct and from circumstances of particular case. Code Civ.Proc. §§ 735, 1161, 1174.

4. Landlord and tenant 🔑291(14)

In unlawful detainer action trial court possesses a sound discretion to determine from evidence whether treble damages shall be imposed. Code Civ.Proc. §§ 735, 1161, 1174.

5. Landlord and tenant 🔑291(14, 18)

In unlawful detainer action issue as to whether lessee remained in possession of property willfully and intentionally after termination of lease so as to authorize trebling of damages is for trial judge and his decision thereon will not be disturbed except for an abuse of discretion. Code Civ.Proc. §§ 735, 1161, 1174.

6. Landlord and tenant 🔑291(14)

Where defendant in unlawful detainer action had knowledge for more than a year that lease would not be renewed and that he was expected to move from store building, finding that since expiration of lease there was no available building in city with adequate floor space for defendant's merchandise did not preclude trebling of damages. Code Civ.Proc. §§ 735, 1161, 1174.

7. Landlord and tenant 🔑291(14)

Where court in unlawful detainer action on sufficient evidence found that defendant deliberately refused to surrender possession of store building for reasons due to his own fault, finding that defendant's new building to which he intended to move was not completed within agreed time because of weather conditions and labor shortage did not indicate an abuse of discretion in trebling plaintiff's damages. Code Civ.Proc. §§ 735, 1161, 1174.

8. Landlord and tenant 🔑291(14)

Where complaint in unlawful detainer action alleged that plaintiff was sustaining damage by defendant's retention of premises and defendant denied that plaintiff was sustaining any damage by such retention and plaintiff without objection introduced contract under which plaintiff's cost of remodeling premises for another tenant were increased by $200 for each month of delay in permitting contractor to start work, court properly allowed plaintiff such damages. Code Civ.Proc. § 1161.

9. Landlord and tenant 🔑291(18)

Where a complaint in unlawful detainer alleges damages in general terms for refusal to surrender possession of premises after termination of lease, and answer denies that any damages were sustained on account of holding over and evidence of special damages on that account is received without objection on theory that it is a proper issue to be determined, defendant is "estopped" from contending for first time on appeal that evidence is incompetent or that it is at variance with pleadings. Code Civ.Proc. § 1161.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

10. Judgment 🔑251(1)

Evidence which is received without objection but which has no legitimate relation to issues which form basis of action or which is in absolute conflict with cause of action set out in complaint does not support a judgment at variance with pleadings.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge, Action by Josephine B. Gwinn against M. Goldman in unlawful detainer for holding over after expiration of a lease. From a judgment for plaintiff for treble damages, defendant appeals.

Affirmed.

Lounibos & Lounibos, of Petaluma, for appellant.

Lewis H. Cromwell, of Petaluma, Barrett & McConnell, of Santa Rosa, and A. Dal. Thomson, of San Francisco, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment which was rendered against him in a suit for unlawful detention of a leased store building in Petaluma. It is conceded that the defendant held possession of the property after the expiration of the lease, and that he owes plaintiff two months' rent aggregating the sum of $640. The court also allowed plaintiff an item of $200 as special damages, sustained by her on account of the delay in surrendering possession of the property. Pursuant to section 1174 of the Code of Civil Procedure, the court rendered judgment against the defendant for treble the aggregate amount of those two sums.

The defendant contends that the court abused its discretion in trebling the sums of said unpaid rent and special damages for the reason that the defendant's withholding of the property after the termination of the lease was not wilful or intentional, but was the result of conditions over which he had no control. It is also asserted that the item of $200 special damages was neither pleaded nor adequately proved at the trial.

The plaintiff owns the store building at 119 Main Street in Petaluma which had been rented to the defendant for a period of seventeen years. The defendant conducted a ladies' department store in that place of business under the name of "The Leader." In January, 1940, he had a conversation with the plaintiff in which he told her he was going to construct his own store building and that he would not renew his lease or occupy her building beyond that year. He planned to erect his own building at a cost of over $48,000 and therefore decided not to renew his lease with the plaintiff.

In December, 1939, the plaintiff notified the defendant in writing that since he had failed to renew his lease, possession of the property would be thenceforth deemed to be held on a basis of tenancy from month to month at a rental of $320 per month, payable in advance. The defendant consented to that agreement. Assuming that the property would be promptly vacated, the plaintiff executed a written contract on March 26, 1940, to lease the property to J. C. Penney Company for a term of eleven years from March 1, 1941, at an annually increasing rental, in excess of $425 per month, after the first year. As part consideration for that lease, the plaintiff agreed to remodel the building at a considerable expense. In June, 1940, the defendant was served with notice terminating his lease and requiring him to vacate the premises in September of that year. At the request of the defendant, the time to surrender possession of the premises was extended to October of that year. The defendant failed to surrender possession of the property and the plaintiff again served notice upon him December 30, 1940, terminating the lease. After conference, as a compromise, the plaintiff and defendant executed a written temporary lease on March 20, 1941, at $320 per month, terminating May 31, 1941, in which instrument the defendant agreed to remove his stock of goods from the building and to surrender possession thereof on or before May 31. Relying upon these various promises to vacate the premises, and in accordance with the previous agreement with J. C. Penney Company to remodel the store building at a cost of $11,000 to conform with the requirements of its lease, the plaintiff signed an agreement with Henry Brown, a building contractor, on January 31, 1941, to deliver to him possession of the building on February 1 for the performance of that work, with a stipulation for completion of the contract within forty-two days. That contract provided that plaintiff would pay Brown $200 additional for each month, beginning with March, during which the possession of the building was withheld from the contractor. The defendant remained in possession to the time of the trial of this case on July 17, 1941. The plaintiff sustained a loss of several hundred dollars on that account.

In spite of defendant's knowledge of the necessity for prompt action on his part to secure another place of business or to complete his own building so as to vacate plaintiff's premises before the lease expired, he failed to let a contract for the erecting of his own structure for a whole year after securing that information. In January, 1940, he knew that he was expected to move his merchandise before the end of that year. He did not contract for the construction of his own building until January 10, 1941. He might have remodeled or adapted some other suitable building for the temporary use of his business. But he made no effort to do so. He executed an agreement with William D. Rapp, a building contractor, on January 10, 1941, to complete his structure in Petaluma at a cost of about $48,000, within 135 days. That contract allowed until May 25 to complete the building, independently of any possible unforeseen delays, which was only five days before the expiration of his lease. The building was not completed for some time thereafter.

After notice to surrender possession of the property, this suit in unlawful detainer was commenced June 2, 1941, under section 1161 of the Code of Civil Procedure. The amended complaint alleges plaintiff's ownership of the building, the execution of the last lease on March 20, 1941, the termination of that lease and the unlawful withholding of possession by the defendant. It also alleges that the reasonable rental value of the premises is $15 per day and that plaintiff sustained damages by reason of said unlawful detention of the property. The prayer of the complaint asks for damages in the sum of $15 per day for each day said property is withheld from the owner, and that said unpaid rent and damages be trebled as provided by section 1174 of the Code of Civil Procedure.

The answer denies the material allegations of the amended complaint, and affirmatively alleges that the defendant retained possession of the premises after the termination of the lease on May 31, 1941, through no fault of his own, but on account of unavoidable delay in completing the construction of his own store building, caused by unusual storms and the existence of a national emergency preventing the securing of necessary skilled labor. It is also asserted the defendant was unable to secure another suitable store building in Petaluma with adequate floor space to accommodate his stock of goods. The defendant's answer specifically denies "that plaintiff has sustained, or is sustaining, any damages at all by reason of his holding over."

The court adopted findings favorable to the plaintiff. It was determined that the lease of March 20, 1941, terminated May 31, and that the defendant "Wilfully held over and continued in possession of said premises and now wilfully holds possession of said premises without the permission of the plaintiff and contrary to the terms of said agreement of lease. That the holding over was and is deliberate, intentional and obstinate, with knowledge that the tenancy was terminated and that the defendant was holding over without and against the consent of the plaintiff, and that by reason thereof the plaintiff is entitled to have judgment for treble the amount of damages herein found due plaintiff from defendant."

The court further found that the defendant was indebted to plaintiff for unpaid rent of said premises in the sum of $640, and that plaintiff had suffered damages in the further sum of $200 as increased cost, for the month of June, 1941, of remodeling her building under her contract with Brown, due to the defendant's failure to surrender possession of the property pursuant to the terms of his lease.

It is true the court found since May 31, 1941, there was no available building in Petaluma of sufficient floor space to adequately accommodate defendant's stock of merchandise. But in that regard, the court further found that "it is not true that defendant continues in possession of the store premises * * * through no fault of his own * * * and it is not true that his holding over is entirely due to Acts of God and labor shortages preventing the completion of his new building." But the court did add that, "due to said weather conditions and the shortage of labor and through no fault of his own, *defendant's new building was not completed within the agreed time.*" (Italics added.)

Judgment was rendered accordingly against the defendant for treble the amount of unpaid rental and special damages in the aggregate sum of $2,520. From that judgment this appeal was perfected.

On appeal it is conceded by the defendant that he retained possession of the premises after the termination of the lease, and that he owed plaintiff unpaid rental in the sum of $640. But it is contended the court abused its discretion in trebling the damages, and that plaintiff neither alleged nor adequately proved the item of special damages in the sum of $200.

[1-4] The findings and judgment justifying treble damages, in the discretion

of the trial judge, are amply supported by the evidence. The authorization for imposing multiple damages under sections 735 and 1174 of the Code of Civil Procedure for the wilful and intentional withholding of real property after the termination of a lease, is penal in its nature and should receive a strict construction. That right depends largely upon the intention of the lessee in holding over after the termination of the lease. The questions of wilfulness and intention of the lessee in holding over should be determined from his conduct and from the facts and circumstances of the particular case. The trial court possesses a sound discretion to determine from the evidence whether treble damages shall be imposed. Sec. 1174, Code Civ.Proc.; Board of Public Service Com'rs, v. Spear, 65 Cal.App. 214, 223 P. 423; Alden v. Mayfield, 33 Cal. App. 724, 166 P. 382; Vatuone v. Cannobio, 4 Cal.App. 422, 88 P. 374; 12 Cal. Jur. 629, sec. 32. The second paragraph of section 1174 Code Civ.Proc. provides in part that: "Judgment against the defendant guilty of * * * unlawful detainer may be entered *in the discretion of the court* either for the amount of the damages and the rent found due, or for three times the amount so found." (Italics added.)

In the Alden case, supra, it is said in that regard [33 Cal.App. 724, 166 P. 383]: "The conduct of defendant in refusing to surrender possession was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated, and that he was holding over against the will and consent of the landlord."

In the case of Board of Public Service Commissioners, supra, 65 Cal.App. on page 218, 223 P. on page 425, it is said: "The trial court, having found that appellant * * * willfully remained in possession deliberately, intentionally, and obstinately, with knowledge that the tenancy was terminated, it would have been an abuse of discretion had the judgment been other than for treble the amount of the rent found due."

[5] The question as to whether the lessee remained in possession of the property wilfully and intentionally, after the termination of the lease, is a problem for the determination of the trial court. 111 A.L.R. 99 note. The decision of the trial judge in that regard should not be disturbed on appeal except for abuse of discretion.

The case of Field v. Walton, 94 Cal. App. 596, 271 P. 500, and San Francisco & Suburban Home Building Society v. Leonard, 17 Cal.App. 254, 119 P. 405, upon which the appellant relies, are not in conflict with what we have previously said regarding the discretion of the trial court to award treble damages, under proper circumstances, in an unlawful detention suit. The Field case, supra, recognizes the principle previously stated. The judgment in that case wherein the trial judge refused to award plaintiff multiple damages was affirmed. It was held that the refusal to treble the damages, under the facts of that case, was not reversible error because the trial court had a sound discretion to deny or allow multiple damages, with which determination a court of review would not interfere except for abuse thereof. In the Suburban Home Building Society case, the Appellate Court merely held that the trial court did not err in refusing to instruct a jury that it might award triple damages under the evidence presented. The court there said it was the sole province of the judge of the court to determine the question as to whether the lessee wilfully and intentionally failed to surrender possession of the premises, and that the jury had no authority to decide that problem.

Nor is the case of Feiges v. Racine Dry Goods Co., 231 Wis. 270, 285 N.W. 799, 122 A.L.R. 272, in conflict with the California rule previously stated. In that case the trial court refused to award to plaintiff treble damages for failure of the defendant to remove his merchandise from a leased store building for a period of twenty-six days after the lease expired. On appeal that judgment was affirmed. The trial court found that the defendant was *willing and anxious* to surrender to the plaintiff the possession of the premises in question, at the time fixed by the terms of the lease; that the defendant hired truckmen to remove his merchandise before that time had expired, but that he was prevented from removing it by picketing strikers who "refused to let the defendant move its goods without bloodshed." Such uncontradicted evidence absolutely refutes the possibility that the defendant *wilfully or intentionally* refused to surrender possession of the premises. He even arranged to remove his merchandise before the expiration of the lease, but was prevented from doing so by threats of bloodshed and violence at the hands of striking picketers. He was powerless then to vacate the premises. The court there said: "The trespass was by the strikers and picketers who against its will forcibly or by threats of violence prevented it from surrendering timely possession of the premises. * * * The only detaining and the only unlawfulness involved are those of the picketers and strikers and their sympathizers. We consider the circuit court was correct in holding as it did."

In the present case the evidence adequately shows that the defendant wilfully, intentionally and stubbornly refused to surrender possession of the store building, knowing the lease had terminated. He remained in control contrary to the will of the plaintiff. He realized that his failure to deliver possession of the building would result in serious loss to the plaintiff, on account of the previous leasing of the property to the J. C. Penney Company. After deciding not to renew his lease, the defendant had a whole year in which to either construct his own building or to locate some other building suitable for his mercantile business. His unwarranted delay is evidence of wilfulness and intention on his part to remain, regardless of the loss sustained by his landlord on that account. The defendant knew in January, 1940, that the lease would not be extended beyond its term. He then told the plaintiff that he did not intend to renew his lease; that he would not remain in the building beyond that year, and that he intended to construct his own store building. He was first given formal notice that the lease would be terminated in October, 1940. The expiration time was repeatedly extended at the request of the defendant. He was again notified in December, 1940. The temporary lease of March 20, 1941, was a mere compromise extending the time to May 31, 1941. That lease specifically fixed that date as final. The defendant agreed to remove his merchandise and abandon the premises on that date. He failed to do so. Knowing that he was expected to vacate the premises before the end of the year, as he told the plaintiff he intended to do, and aware of the fact that she had leased the property to another tenant at an increased rental, it was the defendant's duty to exercise diligence either to promptly construct his own building or to arrange to rent another store building so that he could surrender possession before the termination of his lease.

[6] It is true that the court found there was no available building in Petaluma *since May 31, 1941,* with adequate floor space for defendant's stock of mercantile goods. But that does not mean a suitable building could not have been procured *before that time,* or that a building could not have been enlarged or altered so as to accommodate his business if he had exercised timely effort. The burden was on the defendant to prove that he was unable to procure a suitable building. He had an entire year in which to do so. The court specifically found that he wilfully, intentionally, deliberately and obstinately refused to surrender possession of the building.

[7] It is true that the court also found that the defendant's new building was not completed "within the agreed time" on account of "weather conditions and the shortage of labor." But the court also found that his holding over was not entirely due to those facts. And the court expressly found that it is not true that the defendant withheld possession of the premises "through no fault of his own." In other words, the court found that the defendant wilfully and deliberately refused to surrender possession of the building for reasons due to his own fault. We assume the court believed the defendant was wilfully guilty of a lack of diligence to provide himself with another building during several months after his knowledge of the fact that he did not intend to renew his lease. There is substantial evidence to support that conclusion. Under such circumstances we may not interfere with the court's discretion in that regard.

[8] The court did not err in allowing plaintiff special damages in the sum of $200 as increased cost of remodeling her building under contract with Henry Brown, incurred on account of the failure of the defendant to surrender possession of the property at the termination of his lease. The contract provides for that increase of $200 for each month's delay. That provision is not disputed. Paragraph V of the amended complaint alleges that the reasonable rental value of the property is $15 for each day defendant holds possession after the termination of his lease. It also alleges "plaintiff has sustained and is sustaining damages by reason of the said unlawful detention in the said sum per day." The answer specifical-

ly denies "that plaintiff has sustained, or is sustaining, *any damages at all by reason of his holding over*." The case was tried on the theory that an issue existed regarding plaintiff's damage in the sum of $200 as increased cost of remodeling the building, as provided by the contract. The contract with Brown was received in evidence without objection. The purpose of that offer was specifically stated by plaintiff's attorney as follows: "I call your particular attention to the provision in regard to the $200 monthly increase to be added to the contract price in the event of delays in receiving possession of the premises, commencing February 1st and running to June 1st."

It is not true that the defendant objected to that evidence of special damages. The objection which the defendant asserts that he previously made was addressed only to plaintiff's examination of Mrs. Gwinn regarding her conversation with the defendant on January 2, 1940, in which he told her "he didn't want the building after 1940." In that regard this colloquy occurred:

"Q. Did he tell you at that time what he intended to do? A. He showed me a picture of an architect's exterior of a building, which was lying on his desk. * * * He mentioned something about size, he had been in Santa Rosa looking into something about heating conditions."

To the question, "Did he tell you where he intended to build?" defendant's attorney objected "to this entire line of testimony." The witness was not then questioned regarding damages growing out of the contract with Brown, nor regarding damages of any nature whatever. The "line of testimony" referred to in the objection had nothing to do with the subject of damages. The evidence to which objection was made referred only to the conversation between plaintiff and the defendant in January, 1940, with the object of showing that he knew the plaintiff did not intend to renew the lease beyond its term which ended in 1940, and that the defendant then stated he did not want the property after 1940, and intended to construct a building of his own. The evidence of damages sustained by virtue of the increased cost of repairing the building on account of the contract with Brown was introduced later, without objection, at which time the written agreement was offered in evidence. This contract had no connection with the evidence to which the defendant previously objected.

[9] Where a complaint in unlawful detainer alleges damages in general terms on account of a refusal to surrender possession of the premises after the termination of a lease, and the answer denies, as it does in this case, that any damages were sustained on account of the holding over, and evidence of special damages on that account is received without objection, on the theory that it was a proper issue to be determined, the defendant is estopped from contending for the first time on appeal that the evidence is incompetent or that it is at variance with the pleadings. (2 Cal.Jur. 239, sec. 69; 1 Bancroft's Code Pl. 1021, sec. 727.) In the authority last cited it is said: "Where, however, the trial is had upon the theory that there is a material issue, and the court upon the evidence addressed thereto and received without any or sufficient objection, finds in accordance with that evidence, a party will not be allowed for the first time upon appeal to say that there was no such issue."

[10] It is true that where evidence is received without objection, which has no legitimate relation to the issues which form the basis of the action, or is in absolute conflict with the cause of action which is set out in the complaint, it may not be deemed to support a judgment at variance with the pleadings. Kredo v. Phelps, 145 Cal. 526, 78 P. 1044, 1045; 1 Bancroft's Code Pl.1029, sec. 734. In the Kredo case, it is said: "Courts have been very liberal in sustaining the findings of the trial court upon issues that were attempted to be made by the pleadings, and treated as so made during the trial, where they were of such a nature as to show some legitimate relation to the nature of the action as set forth in the pleadings. But they have not adopted a rule that would, in effect, do away with all pleadings. They have not held that a plaintiff could recover upon a different cause of action developed on the trial by the evidence, with no amendment of the pleadings."

The challenged item of $200 on account of the increased cost of remodeling the building, incurred by virtue of defendant's failure to surrender possession of the property, has a direct and legitimate bearing upon the issues. The pleadings and the failure to object at the trial to evidence on that subject amounted to a tendering of that issue. The court did not err in assuming that it was a valid issue and in awarding plaintiff damages for that amount.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concurred.

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57 Cal.App.2d 345

WILKINSON v. BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Civ. 12196.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1943.

Rehearing Denied March 27, 1943.

1. Mandamus 🔑108

Where the State Social Welfare Board ordered payments to petitioner as a needy blind person continued and on rehearing denied relief to petitioner, mandamus would not issue to compel making of illegal payments to petitioner, if the original order was in effect, but was contrary to law. St. 1937, p. 1102 et seq., § 3000 et seq.

2. Paupers 🔑2

Where the legislature repealed statute including, among purposes of chapter relating to needy blind persons, enlarging of economic opportunities of the blind, and stimulating their efforts to become self-supporting, and adopted statute stating that such were the purposes of a newly enacted chapter relating to partially self-supporting blind, legislature intended to remove allowances to the blind for economic rehabilitation, as distinguished from subsistence, from the old chapter and to provide for them exclusively in the new chapter. St. 1937, p. 1102, § 3000; St.1941, p. 2304, § 3400.

3. Paupers 🔑43(1)

Under statutory chapters relating to the needy blind, and relating to the partially self-supporting blind, those blind who were devoting a portion of their income or property to render themselves self-supporting would be eligible for relief only under the latter chapter, and those who had not sufficient income or property to meet the necessities of bare subsistence would be eligible for relief only under the prior chapter. St.1941, pp. 2304, 2306, 2312, §§ 3400, 3431, 8, 9.

4. Paupers 🔑2

The statute relating to the needy blind and providing relief from poverty and for stimulation of efforts for self-support was repealed and chapter relating to the partially self-supporting blind was enacted to secure federal assistance by conforming to federal Social Security Board requirements and to retain the state's rehabilitation program by providing a different type of aid for rehabilitation of the blind without federal assistance. St.1937, p. 1102, § 3000; St.1941, pp. 2306, 2312, §§ 3431, 9; Federal Social Security Act, § 1002(b) (1), 42 U.S.C.A. § 1202(b) (1).

5. Paupers 🔑43(1)

A blind attorney who practiced his profession but required assistance to bring his total net income up to $50 per month, did not fall within chapter providing assistance for the needy blind but fell within chapter providing assistance for the partially self-supporting blind and containing a ten years' residence requirement for aid, and hence where attorney had been a resident of the state for less than ten years, he was not entitled to relief. St.1937, p. 1104, §§ 3041, 3043; St.1941, pp. 2304, 2306, 2312, §§ 3400, 3431, 8, 9.

◆

Original mandamus proceeding by Donald H. Wilkinson against the Board of Supervisors of the County of Alameda to compel respondents to pay petitioner certain amounts as aid to a blind person.

Alternative writ discharged and peremptory writ denied.

R. W. Henderson, of Bakersfield, Ernest Leslie, of Oakland, L. B. Schlingheyde, of Modesto, Ernest Crowley, of Fairfield, and Eben Whittlesey, of Carmel, for petitioner.

Ralph E. Hoyt, Dist. Atty., J. Frank Coakley, Chief Asst. Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and Stanley C. Smallwood, Deputy Dist. Atty., all of Oakland, for respondent.

DOOLING, Judge pro tem.

This is an original proceeding in mandamus by which petitioner seeks to compel respondents to pay petitioner certain amounts as aid to a blind person under chapter I, part I, division V, Welfare and Institutions Code, St.1937, p. 1102 et seq.

Petitioner became blind in an industrial accident in Utah in 1934 and is in receipt of the sum of $54.10 per month as compensation for that injury. He is a lawyer licensed to practice in California and maintains an office for the practice of his profession. He has been a resident of California for more than five years but less than ten. The basis upon which he claims the right to payments as aid to the needy blind is that after deducting his office expenses from the sum of his compensation of $54.10 per month and the fees received from his practice his net income amounts to less than $50 per month. In other words if he closed his office he would have a net income of $54.10 per month but by keeping it open he needs assistance to bring his total net income up to $50 per month.

Before July 1, 1941, petitioner had been receiving payments as a needy blind person and on that date respondent terminated such payments. Petitioner appealed the order of termination to the State Social Welfare Board. That board first ordered the payments continued but later granted a rehearing and made an order denying petitioner any relief. Petitioner urges that the Social Welfare Board acted in excess of its powers in granting the rehearing. This seems a point of considerable force (see Olive Proration, etc., Committee v. Agricultural Prorate Comm., 17 Cal.2d 204, 109 P.2d 918), but in our view of the case it is not necessary for us to pass upon it.

[1] Basically the question presented to us is whether on the admitted facts petitioner brings himself within the class of persons entitled to an allowance under part I, division V, Welfare and Institutions Code since that part of Welfare and Institutions Code was recast by the Legislature in 1941. Even if the original order of the Social Welfare Board is still in full force and effect, if that order on the admitted facts was contrary to law, mandamus will not issue to compel the making of illegal payments to petitioner. California Highway Comm. v. Riley, 192 Cal. 97, 112, 218 P. 579; Walton v. McPhetridge, 120 Cal. 440, 52 P. 731.

To focus attention on the point directly involved, by the 1941 amendment, Stats. 1941, p. 2302, chapter I, part I, division V, Welfare and Institutions Code was substantially amended and a new chapter III was for the first time adopted. Under chapter I a needy blind person who became blind outside of this state is qualified to receive the aid therein provided for if he has been a resident of this state for one year immediately preceding his application and for five years out of the last nine, § 3043, Welfare and Institutions Code, while to be eligible for aid under chapter III he must have been a resident of the State for ten years continuously, § 3431, Welfare and Institutions Code. It follows that if petitioner's case falls exclusively under the provisions of chapter III he is lacking in the required residence qualification for aid.

The determination of the question thus presented necessitates a consideration of the relevant statutory provisions and somewhat of their history.

Prior to July 1, 1941 (the effective date of the recasting of the provisions for aid to the blind by Stats.1941, p. 2302), the entire subject of payments for aid to the needy blind was covered by chapter I, part I, division V, Welfare and Institutions Code. Section 3000 of that chapter then read as follows: "The purpose of the provisions of this chapter is to relieve blind persons from the distress of poverty, to enlarge the economic opportunities of the blind, and to stimulate the blind to greater efforts in striving to render themselves self-supporting."

In 1941 this section 3000 was repealed. Stats.1941, p. 2303. At the same time as a part of the new chapter III the Legislature adopted section 3400 Welfare and Institutions Code, reading:

"The purpose of this chapter is to provide a plan for this State whereby the blind residents of this State may be encouraged to take advantage of and to enlarge their economic opportunities, to the end that they may render themselves independent of public assistance and become entirely self-supporting.

"To achieve this objective, resources and income beyond the necessities of bare decency and subsistence are required. This chapter, by allowing the retention of necessary income and resources by those of the blind showing a reasonable probability of being able and willing to undertake the acquisition of resources and income necessary for self-support, will encourage them in their efforts to become self-supporting."

[2] It seems clear to us that by the repeal of section 3000 which included among the purposes of chapter I the enlarging of the economic opportunities of the blind, and the stimulation of their efforts to render themselves self-supporting, and by the simultaneous adoption of section 3400 stating somewhat more elaborately that those were the purposes of the newly enacted chapter III, the Legislature intended to remove cases of allowance to the blind for the purpose of economic rehabilitation, as distinguished from subsistence, from chapter I and to provide for them exclusively in chapter III. No other purpose for the repeal of section 3000 has been suggested and we can think of none.

This conclusion is reinforced by the provisions of section 8 of the 1941 enactment, Stats.1941, p. 2312, which reads: "Between the effective date of this act and October 1, 1941, the counties shall review all grants of assistance under Chapter 1 of Part 1 of Division 5 of the Welfare and Institutions Code, relating to the needy blind, to determine which persons are eligible for assistance under Chapter 1 of Part 1 of Division 5 of the Welfare and Institutions Code, relating to the needy blind, and which persons are eligible for assistance under Chapter 3 of Part 1 of Division 5 of the Welfare and Institutions Code, relating to the partially self-supporting blind residents of this State."

[3] Herein is a recognition that after the effective date of the act some persons would remain eligible for relief under chapter I and others who formerly had been receiving aid under chapter I would become eligible only under the newly enacted chapter III. The latter class obviously would be those who were devoting a portion of their income or property to the effort to render themselves self-supporting, into which class petitioner falls. The former class would be those who had not sufficient income or property to meet (to quote the language of section 3400) "the necessities of bare decency and subsistence."

The reason for this classification becomes obvious by reference to section 9 of the 1941 statute. Stats.1941, p. 2312. That section, after declaring the statute an urgency measure to become effective July 1, 1941, recites: "In order to conform fully and completely to the requirements of the Federal Social Security Act, the public assistance program of this State for the blind must provide * * * (c) after July 1, 1941, (i) that, in determining need, the income and resources of the individual shall be considered * * *. If this is not done, the above mentioned public assistance program of this State will not be approved by the Federal Social Security Board and the State will not be eligible for Federal financial assistance. This act makes the changes necessary to provide complete conformity and to secure such approval and provides for the assistance of those blind residents of this State whose grants of assistance are adversely affected by such conformity."

[4] In the recited requirement of the Federal Social Security Board "that, in determining need, the income and resources of the individual shall be considered" is found the reason for the repeal of section 3000 providing, as it did, not only for relief from the distress of poverty but also for enlargement of economic opportunity and stimulation of efforts for self-support.

In the recited purpose to provide "for the assistance of those blind residents of this State whose grants of assistance are adversely affected by such conformity" we find the reason for the enactment of chapter III.

Compelled to an apparent choice of sacrificing federal assistance or sacrificing its rehabilitation program, the Legislature found a means to do both, by providing in chapter I for aid to the blind for subsistence only in strict conformity with the federal requirements, and by providing in chapter III for an entirely different type of aid to be given for rehabilitation without federal assistance.

In doing this the Legislature retained in section 3043 the residence requirement of five years out of the last nine in strict compliance with the provisions of the Federal Social Security Act, 42 U.S.C.A. § 1202(b)(1); but in section 3431 provided a ten year residence requirement for aid under chapter III, since that chapter sets up a form of relief entirely outside of the federal program.

This is wholly consistent with our legislative policy since the ten year residence requirement is basic even for relief under chapter I, sec. 3041, Welfare and Institutions Code, and section 3043 relaxes that residence requirement only "if, when and during such time as grants in aid are provided by the United States Government."

[5] However unfortunate it may be in his individual case we are satisfied that under the statute as enacted petitioner lacks the residence qualifications for the type of aid herein sought by him.

The alternative writ is discharged and a peremptory writ denied.

NOURSE, P. J., and SPENCE, J., concurred.

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57 Cal.App.2d 444

BOLANDER v. THOMPSON.
TUSTING et al. v. SAME.
Civ. 12253.

District Court of Appeal, First District,
Division 2, California.
March 1, 1943.

Rehearing Denied March 31, 1943.
Hearing Denied April 29, 1943.

1. Gifts 🔑47(3)

A "confidential relation" does not arise between a patient and a nurse upon proof alone of the relation of patient and nurse so as to create a presumption of undue influence as to gifts inter vivos by the patient to the nurse.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation".

2. Gifts 🔑47(3)

A "confidential relation" creating a presumption of undue influence as to gifts by the trustee to the beneficiary may exist upon the showing of special circumstances and extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other.

3. Gifts 🔑38

"Undue influence" authorizing setting aside of a gift inter vivos is that kind of influence or supremacy of one man over another by which that other is prevented from acting according to his own wish or judgment. Civ.Code, § 1575.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

4. Appeal and error 🔑931(1)

On appeal from judgment for defendant, District Court of Appeal was required to assume that trial court believed defendant's evidence.

5. Trusts 🔑283(1)

The statutory presumption against the trustee with respect to transactions between a trustee and his beneficiary, as well as statutory disputable presumptions, is rebuttable. Civ.Code, § 2235; Code Civ.Proc. § 1963.

6. Evidence 🔑91

Ordinarily, the party who brings the suit is required to prove his right to recovery.

7. Evidence 🔑87, 89

If plaintiff relies entirely upon a presumption, he has made "prima facie proof" of his case, and if such presumption is rebutted, there is a conflict which the trier of the case must decide.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Proof".

8. Appeal and error 🔑994(3)

When the trial court has the witnesses before it and determines that that one should be believed which supports one side of the issue, findings based upon that evidence should not be disturbed, notwithstanding question of the burden of proof.

9. Gifts 🔑49(2)

Evidence did not establish that inter vivos gifts of personalty and realty by decedent donor to his nurse resulted from the nurse's "undue influence" over donor so as to authorize setting aside of gifts. Civ. Code, § 1575.

10. Trial 🔑18
Witnesses 🔑236(1), 240(1)

It is a function of the trial court to insist upon the orderly conduct of a trial and to protect witnesses against leading and improper questions.

11. Evidence 🔑471(2)
Trial 🔑106
Witnesses 🔑236(1), 240(1)

In action to set aside gifts inter vivos on ground of donee nurse's alleged undue influence over decedent donor, trial court did not err in limiting one of plaintiff's counsel while on the witness stand to the same restrictions imposed upon other witnesses and denying him and other witnesses the right to express their conclusions and inferences relative to the transactions between the parties, and in refusing to permit plaintiff to ask leading questions. Civ. Code, § 1575.

◆

Appeals from Superior Court, Alameda County; John J. Allen, Judge.

Consolidated actions by H. R. Bolander, Jr., as executor, etc., and by Goodwin Tusting and others against Marion R. Thompson to set aside gifts inter vivos from testator to defendant. Judgments for defendant, and plaintiffs appeal.

Affirmed.

Vincent Surr and Morgan V. Spicer, both of San Francisco, for appellants.

James R. Agee and Minett F. Hallmark, both of Oakland, for respondent.

NOURSE, Presiding Justice.

These were actions by the executor of Osborne Tusting's last will and testament and Osborne Tusting's son and second wife as Osborne Tusting's heirs at law to set aside gifts inter vivos to defendant. The two cases were consolidated for trial as they involved the same state of facts, the heirs' suit having been filed prior to the appointment of Bolander as executor. The plaintiffs appeal from judgments for defendant in both cases.

In August, 1939, following an accident to both Osborne and Leona Tusting on Treasure Island, the defendant, Marion Thompson, was hired to take care of Osborne Tusting as a practical nurse. In October, 1939, Osborne Tusting went to stay at a sanitarium and in November, pursuant to Osborne Tusting's consent, Leona was granted an interlocutory decree of divorce and a property settlement was made. In December, 1939, Osborne Tusting bought a house for $4,500 which he deeded to defendant. During the months of December and January he bought a car which he transferred to defendant; he gave defendant a bill of sale to the household furnishings; he made her a beneficiary of a $1,000 life insurance policy; he opened two joint accounts in his and defendant's names; and he opened one account in defendant's name alone. On May 15, 1940, he wandered away from the home in which he was living, and which he had deeded to defendant, and was found three days later in the Alameda estuary.

It is these various gifts which the plaintiffs attack; they point to testimony that prior to defendant's entrance into the household Leona and Osborne Tusting were happily married, that defendant kept him doped, and that she told him lies about his family. They urge that a confidential relationship was proved between nurse and patient, that therefore a presumption of undue influence arose which shifted the burden of proof to defendant to show that she did not unduly influence the deceased, and that defendant did not carry the burden of proof.

The defendant's evidence disputes every material fact which the plaintiffs sought to prove. She expressly denied that she had kept the deceased under the influence of narcotics, and testified that such medicine as was given the patient was prescribed by the attending physician. In this she was confirmed by the latter. She directs attention to the undisputed evidence that, until a short time before his death, the deceased had taken care of his business in San Francisco, had attended a special meeting of the board of directors at his home in Alameda, and was at all times in full possession of his mental faculties. The defendant denied the charge that she brought about the divorce and points to the testimony given by Mrs. Tusting in the divorce case. That case was heard before the same trial judge. A complete transcript of her testimony is included in the record here. Her testimony in that case is wholly inconsistent with the claims she now asserts. The defendant further points to the undisputed evidence that Mrs. Tusting secured the divorce upon independent advice, and without influence on the part of this defendant, that she obtained a satisfactory property settlement, and waived all further claims to the estate of her husband.

The evidence relating to the treatment of his son shows that, during the period which he claims that his father was under the influence of defendant, gifts were made to him of valuable real property in San Francisco, Hayward, and Los Banos, two insurance policies totaling $3,000, and that, having previously given the son forty-seven shares of the stock of the corporation under which decedent's business was conducted, he left a will in which he gave his son the balance of the corporate stock.

All the competent evidence relating to the transfer to the defendant of the real property and that relating to the gifts of personalty shows that the decedent was acting under independent advice, in full possession of his mental faculties, and was not under undue influence or coercion. To rebut this showing the plaintiffs are forced to rely upon the suspicions and conjectures which they draw from the fact that the defendant had the opportunity to use influence upon the deceased, and the fact that she obtained benefits from the relation.

[1, 2] For a reversal the appellants argue that a confidential relation existed between the patient and the nurse, and that the presumption of undue influence was not overcome by satisfactory evidence. The first portion of appellants' statement cannot be accepted as a settled rule of law. None of the cases cited by them, and none that we have been able to find, holds that a confidential relationship arises in all cases between a patient and nurse upon proof alone of the relation of patient and nurse. The accepted rule is that such a relation may exist upon showing of special circumstances of the particular case. This principle is stated in 15 C. J. S., Confidential, p. 823 as follows: "Depending, of course, on the circumstances of each case, the term has been held to include the relationship existing between a husband and father-in-law, a husband and wife, a father and son, a municipal officer and one to whom he delegates the performance of his duties, an oil company and its district geologist, an owner of a business and his manager, a parent and one of his children, a partner and his copartner, a patient and his nurse * * *." In 23 Am.Jur., p. 764 we find this statement: "It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal. Hence, the rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another."

Here the plaintiffs alleged that "from and after November 12, 1939, defendant was the sole nurse, housekeeper and confidante of Osborne Tusting. * * *" In the findings the words "and confidante" are stricken out. The respondent states in her brief that this finding was prepared by appellants and that the stricken words were lined out by the trial court. This is not denied. It was also found that the deceased was "under the care, but not under the control or influence or domination of said defendant." The trial court further found "That from and after November 12, 1939, the mind or will of Osborne Tusting were not subject to the will of or under the domination of the defendant; the said Osborne Tusting did not make the deed hereinabove referred to because of or while acting under or by reason of the will of or any domination of the defendant." And that "Defendant did not thereafter by importunities, blandishments, pretended affection, or by the use of narcotics or sedatives or by means of her will, exercise her will upon said Osborne Tusting. Defendant did not obtain complete domination over the will and mind of Osborne Tusting or his complete subservience to her will. Defendant did not instill in said Osborne Tusting a fear of his wife or induce him to leave his home or wife. Defendant did not induce Osborne Tusting to make her his sole nurse and confidant."

[3] Undue influence has been defined in 6 Cal.Jur., p. 70 as follows: "Undue influence has been defined to be that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment." See § 1575, Civ.Code.

[4-9] It may be granted that the appellants endeavored to prove undue influence, but it should be conceded that the evidence was in sharp conflict. We must assume that the trial court believed the evidence offered by respondent. Therefore, if we may assume that a confidential relation existed between the parties which created the relation of trusteeship and brought into play the presumption of section 2235 of the Civil Code, we are still confronted with the conflict of evidence rule, since that presumption, like those mentioned in section 1963 of the Code of Civil Procedure is a rebuttable one. Now the appellants urgently contend that "having proved the confidential relation" the burden of proof shifted to respondent to show that undue influence was not used. The question of the shifting of the burden of proof is not a settled one. Ordinarily the party who

brings a suit is required to prove his right to recovery. If he relies entirely upon a presumption he has simply made prima facie proof of his case. If such presumption is rebutted by competent evidence there is then a conflict which the trier of the case must decide. In the case at hand the question of the burden of proof, or of the shifting of the burden, is not material. The material issue is the fact of undue influence, as distinguished from the suspicions and conjectures which may arise from the conduct of the party. When the trial court has the witnesses before it and determines that that one should be believed which supports one side of the issue, the findings based upon that evidence should not be disturbed notwithstanding the question of the burden of proof. Under those circumstances we must assume that the trial court found that the burden of proof was sustained, otherwise it would not have made the finding.

We see no purpose in appellant's argument and citation of authorities on the right to introduce evidence of a telephone call to one of decedent's insurance carriers. The testimony was offered by appellants and received subject to a motion to strike out. Such motion was made, but not acted on. The testimony is all in the record and proves no material element of the case.

[10, 11] The appellants close their brief with a bitter condemnation of the conduct of the trial judge. It does not appear to be an assignment of error, or a claim of misconduct. The burden of their complaint is that the learned trial judge was too severe in requiring them to adhere to the established rules of procedure, particularly in the examination of witnesses. They complain particularly of the action of the trial court in limiting one of their counsel while on the witness stand to the same restrictions imposed upon other witnesses, in denying him and other witnesses the right to express their conclusions and inferences relative to the transactions between the parties, and in refusing to permit them to ask leading questions. It is the function of the trial court to insist upon the orderly conduct of the trial and to protect the witnesses against the use of leading and improper questions. We find no error in the matters complained of.

The judgments are affirmed.

SPENCE, J., concurred.

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57 Cal.App.2d 549

SANSOM v. ROSS–LOOS MEDICAL GROUP et al.

Civ. 13821.

District Court of Appeal, Second District, Division 1, California.

March 8, 1943.

1. Physicians and surgeons 🔑14(4)

A physician is required only to have degree of learning and skill ordinarily possessed by physicians of good standing practicing in same locality and to exercise reasonable and ordinary care and diligence in treating patient and applying such learning and skill to case.

2. Physicians and surgeons 🔑18(8)

In malpractice action, it is insufficient for plaintiff to show that defendant physician did not treat plaintiff in that mode or use those measures which case required in opinion of others, even medical men, as such evidence tends to prove errors of judgment, for which physician is not responsible, as much as want of reasonable care and skill, for which he may be responsible.

3. Physicians and surgeons 🔑18(8)

What is or is not proper practice by physician is a question for experts and can be established only by their testimony.

4. Physicians and surgeons 🔑18(8)

In malpractice action, evidence need not demonstrate conclusively and beyond possibility of doubt that defendant physician's negligence was proximate cause of plaintiff's injury, but substantial evidence, reasonably supporting judgment for plaintiff, is sufficient.

5. Physicians and surgeons 🔑18(8)

In action for malpractice in setting and treating broken arm bone, plaintiff's medical expert's testimony, in answer to hypothetical questions, that his opinion was that there was a degree of carelessness on defendant's part in doing and failing to do certain things, *held* sufficient to support jury's verdict for plaintiff.

6. Appeal and error 🔑1001(1)

In malpractice action, where there was substantial evidence from which jury could infer that defendant in treating plaintiff did not exercise care, diligence and skill of prudent, skillful and careful physicians practicing in same vicinity, reviewing court will not set aside jury's verdict for plaintiff.

7. Evidence 🔑528(1)

In action for malpractice in setting and treating broken arm bone, question asked plaintiff's expert witness as to whether angulation, which he saw in X-rays, photographs and examination of plaintiff, was caused by defendant's carelessness, was improper as calling for conclusion from results and invading jury's province.

8. Appeal and error 🔑1048(5)

In action for malpractice in setting and treating broken arm bone, error in overruling objection to question asked plaintiff's expert witness as to whether angulation, which he saw in X-rays, photographs and examination of plaintiff, was caused by defendant's carelessness, did not warrant reversal of judgment on jury's verdict for plaintiff, in view of witness' meaningless answer, "Yes, I do", and absence of motion to strike.

9. Physicians and surgeons 🔑18(10)

In action against orthopedists for malpractice in setting and treating broken arm bone, instruction that specialist in treatment of particular kind of injury must have and use degree of knowledge and skill ordinarily possessed and used by other specialists of same type in particular locality correctly set forth defendants' duty to use higher standard of care than is generally required.

An "orthopedist" is a surgeon engaged in branch of medicine dealing with correction of deformities and chronic diseases of the joints and spine.

See Words and Phrases, Permanent Edition, for all other definitions of "Orthopedist".

10. Physicians and surgeons 🔑14(4)

One holding himself out as specialist in treatment of certain organ, injury or disease is bound to exercise degree of skill and knowledge ordinarily possessed by other such specialists in same general locality, considering state of scientific knowledge at the time.

11. Trial 🔑295(6)

In action against orthopedists for malpractice in setting and treating broken arm bone, where general rules as to care required of such physicians were correctly stated in instructions as whole, instruction that specialists must have and use same degree of knowledge and skill ordinarily possessed and used by other specialists of same type in particular locality was not error warranting reversal of judgment on jury's verdict for plaintiff, as jury could not have been misled thereby.

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge pro tem.

Action by Richard Eugene Sansom, a minor, against the Ross-Loos Medical Group, a copartnership, and others, for malpractice. From a judgment on a jury's verdict for plaintiff and an order denying defendants' motion for judgment notwithstanding the verdict, defendants appeal.

Affirmed.

Parker & Stanbury, of Los Angeles, for appellants.

A. J. O'Connor and John Henry Nutt, both of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

When plaintiff was 14 years old his arm was broken as the result of a collision between a bicycle on which he was riding and an automobile. He was taken by his parents to the defendants for the purpose of having the broken bone set and treated. This medical service was rendered by several different doctors at different times, but they were all members of, or employees of, a partnership group of medical men called a clinic.

The broken bone was the humerus of the left arm, the longest and largest bone of the upper extremity: the long shaft-like bone in the arm reaching from shoulder to elbow. The broken place was approximately at the junction of the lower and middle thirds of the humerus, just about where the muscle swells in the arm when one demonstrates how much muscle he has.

The fracture was a complete breaking of the bone, so that the two broken ends of the shaft of the humerus slipped past each other. The doctors called this over-lapping. And all the medical witnesses agree that the fracture was at a place extremely difficult of treatment.

When the boy was brought to the doctor he was sent to the hospital, put to bed and the fracture reduced by the first defendant doctor to treat him. This was done by pulling the two broken pieces of the humerus apart in order to overcome the overlapping, and then so adjusting the broken ends in apposition to each other that nature would cause them to grow together again. Then the arm was encased in a plaster cast. And then, by a system of wires, weights and pulleys a pull was exerted upon the arm to keep the two pieces of broken bone in apposition, that is, to keep the broken ends from again slipping past each other and thus losing contact with each other. This method of pulling on a broken bone is called traction.

After a time spent in the hospital, the boy was sent home, with his arm in a plaster cast, and still under the supervision of the doctors. The first doctor who treated him was followed by another doctor, and then by the chief of the clinic. All of these doctors were orthopedists.

As time went on there was difficulty in getting the two broken ends of the bone to grow together again. This is called union.

Eventually union ensued but in such a manner that instead of the humerus being straight, the two broken ends united at an angle, leaving the bone between the elbow and the shoulder with a crook in it. This is called angulation. Also, the plaintiff's arm was one-half inch shorter than it had been before it was broken; and also, at the point of union there was a large knob of bone.

Action for malpractice was commenced against the defendant doctors; issues were joined; and the case tried with a jury, which rendered a verdict against the defendant copartners for $8,500. Motion for judgment notwithstanding the verdict was made and denied, judgment was rendered in accordance with the verdict and appeal followed.

The rules to be applied to solve the questions now presented to this court are well settled. The only difficulty is the application of these rules to the facts of this case.

[1, 2] The degree of care and skill required of physicians in treating patients is recapitulated in Adams v. Boyce, 37 Cal. App.2d 541, at page 548, 99 P.2d 1044, at page 1048:

"The law on the subject of the care and skill required of physicians in the treatment of patients is well settled, and was epitomized in the case of Hesler v. California Hospital Co., 178 Cal. 764, 767, 174 P. 654, 655, where it was said that the law requires of the physician only 'first, that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality, and, second, that he shall exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case. The law takes cognizance of human weakness and liability to err in the application of skill and learning and it requires only the exercise of reasonable and ordinary care and diligence to avoid error.'

"Concerning the obligations assumed by a physician when he undertakes to treat a patient, it is said in the same case at page 766 of 178 Cal. at page 655 of 174 P.:

"' "A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge." Pike v. Honsinger, 155 N.Y. 201, 209, 49 N.E. 760, 762, 63 Am. St.Rep. 655. "The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances." Zoterell v. Repp, 187 Mich. 319, 330, 153 N.W. 692, 695. "It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible." Leighton v. Sargent, 27 N.H. 460, 474, 59 Am.Dec. 388.' " And see Trindle v. Wheeler, — Cal.App.2d —, 133 P.2d 425, and cases there cited.

[3] What is or what is not proper practice on the part of the physician is uniformly a question for experts and can be established only by the testimony of such experts. Trindle v. Wheeler, supra; Adams v. Boyce, supra; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128. Such exceptions as there are to this rule are not applicable under the facts of this case.

[4] But it is not required that the evidence demonstrate conclusively and beyond possibility of a doubt that the defendants' negligence was the proximate cause of plaintiff's injury; it is sufficient if there is substantial evidence which reasonably supports the judgment. Smith v. Coleman, 46 Cal.App.2d 507, 116 P.2d 133.

[5] Two long hypothetical questions were put to plaintiff's medical expert, embracing several theories of malpractice. The last question was limited to treatment by the chief of the clinic. Certain of these theories may be described as: failure to have X-ray pictures of the plaintiff's arm taken frequently enough to keep the attending physicians advised of the progress of the healing of the broken bone; failure to properly read or evaluate the X-ray pictures themselves, and then to take the necessary steps to correct the apparent progress of angulation of the union; too much traction, thereby keeping the broken ends of the bone apart so they did not unite properly and straight; failure to maintain traction and cast on the arm for a sufficient length of time; failure to take proper measures to correct the angulation before the broken bone formed in a solid union impossible of being straightened except by operative means. The conclusion of the first question is as follows:

"Assuming all of the foregoing facts to be true, have you an opinion as to whether or not the physician and surgeon and orthopedic specialist, doing the things which I have outlined, performed his services in a manner consistent with that degree of care and skill usually possessed and rendered by other physicians and surgeons practicing their profession in this or similar localities under substantially similar circumstances—answer yes or no, have you an opinion? A. Yes.

"Q. What is that opinion?

"Mr. Stanbury: Objected to on the ground that no foundation has been laid, your Honor, incompetent.

"The Court: Objection overruled. He may answer. A. My opinion is that there was a degree of carelessness through the entire procedure, as you have read it to me.

"The Court: What was the last word? A. As he has read the question to me.

"Q. By Mr. O'Connor: In other words, I take it, Doctor, you feel that the physician and surgeon assumed in the hypothetical question did not exercise that degree of care and skill to be exercised and possessed by the average physician and surgeon practicing in this or a similar locality, is that right?

"Mr. Stanbury: The same objection, no foundation laid; and incompetent.

"The Court: Objection overruled. A. Yes sir."

The conclusion of the second question was:

"Doctor, assuming those additional facts to be true and none other, have you an opinion as to whether the superior physician and orthopedic specialist, by doing the things which I have outlined and performing the services which I have stated, did he perform his services in a manner consistent with that degree of care and skill to be possessed and rendered and exercised by other physicians and surgeons practicing their profession in this or similar localities under substantially similar circumstances? Have you an opinion? A. Yes.

"Q. What is that opinion?

"Mr. Stanbury: Objected to, on the ground it is incompetent and no foundation laid.

"The Court: Objection overruled, he may answer. A. May I have the question? (Question read.)

"Q. By Mr. O'Connor: What is your opinion? A. I think there was a degree of carelessness also apparent here."

This testimony is sufficient to support the verdict of the jury. Thomason v. Hethcock, 7 Cal.App.2d 634, 46 P.2d 832.

[6] Where there is substantial evidence from which the jury could infer that the course of treatment persisted in by the defendant was not of that care, diligence, and skill possessed and used by prudent, skillful and careful practitioners of medicine

practicing in the same vicinity a reviewing court will not set the verdict aside. Abos v. Martyn, 31 Cal.App.2d 705, 88 P.2d 797.

[7, 8] Appellant complains of a ruling by the trial court on objection to a question subsequently answered by the plaintiff's expert witness as follows:

"Now Doctor, the angulation you saw in the X-rays and the photographs and the examination you made of this boy, I believe you said around eight weeks ago, was that caused by the carelessness of the attending physician and surgeon?

"Mr. Stanbury: Objected to, calling for a conclusion; attempting to reason from results, and an invasion of the province of the jury, and incompetent.

"The Court: Objection overruled. A. Yes, I do.

"Mr. O'Connor: That is all."

Obviously the objection to the question should have been sustained, but just as obviously the answer is meaningless and could have had no effect upon the verdict of the jury. Also, no motion to strike was made.

[9] Appellant complains of the giving of the following instruction:

"You are instructed that defendants have admitted that Dr. R. E. Hughes and Dr. Donald E. Ross held themselves out to be specialists and experts in the treatment of injuries such as that sustained by plaintiff. A specialist is one who possesses the knowledge and skill of those who have made a special study of the treatment of the particular injury. While an ordinary practicing physician, as distinguished from a specialist, is only required to have and use that degree of care and skill possessed and used by other ordinary practicing physicians in his locality, a specialist must meet a higher requirement to the extent that he must have and use the same degree of knowledge and skill ordinarily possessed and used by other specialists, and experts of the same type in the particular locality."

Appellant contends that by this instruction the jury was told that there was required in this case a higher standard of care than generally in actions of this kind. However, all of the defendants were orthopedists and held themselves out as such. An orthopedist is a surgeon engaged in that branch of medicine which deals with the correction of deformities and chronic diseases of the joints and spine. (The American Illustrated Medical Dictionary, by Dorland, Fifteenth Edition.)

[10] "One who holds himself out as a specialist in the treatment of a certain organ, injury or disease, is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time." Hopkins v. Heller, 59 Cal.App. 447, at page 452, 210 P. 975, at page 977.

[11] The instruction complained of correctly sets forth the duty of defendants in this case. In any event, the general rules were correctly stated in the instructions as a whole, and the jury could not have been misled by the giving of the instruction complained of. McNamara v. Emmons, 36 Cal.App.2d 199, 97 P.2d 503.

The judgment and order, and each of them, is affirmed.

YORK, P. J., and WHITE, J., concurred.

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